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**EMPLOYMENT RELATIONS
RESEARCH SERIES NO.29**

Trade union recognition:
statutory unfair labour
practice regimes in the USA
and Canada

JOHN GODARD



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JOHN GODARD
UNIVERSITY OF MANITOBA

Published in March 2004 by the Department of Trade and Industry.

URN 04/855

ISBN 0 85605 334

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Postal enquiries should be addressed to:

Employment Market Analysis and Research
Department of Trade and Industry
1 Victoria Street
London SW1H 0ET
United Kingdom

Email enquiries should be addressed to: emar@dti.gov.uk

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Foreword

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The Department has an ongoing research programme on employment relations and labour market issues, managed by the Employment Market Analysis and Research branch (EMAR). Details of our research programme appear regularly in the ONS journal *Labour Market Trends*, and can also be found on our website: <http://www.dti.gov.uk/er/emar>

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Grant Fitzner
Director, Employment Market Analysis and Research

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Executive summary

The North American experience suggests that the extent to which unfair labour practice regimes can be effective in a union recognition process varies considerably depending on matters of law, and that law is more important than are administrative procedures.

The effectiveness of an unfair labour practice regime, as it pertains to the union recognition process, includes not only relevant unfair labour practice laws and procedures, but the design and administration of the process itself. An examination of the North American experience suggests that the three main factors that influence the effectiveness of such regimes are:

1. The ability of unions to gain legal recognition without a ballot, and the minimisation of delay between application for recognition and the holding of a ballot, should one be required.
2. The extent to which employer activities and interventions are legally proscribed during the union organising and recognition process.
3. The extent to which the body charged with the administration of the regime has sufficient powers to be able to impose remedies that are timely, sufficient to remedy unfair labour practice violations, and can provide for closure from alternative ways of legal remedy.

The North American context

Two assumptions underpin the policy rationale underlying North American unfair labour practice regimes and both remain central to analyses of these regimes. The first is that the decision of workers as to whether to join or vote for a union should be free from undue employer interference, especially threats, coercion, promises, or recrimination. The second is that, if provided with the opportunity to do so, employers might generally be expected to engage in such activities.

These assumptions reflect a long history of employer animus towards trade unions and collective bargaining in North America. This has been especially manifest in the United States. The National Labor Relations Act (NLRA), enacted in 1935, was intended to address this problem by establishing a statutory recognition process and proscribing practices that could be seen to unfairly undermine a union during and after a union organising drive, defining such practices as *unfair labour practices*. The National Labor Relations Board (NLRB) was created to administer the NLRA.

The NLRA has subsequently been steadily weakened by legal amendments and by various NLRB and court rulings, especially throughout the 1940s and 1950s. Though initially effective, it no longer provides adequate protections for workers.

The Canadian case is different. Canada has 11 labour law jurisdictions, all of which have labour law systems introduced in the late 1940s and largely based on the NLRA model. While some weakening occurred in the late 1980s and again in the late 1990s, and there is significant variation across jurisdictions, Canadian unfair labour practice regimes in general allow much less opportunity for employer intervention and operate more effectively than their US counterpart. This would appear to reflect differences in political institutions and a greater tolerance for administrative law in Canada.

The unfair labour practice regime in the United States

In the United States, the NLRA is vague as to the specific activities that constitute unfair labour practices. Identification of these activities has been left in considerable measure to case law established by NLRB and court rulings. With regard to the recognition process, the following practices are now considered to be illegal: discipline and dismissal in whole or in part for legitimate union activities; closing an establishment if part of the reason is to avoid or eliminate a union; overt threats or promises related to the decision to join a union; and, altering the terms of employment during an organising drive. Employers may, however, engage in free speech provided that it is not overtly threatening, including requiring employees to attend 'captive audience meetings' up to 24 hours prior to a ballot, subjecting employees to mandatory one-on-one communications, engaging in anti-union propaganda even where not factual, and 'predicting' closure of the workplace if it becomes unionised. Unions have no rights of access to the workplace, and employees may not organise or even discuss union recognition if doing so detracts from their regular work.

The NLRB relies on civil law standards when determining whether an unfair labour practice has occurred and the recourse to be taken. In the former case, this means that the Board bases its decision as to guilt on what it considers to be the balance of probabilities. In the latter, it relies on 'make whole' remedies, requiring the employer to compensate the complainant for damages and restore employment where applicable. It may also order certification without a majority vote if it believes that the employer has so undermined the process as to render a ballot no longer meaningful and the union can demonstrate that it did, at some point, manage to sign up a majority of eligible workers. But it must otherwise hold a ballot in all cases. It is also prohibited from relying on punitive remedies.

The processing of an unfair labour practice complaint involves an initial investigation by an agent from one of the NLRB's 33 regional offices, then an attempt by the director of that office to resolve the complaint, followed by a decision as to whether to proceed with the complaint, then a formal hearing before an administrative law judge (employed by the NLRB), in which an NLRB-employed lawyer acts as prosecutor. Any decision is in turn implemented by an agent of the NLRB. However, the parties can appeal this decision. If this occurs,

the complaint then goes to the appointed board members for a decision, preceded by an oral hearing if deemed to be necessary. This decision may in turn be appealed to the courts, and, if so, is not implemented until it has been ruled on. About 85 per cent of charges are resolved by the regional director. Otherwise, it takes almost eight months on average to settle a case at the administrative judge level, and another thirty months to do so at the Board level. Court appeals may take as long as three years.

The requirement of a ballot, coupled with undue delays in the recognition process and the legal rights of employers during this process create opportunities for employers to threaten and intimidate workers. The remedies for unfair labour practices, where they are found to have occurred, are also considered insufficient to act as deterrents, especially as the Board rarely orders certification without a majority ballot. The number of steps required is also seen as costly and as introducing undue delays, so that any remedies are often of limited value. There is also little recourse if employers delay or frustrate bargaining. This can effectively render the unfair labour practice regime meaningless.

Canadian unfair labour practice regimes

Although many Canadian labour law statutes contain more explicit definitions of unfair labour practices, there is also considerable reliance on case precedent. But in addition to the practices proscribed under the US regime, any employer statement or action that may be reasonably construed as a threat or promise, however indirect or implicit it may be, is likely to be ruled an unfair labour practice. Thus, employer speech rights are much more highly restricted.

Canadian labour boards also rely on civil law procedures and standards, but have some recourse to punitive remedies and do not require evidence of a majority card sign up to order certification in the absence of a majority vote. In addition, the burden of proof is normally on the respondent in discipline and dismissal cases.

The process for settling an unfair labour practice complaint also involves fewer potential steps. A labour board agent investigates and seeks to resolve each complaint informally, but if unsuccessful, the complaint goes directly to the board. There is no administrative law judge system. Nor are there board-employed lawyers to argue the case. Instead, a panel of three board members rules on the complaint, with the parties arguing their own cases. The panel's decision may be appealed to the labour board, but the scope for appeal to the courts is highly restricted.

A majority of Canadian jurisdictions also allow for automatic certification, without a ballot, and virtually all have a limitation of ten days or less from the time a union applies to the board to the holding of a ballot where one is required. The opportunities for employer involvement are thus sharply limited. Finally, most jurisdictions allow the board to impose an arbitrated contract if a newly certified employer does not appear to be bargaining in good faith.

Because of these differences, Canadian regimes are in general thought to lessen many of the problems associated with their US counterpart. Nonetheless, many non-union employees still fear employer retribution if they organise a union.

The research evidence and debate

The overall effectiveness of Canadian unfair labour practice regimes relative to that of their US counterpart is reflected in substantially higher union organising success rates and substantially fewer unfair labour practice filings per case. Evidence shows that unfair labour practice filings are negatively associated with the probability of union certification, thus suggesting that these differences matter. There is also evidence that changes to unfair labour practice regimes over time are associated with changes in union membership rates.

There has been no research as to the effectiveness of specific labour board procedures for processing unfair labour practices. However, there is evidence that the length of time from union application to a ballot (where required) lowers the likelihood of certification, especially where an unfair labour practice has occurred. The availability of card certification has also been found to bear a strong association with this likelihood, indicating that virtually any delay may be exploited by employers. There is also evidence that restrictions on employer activities are associated with a higher likelihood of union organising success. The likelihood of a newly certified union succeeding in negotiating a contract is also much lower in the USA than in Canada.

The importance of these regimes is also illustrated by the rancour that occurs whenever reforms to labour law and unfair labour practice regimes are proposed in either the USA or Canada.

To the extent that genuine policy debate has occurred over unfair labour practice regimes, it has generally involved two legal reforms. The first involves majority certification without a ballot. Employer groups argue that this enables unions to place undue pressure on employees, while unions argue that it lessens the likelihood of employer coercion. The second issue involves US-style employer speech rights. Employer groups argue that these rights allow them to counter union propaganda and provide employees with accurate information, while unions argue that they enable employers to engage in implicit threats and intimidation. In both cases, the available evidence would appear to provide greater support for the union position.

There has been little if any policy debate over specific labour board procedures in either Canada or the US.

Institutional environments and unfair labour practice regimes

The North American experience points to the importance of the national institutional environments of unfair labour practice regimes. These environments help to explain widespread employer animus towards unions in both Canada and the USA, thus requiring strong unfair labour practice regimes. Yet differences in national political and legal traditions have resulted in much stronger unfair labour practice regimes in Canada than in the USA. In an era of

globalisation, however, it is uncertain as to whether national institutional environments will continue to matter or whether institutional conditions common to developed economies, and especially liberal market economies (i.e., economies that rely primarily on competitive market arrangements) will take priority.

About this project

This report was commissioned by the Department of Trade and Industry in July of 2003 to describe, compare, and evaluate unfair labour practice regimes in the USA and Canada as they pertain to employer practices in the union recognition process. It is based primarily on the relevant academic literature and on primary sources addressing the design and operation of these regimes. There are few analyses of unfair labour practice regimes produced by government, employer or labour organisations in North America, although such analyses are also drawn on where available. All interpretations are those of the author.

The author

This report was written by John Godard, Professor at the Asper School of Management, the University of Manitoba. Professor Godard has published extensively on industrial relations issues, including on labour law in Canada, the USA, and (with S.J. Wood of Sheffield University) the UK. He is currently President-Elect of the Canadian Industrial Relations Association and an editor at the *British Journal of Industrial Relations*.

Acknowledgements

The author thanks John Taggart of the Canada Industrial Relations Board and Janet Duff of the Manitoba Labour Relations Board for their assistance in obtaining information used in this report, and John Logan of the London School of Economics and Political Science for his comments on an earlier draft.

Glossary of terms

administrative law judge – a judge charged with holding unfair labour practice hearings.

AFL-CIO – the American Federation of Labor – Congress of Industrial Organization, the dominant US labour federation.

bench decision – an oral decision that is read into the record at the conclusion of an unfair labour practice hearing or shortly thereafter.

board – a shorthand term for the body charged with administering labour laws, including unfair labour practice regimes; also referred to as a labour, labour relations, or industrial relations board.

business unionism – a form of unionism that focuses on winning more favourable terms and conditions of employment for its members rather than as challenging management control or pursuing broader social objectives.

card certification – when a union is certified as the bargaining agent of workers without a ballot, based on its ability to sign up a predetermined percentage of eligible workers.

cease and desist order – an order issue by a labour board requiring a party to cease and desist from activities that are believed to be illegal, violation of which may be subject to a contempt of court prosecution.

discretionary certification – when a union is awarded certification in the absence of majority support because the labour board has determined that employer unfair labour practices have prevented a majority from being achieved.

general counsel – the person responsible for administering the affairs of the NLRB, including legal attorneys employed by the NLRB.

Gissel bargaining order – a discretionary certification issued by the NLRB, but which requires proof that the union at some point had the majority support of eligible employees.

international union – a union with members in both the USA and Canada.

liberal market economy – an economy characterised by competitive markets and in which employers are believed to proceed from a shareholder value orientation, examples of which include the USA, the UK, and Canada; normally contrasted with 'co-ordinated market economies,' characterised by co-ordinated markets and in which employers are believed to proceed from a stakeholder orientation, examples of which include Germany and Japan.

make whole remedy – a legal remedy that is designed to restore an aggrieved party to the position (employment, economic, or otherwise) that this party would have been in had an illegal practice not occurred.

NLRA/National Labor Relations Act – the act regulating labour relations, including unfair labour practices, in the US private sector.

NLRB/National Labor Relations Board – the body that administers the NLRA.

regional director – the director of a regional labour board office.

social unionism – a form of unionism that focuses not just on obtaining improved terms and conditions of employment for its members, but also on pursuing reforms that serve the interests of working people in general.

status quo ante – the circumstances that would have obtained had one or more parties not acted as they did.

unfair labour practice – any employer or union practice that is considered to be illegal either during or subsequent to the union organising process.

unfair labour practice regime – all laws and procedures that have implications for the prevention or effects of unfair labour practices.

union certification – the legal certification of a union as the sole bargaining agent of workers in a given workplace, requiring employers to legally recognise and bargain with that union.

union density – the percentage of non-agricultural paid workers who belong to a union.

union organising – the process by which a union seeks to gain certification.

1

Introduction, background and scope

The Employment Relations Act, passed by the UK Government in 1999, established a new statutory system for union recognition. An explicit intention of this Act was to avoid a return to the acrimony that characterised the UK in the 1970s, and which continues to characterise statutory systems in the USA and Canada. The new statutory system was instead designed to build on the UK tradition of voluntary recognition and, ideally, to foster a culture of union and management co-operation in the workplace. To this end, it encourages employer involvement in the union recognition process, and places few constraints on employer conduct towards their workers, other than those which follow from other parts of trade union and employment law. Persons who believe that they have been dismissed or suffered other detriment for engaging in a recognition campaign may file a charge with an employment tribunal seeking compensation for themselves as individuals. However, there is little or no recourse for the union under the recognition procedure if the result of this dismissal, or of other employer activities, has been to intimidate employees and in doing so undermine support for the union's application for recognition, even though such activities are contrary to the spirit of the Act.

The UK system differs from its North American counterparts both in its design and in the objectives that appear to underlie it. As in the UK, legal recognition in the USA and Canada is attained through a statutory system based on the majority principle. However, a central assumption underlying these North American systems is that most non-union employers would prefer to remain union free and, in the absence of laws precluding them from doing so, can be expected to engage in a variety of anti-union practices when confronted with a union recognition drive. It is believed that many of these practices can undermine the ability of employees to exercise free choice in the union recognition process and hence that they represent an unfair exercise of employer authority. Unfair labour practice laws serve primarily to identify and proscribe such practices. Unfair labour practice regimes consist of these laws and of related procedures and penalties designed to prevent or provide remedies for unfair labour practices.

Unfair labour practices regimes are, within the context of US and Canadian recognition processes, believed to be central to explaining variation in a statutory system's effectiveness. In the United States, the statutory system is largely ineffective in protecting the ability of workers to exercise free choice as to union representation. In Canada, this is generally not the case, although there are eleven separate jurisdictions and hence some variation in effectiveness. Differences between the USA and Canada and within Canada in the

performance of statutory systems primarily reflect differences of design and administration, especially as they pertain to unfair labour practice regimes.

Scope of this report

Although the US and Canadian systems and the assumptions that underlie them differ from those of the UK in important respects, all three countries are characterised by liberal market economies, with competitive rather than co-ordinated markets and in which shareholder value rather than stakeholder orientations predominate. Thus, the design and operation of US and Canadian unfair labour practice regimes may help to inform the UK policy debate surrounding employer actions during the recognition process. *This report has thus been commissioned by the Department of Trade and Industry to describe, compare, and evaluate these regimes as they pertain to employer practices in the union recognition process. It is based primarily on the relevant academic literature and on primary sources addressing the design and operation of these regimes. There are few analyses of unfair labour practice regimes produced by government, employer or labour organisations in North America, although such analyses are also drawn on where available. All interpretations are those of the author.*

The report does not seek to identify any implications for countries outside North America and does not make any recommendations that might flow from such implications. However, any implications or recommendations that may be drawn from this report must be informed by a recognition and understanding of important differences not only in the design and underlying assumptions of North American statutory systems, but also in the broader historical and institutional contexts within which these systems have developed and continue to function. This report thus goes beyond simple consideration of unfair labour practice regimes per se to explain these contexts and their relevance to understanding how North American unfair labour practice regimes are designed and administered, what matters to their effectiveness, and how they differ.

In addition, this report focuses on matters of law more than of administrative procedure. Discussion and analysis of unfair labour practice regimes in North America has centred on the extent to which these regimes enable employees to choose whether to join or vote for a union in an environment that is free from employer threats, coercion, promises, or recrimination that could interfere with this choice. Emphasis has been on the strength of unfair labour practice regimes as judged by this criterion. The specific procedures followed by labour boards – the bodies responsible for the administration of these regimes – have largely not been addressed in the available literature. Part of the reason may be that there is little common ground between employer and labour groups over broader matters of law pertaining to the strength of these regimes. But it is also the case that these regimes have now been established for well over half a century. Thus, although they may suffer from various problems, such problems have generally been resolved to the extent possible given the broader legal context within which labour boards operate.

Although the report does include some discussion of specific procedures followed in US and Canadian jurisdictions, these procedures can be extensive

and the report cannot provide a thorough treatment of them. However, these procedures are readily available for those seeking greater detail. The US National Labor Relations Board (NLRB) *Rules and Regulations* contains 25 pages on the processing of unfair labour practice cases in that country, and these are supplemented by *the NLRB Casehandling Manual for Unfair Labor Practice Proceedings*, which is over 200 pages in length. Both are available on the NLRB web site (www.nlr.gov). In Canada, most if not all jurisdictions also have rules and regulations available on their web sites.¹ One (the federal jurisdiction) also has a case handling manual, but this is not publicly available.

Finally, much greater detail as to US and Canadian labour laws and hence unfair labour practice regimes is available in, respectively, *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act (4th edn.)*, edited by Patrick Hardin and John E. Higgins, and published in Washington, DC, by the Bureau of National Affairs, and *Canadian Labour Law (2nd. edn.)*, authored by George W. Adams and published in Aurora, Ontario, by Canada Law Book Inc.. These are the authoritative sources for each country.

The remainder of this report proceeds as follows:

- **chapter two** discusses the institutional and historical contexts of US and Canadian unfair labour practice regimes, and in so doing establishes a basis for understanding their current structure and functioning.
- **chapter three** describes and provides a brief assessment of the US unfair labour practice regime, including its administrative structure, the organising and certification process, employer unfair labour practices concerning the recognition process, remedies for unfair labour practices, the processing of unfair labour practice charges, the implementation of remedies, and the problems that have been identified with the US regime.
- **chapter four** describes and provides a brief assessment of Canadian unfair labour practice regimes, following the same structure as chapter three but also comparing Canadian regimes to their US counterpart where relevant.
- **chapter five** reviews the evidence as to the relative effectiveness of US and Canadian regimes in general and as to the implications of provisions and characteristics that vary across North American regimes, and then discusses the political debate surrounding this evidence.
- **chapter six** provides a broader evaluation of the US and Canadian regimes and the model on which they are based.

For reference purposes, this report also contains appendices with relevant sections of the National Labor Relations Act (appendix A) and the Canada Labour Code (Appendix C) and selected cases illustrating the administration of the US regime (Appendix B) and Canadian federal regime (Appendix D).

2

Setting the stage: the US and Canadian contexts

An understanding of the content and effectiveness of unfair labour practice regimes and of differences therein requires a familiarity with the way in which they have evolved and with their institutional contexts. In North America, the recognition process has become a highly adversarial one, in which employers typically view an organising drive as an attack on their authority and often do everything in their power to avoid recognition. This is especially true for the USA, which has been characterised by strong employer resistance both to unions and to unfair labour practice laws and by a gradual decline in the strength of both since the middle of the twentieth century. In Canada, employer resistance has also been strong, although neither unions nor unfair labour practice laws have faced the same level of decline, and that decline which has occurred has been more recent.² These similarities and differences lie at the heart of understanding the relations between employers and unions in both countries, which is in turn central to understanding the unfair labour practice regimes to which they are subject. The present chapter outlines the development of and relationships between union-management relations and unfair labour practice regimes in the USA and then Canada. It emphasises similarities and differences, and seeks to explain these by focusing on the uniqueness of the US and Canadian contexts.

The US context

Labour unions date back to the late 18th century in the USA, although it was not until the late 19th century that the 'modern' labour movement was born. A lack of working class radicalism, coupled with a weak state and strong employer resistance to pro-labour reforms, meant that 'business' unionism came to predominate³ and continued to do so throughout the twentieth century. Although this model was not to go unchallenged, labour unions in the USA came to view their primary purpose as winning more favourable terms and conditions of employment for their members rather than as challenging management control or pursuing broader social or political objectives. They eschewed formal affiliation with or partisanship towards any political party, and indeed the American Federation of Labor – Congress of Industrial Organisation (AFL-CIO) came to adopt a formal policy forbidding its member unions from doing so. Any political activities the labour movement engaged in tended to be narrowly drawn, focusing on winning improvements in labour and employment laws and seeking economic policies favourable to collective bargaining. Unions were organised primarily at the level of the workplace, and

it was at this level or the employer level that their main activities took place, with unions seeking to 'take wages out of competition' and hence maximise membership gains by co-ordinating settlements across workplaces and employers.

Despite these relatively conservative goals, unions were initially able to gain employer recognition and engage in meaningful collective bargaining only where their members had skill levels sufficient to effectively shut-down an employer without fear of being replaced. Thus, labour's initial stronghold in North America was in the skilled trades, and it was skilled trades or craft unions that had come to dominate the US labour movement by the beginning of the twentieth century. Yet craft workers represented only a limited portion of the labour force, and from the early 1900s to 1930s union density (the percentage of the non-agricultural paid labour force in a union) remained largely stalled, fluctuating around 10 per cent.

The 1930s saw the growth of industrial (industry rather than craft based) unionism and with it some resurgence of the US labour movement. However, union organisation was made difficult by widespread employer resistance and a lack of legal protections in the face of this resistance. Density thus continued to be largely stagnant until after the enactment of the National Labor Relations Act (NLRA) in 1935 and the establishment of the National Labor Relations Board (NLRB) to administer and enforce it. The NLRA was part of President Franklin Delano Roosevelt's 'New Deal' legislation to revive the US economy and lessen disruption from union recognition disputes. It was to provide what continues to be the basic framework for the regulation of industrial relations in the US private sector.

The National Labor Relations Act

The NLRA was designed to establish and protect the right of private sector workers to organise and bargain collectively with their employer. Under the NLRA, a union must first approach the employer and ask to be recognised. If the employer refuses or there is some question as to representativeness, the union must then petition the NLRB for legal certification as the bargaining agent of workers. To gain this certification, a union must be able to demonstrate that a majority (50 per cent plus one) of eligible workers wish it to represent them for purposes of collective bargaining. To do so, it engages in what is referred to as an 'organising campaign,' in which workers are encouraged to sign up and, where relevant, vote in favour of union representation. The employer is prohibited from interfering with, restraining, threatening, or coercing workers in the exercise of their right to organise a union and to participate in legal union activities. The employer also may not attempt to dominate or interfere with the formation or administration of a union. Such actions constitute unfair labour practices and may be the subject of remedial actions by the board. Finally, if the board grants the union's petition for certification, the employer must recognise and bargain with it 'in good faith.' Failure to do so also represents an unfair labour practice.

The initial implications of this Act for the ability of unions to gain legal recognition appear to have been positive, with union density increasing from 13 per cent prior to the NLRA to 28 per cent by 1939, and then to 34 per cent by 1945. Union growth may have been aided by the labour friendly policies of the War Labour Board during World War II, and by growing worker discontent in the 1930s,⁴ and the NLRA's full effect does not appear to have been felt until 1937, when the Supreme Court upheld its constitutionality (in April of that year). But the passage of the NLRA and, in particular, the unfair labour practice regime associated with it, would appear to have played a major role in protecting the ability of workers to organise, a role that was reflected in substantial union growth.⁵

Initially, there was some hope that the NLRA would encourage the 'self-organisation' of workers and even voluntary recognition by employers, with NLRB involvement only where there was a dispute over a union's representativeness.⁶ In this regard, the NLRB insisted on strict employer neutrality during recognition campaigns and, where the employer contested union support, it allowed certification based on union cards alone (i.e., without a ballot). Yet these and related policies were to meet with entrenched opposition from employer groups. This opposition, coupled with weaknesses in the Act itself, meant that the Act was to become steadily weakened by court rulings and legislative reforms over the ensuing half century,⁷ and that union recognition was to increasingly become a highly administered and adversarial process.

With regard to the unfair labour practice regime, the Supreme Court had already ruled before the 1930s were out that the NLRB could not fashion punitive remedies where an unfair labour practice had been found to occur.⁸ However, the most significant and controversial changes to the unfair labour practice regime were contained in the Union-Management Relations or 'Taft-Hartley' Act of 1947. Under this Act, the right of unions to gain recognition through the signing of membership cards was withdrawn and employers were given the right to use anti-union propaganda during an organising campaign. These and other changes reflected growing political criticisms of the NLRB during the 1940s and were presaged by changes in Board policies in response.⁹ However, their full effects were only fully realised after 1953, when the Eisenhower administration appointed three pro-management representatives to the five member NLRB.¹⁰ Based on Taft-Hartley, the Eisenhower board was to make a number of rulings widely considered detrimental to union organising success. It ruled that employers can deliver a captive speech on company time, while refusing a union's request to reply, that they can interrogate workers about their union activities, that they can state that they will not bargain with the union if certified, and that they can claim that union recognition could result in a plant's relocation.¹¹ By the late 1950s, the US labour movement had begun what was to be a steady long term decline, with density gradually dropping to its present day levels of 13 per cent overall and 8.5 per cent in the private sector.

Understanding the US context

Although weaknesses in the NLRA unfair labour practice regime have been viewed as central to the decline in union density, employer opposition to unions explains both why these weaknesses exist and why they appear to have had such devastating consequences for the US labour movement. Understanding this opposition is important, because it would appear, historically, to have been more intensive in the USA than in any other industrialised nation. The following explanations have been identified¹²:

1. The relative lack of radicalism in the US working class has historically meant that employers have had little need to seek any kind of class compromise with labour.
2. American employers have traditionally been larger in size than their European counterparts and hence had greater economic resources with which to combat unions, thus diminishing any need to accommodate unions.
3. The tendency for bargaining to occur at the establishment or employer rather than industry level has meant that unionised employers can find themselves at a substantial competitive disadvantage unless unions have succeeded in organising their competitors and taking wages out of competition.
4. The USA was borne of a revolution, and there has subsequently been significant distrust of centralised government power.
5. The USA has historically been characterised by a weak state, with a history of limited intervention and strong employer resistance to such intervention, whether it is legal or otherwise.¹³
6. Dominant USA ideologies have generally focused on individual achievement and private property rights, neither of which is conducive to collective bargaining.
7. US employers had effectively rationalised the workplace by the early decades of the twentieth century, thus reducing the power of skilled workers and hence the need to respect employee desires for collective representation.

The factors above combined to generate more intensive employer opposition to both unions and labour law than in other developed nations. This opposition, coupled with a history of limited state intervention in the US economy, has in turn fostered what has been referred to as 'the bloodiest and most violent labour history of any industrial nation in the world.'¹⁴ During the 'golden age' of the 1950s and 1960s, this opposition seemed to be muted, with leading US corporations appearing to accept labour unions and collective bargaining. Significant numbers of corporations continue to do so.

The evidence generally suggests, however, that the most significant shift was to more sophisticated forms of union avoidance, whether these forms involved

a) 'progressive' management practices characteristic of some leading American corporations throughout the post-war era, b) more sophisticated strategies for circumventing or undermining the unfair labour practice regime, or c) efforts to shape state policies and court decisions so as to create an environment hostile to unions and collective bargaining and to any legal reforms sought by unions. Although the implications of progressive practices for union organisation remain a matter for some debate, the evidence is that all three of these factors have increased in prevalence over the past three or four decades. This has engendered a culture in which employer opposition to labour unions and labour law has become increasingly institutionalised, so that this opposition is now simply a taken-for-granted employer norm assumed to be endemic in the USA.

Other factors may also be identified to explain the US case. In particular, the US tradition of limited trust in the state may have meant that, despite surveys suggesting levels of public support for unions similar to those in other liberal market economies,¹⁵ this support may not have extended as fully as otherwise to state intervention in union-management relations. Consistent with this explanation is a tradition of weak administrative law.¹⁶ This may partly explain why employers appear to have been so successful in weakening the US unfair labour practice regime through political actions and why workplace level employer activities that undermine this regime have not generated more widespread condemnation. These factors likely combine with and reinforce employer opposition, not only helping to explain the steady weakening of the unfair labour practice regime and its exploitation by employers, but also suggesting that the US case may be of limited generalisability. In this respect, Canada represents an especially interesting case.

The Canadian context

Canadian industrial relations institutions have historically been similar to those of the USA. As in the USA, the first Canadian labour unions can be traced back to the end of the 18th century. Though initially autonomous from their US counterparts, they came to be increasingly dominated by US based 'international' unions¹⁷ seeking to prevent Canadian employers from undercutting their unionised US counterparts through lower wages. By 1905, these unions accounted for 95 per cent of all union members in Canada. This figure was to subsequently decline, but it remained as high as 70 a quarter of a century later.¹⁸ Thus a variant of 'business unionism' also had come to predominate within Canada by the early decades of the twentieth century.

The Canadian variation on the NLRA

The development of labour law in Canada lagged that of the USA by a decade. Under a 1926 Supreme Court ruling it had been held that labour and employment legislation are primarily the jurisdiction of the ten provinces (and subsequently three territories), with the federal government having jurisdiction over only its own employees and those working in a handful of selected industries (presently about ten per cent of the labour force). However, in 1944 the federal government invoked special wartime powers enabling it to temporarily over-ride provincial jurisdiction, issuing an Order in Council that provided unions in all jurisdictions with protections similar to those in the USA.

Although this order was revoked after the war, it established the basic model for Canadian labour law. By the end of the 1940s, all Canadian jurisdictions had adopted a variant of these regulations and hence of the US model.

Employer acceptance of unions was also to be limited in Canada.¹⁹ But, perhaps paradoxically, an NLRA style unfair labour practice regime, and labour laws in general, appear to have been more conducive to the Canadian than to the US context. In Canada, labour laws came, if anything, to be strengthened rather than weakened throughout the post World War II era. Despite some weakening in the late 1980s and then again in the late 1990s, they are still much stronger and more effective than in the USA.

US and Canadian divergence in labour laws and unfair labour practice regimes has been paralleled by a divergence in the fortunes of each country's respective labour movements.²⁰ Overall union density in Canada did not reach US levels until the late 1940s, and remained within two percentage points of these levels throughout the 1950s and much of the 1960s. But since then, they have come to more than double those of the USA. Despite a decline of as much as 5 percentage points in the second half of the 1990s, overall density now stands at about 30 per cent, compared to 13 per cent in the USA. Private sector density appears to have undergone significant decline in the early 1980s, but has undergone only slight decline since. It is now at 18 per cent, compared to 8.5 per cent in USA. The primary explanation for this divergence has been Canada's stronger system of labour laws, particularly its unfair labour practice regimes.²¹

Understanding the Canadian context

Although Canadian industrial relations institutions have historically been quite similar to those of the USA, Canada's historical development has differed in important respects. In particular, large fur trading corporations (e.g., the Hudson's Bay Company), aided by the state, played a much more important role in Canada's early development. Canada also has no history of revolution, in contrast to the USA, and employers have tended to be smaller and more reliant on the state than in the USA. These factors have given rise to a political climate in which the state has been more highly trusted and seen as playing a more important role in the economy. Within this climate, there has developed a stronger tradition of administrative law and greater support for labour laws and hence unfair labour practice regimes.

It is also possible that these conditions historically gave rise to less intensive employer opposition to unions and to unfair labour practice laws, although there is little evidence that this is the case at present.²² These conditions do, however, appear to have given rise to a divergent philosophy within the Canadian labour movement, especially since the 1960s and 1970s. Since this time, the Canadian labour movement has become known for its 'social unionism.' This refers to a concern for social and economic problems faced by Canadian working people in general rather than merely focusing on the immediate interests of union members.²³ The Canadian labour movement has also come to play an important role in party politics, with close institutional ties to Canada's equivalent of a labour party, the New Democratic Party. Although it

forms one of the two main parties in only three jurisdictions, this party is considered to have had a strong influence on the labour law throughout Canada as a whole.²⁴ It is likely that these institutional differences also help to explain differences in US and Canadian unfair labour practice regimes.

Conclusions

This chapter has outlined the development and context of labour laws and unfair labour practice regimes in the United States and Canada. Canada adopted the same model as the USA, and the Canadian labour movement has historically been closely linked to its US counterpart. However, the US unfair labour practice regime was steadily weakened in the decades after its enactment, while the Canadian regime was not. This divergence reflects important differences in the early development of these two countries, differences that have given rise to a climate more favourable to labour law, and administrative law in general, in Canada. It has also been accompanied by an equivalent divergence in union density levels, so that Canadian levels are now double those of the USA.

Although this chapter has focused on differences between the USA and Canada, it has also illustrated similarities, especially with regard to employer animus towards unions and the model on which unfair labour practice regimes have been based. These issues receive greater attention in chapter six. The following three chapters first provide a more thorough account and assessment of the structure and functioning of US and Canadian regimes and the issues associated with them.

3

The US unfair labour practice regime at present²⁵

The US unfair labour practice regime is founded in sections 7 and 8 of the National Labour Relations Act (NLRA) of 1935, as amended by the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959. The sections that apply to employer practices during the recognition process (sections 7 and 8a) appear in Appendix I of this report. These sections are interpreted and administered by the National Labor Relations Board (NLRB) in accordance with civil law procedures and standards, and subject to past precedent as established in both NLRB and court rulings. This chapter begins by briefly discussing the structure of the NLRB.

The National Labor Relations Board

The National Labour Relations Board is the body responsible for handling union petitions for union recognition and all issues relating to the recognition and collective bargaining process in the US private sector. The board itself consists of a chairman and four persons appointed by the President subject to congressional approval. The normal term for each appointee is five years, and the terms are overlapping. Thus, it can take a new President a few years to put his 'stamp' on the board. Normally, the chair and two additional appointments are from the President's party, while the remaining two appointments are from the other major party. Each board member has a chief counsel and a staff of about 15 attorneys who function as his/her counsel.

The board also has a general counsel, again appointed by the President subject to congressional approval. The general counsel exercises general supervision over attorneys employed by the board, who are primarily responsible for the prosecution of meritorious unfair labour practice charges. The general counsel also exercises general supervision over all officers and employees of the board. These officers and employees are at present distributed across 33 regional offices, each of which is administered by a regional director. Regional offices are normally responsible for the initial processing of union petitions for legal certification and of unfair labour practice charges, and may make decisions about both on behalf of the board.

Finally, the NLRB employs approximately 75 administrative law judges to hear unfair labour practice cases. Although employed by the board, these judges function independently of the board and of the general counsel. Their role is similar to that of trial court judges in non-jury trials, hearing witnesses, ruling on

the admissibility of evidence, and making the initial decisions and findings of fact in unfair labour practice cases.²⁶

The organising and certification process

The process by which a union gains legal recognition has important implications for the effectiveness of unfair labour practice laws. In the United States, it requires that a union gain legal certification as the sole bargaining agent for eligible workers in a particular workplace. The certification process begins with a formal petition to the Board. As part of this petition, the union must state that the employer has refused to recognise it for purposes of collective bargaining. However, there is no statutory process for encouraging voluntary recognition, and such recognition is relatively rare. Where it does occur it is often because an already unionised employer has opened a new establishment, and is typically in response to collective agreement provisions or union pressures. There has in recent years been some effort by unions to make greater use of the voluntary route, in response to the perceived failings of the formal statutory route.²⁷ Usually, such efforts entail an agreement with the employer to recognise the union if it can demonstrate that a majority of workers has signed a union card, backed up by the threat of some form of negative publicity campaign if the employer resists. There are no available statistics on how prevalent such tactics have become. But in view of the history of strong employer resistance to unions, the general assumption is that employers are antagonistic towards union recognition, and union attempts to win voluntary recognition do not appear to be widespread.

The normal process for union organising is for workers in a given workplace to contact a union office and request assistance. The union then investigates the prospects for majority support and then, if these prospects appear to be reasonable, to assign a professional union organiser to initiate an organising drive. Usually, this entails the formation of an organising committee consisting largely of employees from within the establishment.

Employees may engage in organising activity during break or lunch periods, and may even engage in oral communication while working, provided that this does not interfere with the normal conduct of their work.²⁸ Otherwise, such activity is not legally protected and may be subject to employer discipline. With some exceptions, professional organisers (i.e., non-employees) may be legally denied access to employer premises.²⁹ There are no requirements to grant organisers access to employees through speeches or the distribution of literature, although such literature may be posted on bulletin boards or distributed through e-mail if personal messages and communications unrelated to work have been allowed in the past.³⁰ Moreover, under the *Excelsior* Rule, employers are routinely ordered to provide the regional director with the names and addresses of all eligible employees within seven days after the NLRB has ordered a representation election. The regional director then makes this list available to all parties.³¹

Union organisers attempt to conceal the drive from the employer for as long as possible and, as a general rule, try to sign up a majority of two-thirds prior to contacting the employer and petitioning for certification, in recognition that support often drops once an employer is aware of and able to become involved in the organising campaign.³² However, the union may petition for certification once 30 per cent or more of eligible employees have signed a union card. In 2001, 5108 petitions were received.³³

A number of steps are followed once a petition has been received. First, the regional director's office investigates to determine the level of support for the union. If the level of support appears to be sufficient (i.e., 30 per cent or more), the regional director arranges a hearing, conducted by a hearing officer. This hearing serves primarily to resolve issues of existing representation and to establish the appropriate unit for purposes of collective bargaining and hence for a ballot. The latter normally includes all of those workers in the same general occupation (e.g., all blue-collar workers) at the same location. However, the inclusion or exclusion of specific sub-groups may affect the union's chances of success, and there is evidence that the likelihood of a union winning a certification election is reduced in cases where the union's proposed unit is altered.³⁴ Thus, the employer often contests the precise definition of this unit. Where this is the case, the director accepts submissions from the parties prior to making a determination and establishes whether a sufficient number of eligible workers has signed a union authorisation card.

Next, if satisfied that at least 30 per cent of eligible workers has signed a union card and there is no other union certified to represent the same workers, the regional director will normally arrange for a secret ballot, to be conducted by an agent of the board. However, if both parties agree, the hearing may be waived and a 'consent election' held, in which any remaining issues are left unresolved until after the ballot. Although once prevalent, these elections are now rare.³⁵ Out of 3,005 certifications in 2001, only three involved a consent election.³⁶

One or both parties may file an objection to the regional director's findings. This will not operate as a stay of the election unless otherwise ordered by the board, but where such a request is granted, the certification decision is delayed until after the board has held an objections case hearing to establish whether the regional director has erred.

Once any objections have been addressed, an election is held. Elections are normally conducted less than 50 days from the date a petition has been filed,³⁷ although about 20 per cent of elections are held more than eight weeks later, often when the employer contests the bargaining unit.³⁸

If a majority of those participating in the ballot vote in favour, the regional director will normally grant a union's petition for certification. Once a union is certified it has a duty to represent all employees of the bargaining unit, even those who choose not to join the union or pay the equivalent of union dues. The employer is subsequently required to recognise and bargain in 'good faith' with that union on all issues pertaining to wages, benefits, and other terms and conditions of employment.

Failure of the parties to reach a collective agreement may result in a legal strike or lockout. During a strike, unions may picket at or near the employer's place of business, although they may not engage in secondary picketing or embark on a secondary boycott.³⁹ The employer may hire replacement workers on a permanent basis. Thus, striking workers have no right to displace these workers at such time that the strike or lockout ends or individual strikers decide to return to work. The employer's only obligation is to give them priority over other applicants at such time that a job for which they are qualified becomes available. Of note, the right to use permanent replacement workers applies only to an 'economic strike,' defined as a strike that has occurred as a result of a failure to reach a collective agreement. It does not extend to strikes arising from employer unfair labour practices, which are legal and can represent a union's main recourse if faced by a recalcitrant employer.

Unfair labour practices

Section 8(a) of the NLRA proscribes various employer practices during and after the organising process, defining these as unfair labour practices. This section is reproduced in Appendix A, along with section 7, which affirms employee rights under the Act. However, unfair labour practices tend to be vaguely defined in the Act. Because of this, rulings by the NLRB and the courts have played as great a role in defining what does and does not constitute an unfair labour practice as has the Act itself. Generally, past rulings form precedents which both the Board and the courts are unwilling to overturn. Although there have been cases in which this has occurred, such cases have been rare. Thus, these rulings also tend to acquire the force of law and are central to defining what is and is not likely to be held as an unfair labour practice.

The focus of this report is on employer unfair labour practices that pertain to the union certification process, because it is through this process that legal recognition occurs. However, the functioning of unfair labour practice laws depends not just on the processes by which unfair labour practice claims are heard and the remedies at the disposal of labour boards, but also on additional laws and procedures that may encourage or discourage these practices. The operation and effectiveness of unfair labour practice laws cannot be understood without reference to these laws and procedures. For this reason, unfair labour practice regimes must be defined to encompass them. Moreover, although most unfair labour practice laws pertain primarily to the organising or recognition process, all jurisdictions also have unfair labour practice laws that pertain to union and management practices after recognition has occurred. The latter often have implications for the effectiveness of the former, and as such need to be considered where this is the case.

Five areas of employer activity are regulated under section 8 of the NLRA: (1) the use of threats and coercion, (2) domination of a labour organisation, (3) discrimination for union activities, (4) discrimination for filing a charge or giving a testimony under the Act, (5) refusal to bargain. The first, third, and fifth of these are relevant in the present context.

Threats, coercion and employer speech rights

Section 7 of the NLRA states that 'employees shall have the right to self-organisation to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activity.' In support of this right section 8a(1) states that it is an unfair labour practice for employers to 'interfere with, restrain, threaten, or coerce employees in the exercise of the rights guaranteed under the Act.' Under this provision, the employer may not engage in surveillance unless it is casual or there are justifying circumstances. For example, the random viewing of a union gathering is not prohibited, but planned surveillance of union meetings has been treated as a violation on the grounds that this is implicitly coercive.⁴⁰ Employers also cannot alter the terms of employment during an election campaign, unless doing so entails putting into effect any improvements that would have been implemented in the normal course of events.⁴¹ Nor can they promise benefits to employees if they vote against union representation.

Despite these restrictions, employers have important speech rights. Subsequent to the amendments in the Taft-Hartley Act of 1947, the NLRA explicitly allows employers to express any views, argument, or opinion, or the dissemination therefore, whether in written, printed, graphic, or visual form, provided such expression contains no threat of reprisal or force or promise of benefit (sec. 8c). This provision has been interpreted by the NLRB to allow employers to hold captive audience meetings and to engage in anti-union propaganda up to 24 hours prior to a ballot as long as explicit threats or promises are not employed and this speech does not occur in the context of other coercive behaviour that could affect how it is interpreted.⁴²

Moreover, although overt threats and intimidation are illegal, employers can, under various NLRB and Supreme Court Rulings,⁴³ legally 'predict' workplace closures, firings, wage and benefit cuts, and other dire consequences if workers form and join a trade union, provided that these are carefully phrased. It has even been ruled that, where an employer has decided to close the entire operation in the event that it is unionised, it may communicate this to employees.⁴⁴

Employers may also pressure workers through mandatory one-on-one communications. Although interrogating workers was originally proscribed, the Eisenhower labour board ruled, in *Blue Flash (1954)*, that this would be the case only where coercion could be demonstrated. Thus, for example, although it may be a violation for a company president who would not normally speak to individual workers to meet with workers individually to discuss union certification, it may well not be a violation if their immediate supervisors do so.

Discrimination in hiring or tenure

Section 8a(3) of the NLRA explicitly identifies discrimination in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation as an unfair labour practice. Discrimination has been ruled to include not just the targeting of individual employees, but also the relocating operations, transferring of work,

or contracting out of work in order to avoid or undermine a union. However, employers can relocate for 'valid' business reasons, including a concern that union related costs are making operations unprofitable.⁴⁵ Moreover, an employer, even if motivated solely by anti-union animus, may close down its entire operations without committing an unfair labour practice.⁴⁶

The requirement to recognise and bargain with a union

Certification of a union means that the employer must recognise and bargain with it as the sole agent of workers in the established bargaining unit. Under section 8a(5) of the NLRA, it is an unfair labour practice for an employer to refuse to bargain collectively and in good faith with representatives of his employees where a union is certified. Employers must negotiate with the employee organisation and not with individual employees, and may not circumvent the union by making an offer directly to employees. The employer is also required to provide information that is relevant to negotiations, especially if it is basic to the formulation of union demands. The employer also cannot appear to intentionally frustrate negotiations.⁴⁷ However, the employer is required to bargain only over issues that pertain to specific terms and conditions of employment, and not over such issues as investment decisions, major layoffs, or plant closings. The employer is also free to engage in tough bargaining. The Supreme Court has ruled that the refusal of an employer to grant even the most minimal provisions need not amount to bad faith bargaining, even where these provisions are common in other agreements.⁴⁸

Union unfair labour practices

Although the preponderance of unfair labour practice charges involve employer behaviour,⁴⁹ the NLRB, again as amended under the Taft-Hartley Act, prohibits labour organisations from engaging in a number of behaviours. Though these are not factors addressed in this report, they warrant mention. Unions may not restrain or coerce employees in the exercise of their rights under the Act, although they have the same free speech rights as employers. In addition, a union also may not cause or attempt to cause an employer to discriminate against an employee on its behalf and is prohibited from charging any member excessive or discriminatory fees. Unions also may not force an employer to recognise and bargain with a particular labour organisation, if another labour organisation has already been certified as the representative of the employees in question, nor may they force or intimidate any individual to strike or engage in a boycott of the employer. Unions are further prohibited from picketing an employer where an objective thereof is to force an employer to recognise and bargain with a labour organisation, unless an application for certification has been made to the board. Finally, unions are subject to the same good faith bargaining requirements as are employers.

Remedies for unfair labour practices

In the *Consolidated Edison* case,⁵⁰ the Supreme Court ruled that the board may not order punitive damages. It may only resort to a make-whole remedy, in which it restores the status quo ante. Subsequent to the Supreme Court's *Phelps Dodge* decision⁵¹, a worker dismissed for union activities may be awarded only reinstatement with back pay covering lost income, defined as what the worker would have earned *minus* any earnings from other employment the worker may have obtained after dismissal. Where there has been a discriminatory closing, the board may also order the operations to be reopened and employees re-instated. However, it may not do so if the employer is able to demonstrate that doing so would be 'unduly burdensome.' Where this is the case, the board may order the employer to give workers equivalent jobs at another location, along with either moving expenses or a transportation allowance.⁵²

If the employer has openly threatened or intimidated workers, the board may issue a cease and desist order, requiring that the employer cease this behaviour and post a notice promising employees that it will not occur in future. The board also has the authority to apply to the courts for temporary injunctive relief pending a board decision. To obtain such relief the court must decide if there is reasonable cause to believe that the alleged violations have occurred, based on the information provided by the board. Although it is normally regional directors who seek relief, they may not do so directly. Rather, it is necessary for them to arrange for the general counsel to request that board members authorise an application.⁵³

Under *General Shoe Corp.* (1948), the board may also order a re-run election if it determines that employer conduct created an atmosphere that rendered free choice improbable, even where an unfair labour practice has not been held to have occurred.⁵⁴

If the board rules that employer behaviour has rendered any semblance of free choice impossible, it may also issue a 'Gissel bargaining order' requiring the employer to recognise and bargain with the union even though a majority has not voted in favour. An example of a Gissel order and the criteria on which such rulings are based appears in Appendix B. This remedy is, however, rarely used, and requires evidence that the union had an authorisation card majority at some time prior to the ballot.

Finally, where a charge of bad faith bargaining has been upheld, the board may issue an order to return to the bargaining table and bargain in good faith. Where it has resulted in or prolonged a strike, the board may also order the payment of back pay, but only for the period commencing with the employees' unconditional offer to return to work.⁵⁵ The Supreme Court has held that the board may not remedy such behaviour by imposing a contract.⁵⁶ It has also held that the board cannot require an employer to reimburse workers for any improvements in wages and benefits they may have lost because of employer bad faith bargaining.⁵⁷

The processing of an unfair labour practice charge⁵⁸

In 2001, the NLRB received 21,510 unfair labour practice cases involving section 8a of the NLRA.⁵⁹ Charges pertaining to section 8a1, prohibiting the employer from interfering with, restraining, or coercing employees in the exercise of their rights under the act, are typically a by-product of other charges under section 8a. Thus, all cases involved a charge that the employer had violated this provision. In addition, 47 per cent involved a charge of discrimination for union activities (8a3), and 45 per cent a charge of failure to bargain in good faith (8a5).⁶⁰ Data as to the portion of the latter that involved a first contract are unavailable.

Unfair labour practice charges may be made by any person, provided that they are filed not more than six months after the party adversely affected receives actual or constructive notice of the practice. They are to be filed with the regional director of the board for the region in which the practice is said to have occurred. In 2001, 31 per cent of filings were by individuals, and 69 per cent by labour unions.

Once a charge has been filed, it is initially investigated by an agent of the general counsel, either by visiting with the parties or through a telephone conversation with them. Based on the results of this investigation and the agent's recommendation, the regional director decides whether there are grounds for a complaint against the party against which the charge has been levelled. Parties to the charge participate in this stage only by providing the regional office with available facts and informally presenting their theories of applicable law.

If, after investigation, the regional office decides that the charge lacks merit, it will normally ask the charging party to withdraw the charge. In 2001, 28 per cent of all charges involving the recognition process were withdrawn as a result of this practice.⁶¹ Otherwise, the regional director will dismiss the charge. In 2001, 24 per cent of all charges involving the recognition process were so dismissed.

In the case of dismissal, the person making the charge may appeal to the general counsel, who may over-ride the regional director's decision. There is, however, no basis for appealing the general counsel's decision to the board or the courts. The general counsel's initial decision is almost always final, although the complainant does have a right to ask that the general counsel reconsider in light of newly discovered information or on the basis of error.

If the charge is found to be meritorious (in 2001, close to half of all cases under section 8a), the director may at this stage apply to the courts for injunctive relief pending final adjudication of the board, as discussed in the preceding section of this report.

Normally, the director also seeks a voluntary settlement. This may be done informally, in which case the charge is withdrawn upon appropriate remedial action by the charged party. Such settlements can occur without the involvement of a regional director or general counsel, but must be approved by

the regional director. They need not provide a full remedy to be approved, although they may be (but seldom are) refused on public policy grounds. In 2001, 31 per cent of all charges involving the recognition process were settled in this way prior to issuance of a complaint. Failure to comply with the terms of a settlement can mean its withdrawal and prosecution of the case.

In a small number of cases (0.2 per cent in 2001), a formal settlement may occur. In such cases, the charged party agrees to the issuance of a formal board remedial order and, in some cases, a court decree enforcing that order. Such settlements are normally sought where there has been a flagrant or persisting violation.

If unsuccessful in obtaining a settlement at this stage (in 2001, about 17 per cent of section 8a cases), the director may then issue a formal complaint describing the alleged unlawful conduct and stating the charges in that respect. The director also schedules a hearing to be held not less than 14 days after the service of the complaint. In 2001, the median time from filing of a charge to issuance of a complaint was 101 days. If a complaint is filed, the respondent is to provide a response within 14 days; otherwise the complaint will be deemed to be true. A general denial is usually sufficient to preserve the respondent's right to a hearing.

The parties may voluntarily settle an unfair labour practice charge after a complaint has been issued and even after a formal hearing has begun. Since 1995, the parties have also been able to opt for a voluntary settlement process before an administrative law judge.⁶² As of 2001, 11.5 per cent of all section 8a cases involved voluntary settlements after a complaint had been issued, and another 0.6% after a hearing had opened. Formal voluntary settlements at either of these stages were negligible (0.2% of all cases).

During a hearing, an attorney from the regional office, acting on behalf of the general counsel, acts as prosecutor at no cost to the party who filed the charge. As for all board hearings, it is normally open to the public, although it may be closed under select circumstances or where the board deems it to be in the public interest.⁶³ The initial hearing is held before an administrative law judge in accordance with the rules of evidence and under rules of civil procedure applicable in the district courts of the USA, so far as practicable. There may be some departure from normal rules of evidence where warranted, but this would appear to represent the exception.⁶⁴ All parties have a right to legal representation, are entitled to call, examine, and cross-examine witnesses, and may introduce evidence. Witnesses are sequestered unless the judge considers it necessary for them to remain in the hearing room to hear other witnesses. Subpoenas are available to all parties in board hearings to compel testimony of a witness or the production of documents, although there is no pre-trial discovery, in which the parties are allowed to have access to all of the evidence in the case. The parties also have only a limited access to investigatory files. Finally, with the exception of bench decisions (below), any party may file a written brief within (normally) 35 days of the oral hearing.

The median elapsed time between the issuance of a complaint and the beginning of a hearing is nearly three months, and the hearing itself may last several months, depending on the complexity of the case. In 2001, the median time from the filing of a charge to the administrative law judge's decision was 232 days.⁶⁵ Administrative law judges completed 362 section 8a unfair labour practice hearings, which represents about one fifth of all complaints issued by regional directors and two per cent of all cases received.⁶⁶

If the administrative law judge believes that the law is clear or that the issues are predominantly or exclusively questions of credibility or fact-finding, a bench decision may be issued. This is an oral decision that is read into the record at the conclusion of a hearing or shortly thereafter, and which precludes the filing of briefs subsequent to the hearing. Otherwise, the judge issues a written decision containing a complete statement of the case, findings of fact, conclusions of law and the reasons therefor, and a recommended order. Findings of fact are based on civil law standards, and as such only require the judge to conclude that they are true on the balance of probabilities.

To establish discrimination, it must be demonstrated that the employee was engaging in protected activity, that the employer was aware of this, and that the employer's action was motivated at least in part by anti-union animus. If the employer cannot rebut the case presented against it, it must demonstrate that the same personnel action would have taken place for legitimate business reasons. If the employer asserts that the employee's performance or conduct have been unacceptable, it must normally establish that it had given the employee prior warnings.⁶⁷ This does not, however, entail a shifting of the burden of proof to the employer, as the a prima facie case against the employer must be established before an unfair labour practice complaint can be upheld.⁶⁸

The administrative law judge's decision is filed with the board and served on each of the parties.⁶⁹ The board then enters an order transferring the case to the board and serves copies of this order to the parties, setting forth the date of transfer. The parties normally have 28 days subsequent to the date of transfer within which to file an exception to the ruling. If they do not, the decision normally becomes an automatic decision of the board.

If an exception is filed, the party must state fully and very specifically the determinations of fact, law, or procedure to which the exception is taken. Any party opposing an exception is allowed 14 days from the last date on which an exception is allowed to file an answering brief. Another 14 days is allowed for the filing of cross-exceptions, followed by 14 more days for the filing of further answering briefs, and then by another 14 days for parties to file a reply brief to the answering brief.

Prior to ruling, the board may hold an oral hearing if so requested by one of the parties, usually delegating its power to a panel of three board members. However, an oral hearing need not be held for the board to issue a ruling and, indeed, such hearings are rare.⁷⁰

The board's decision is based on the entire record of the administrative law judge hearing, the administrative law judge's decision, the exceptions to this ruling, and supporting briefs. If it deems the administrative judge's decision to be flawed, it may modify or set aside the order provided that it has not yet been filed in court. In 2001, the median time from the initial filing of a charge to a ruling by the board was 1,144 days.⁷¹

Where an unfair labour practice is deemed to have occurred, the board states its findings of fact and issues an order requiring that the person cease and desist and ordering remedial action where deemed appropriate. The board may petition the courts for the enforcement of this order and for appropriate temporary relief or a restraining order (sec. 10e).

In 2001, 1,094 cases, or 4.8 per cent of all section 8a unfair labour practice cases, were closed subsequent to an administrative law judge's ruling or completion of a subsequent stage. Seventy-eight cases, amounting to 7 per cent of all cases ruled on by a judge, were closed after the judge's decision but before issuance of a board decision, and 217 cases, amounting to 20 per cent, after issuance of a board decision in the absence of an exception. A third, or 371 cases, were closed by board decision after issuance of an exception. The remainder (428, or 39 per cent) involved court appeals (see below).⁷²

Implementation and appeals of unfair labour practice rulings

Orders of the board are not self-enforcing. Responsibility for securing compliance is assigned to the general counsel, who acts through the regional offices.⁷³ Once an order has been filed, the regional director establishes whether the respondent is prepared to comply and determines how the order is to be enforced (e.g., the amount of back pay due), issuing a compliance determination.⁷⁴ The charging party may appeal this determination to the general counsel within 14 days. Within 14 days of the service of the general counsel's decision, the charging party may request a further review by the board, which may affirm or modify this decision. The board may, however, hold a hearing if the regional director processing the case deems this necessary. It may also petition any court of appeals for the enforcement of an order and seek appropriate injunctive relief or a temporary restraining order as it deems just or proper.

Under sec. 10f of the NLRA, decisions of the board may be appealed to the courts (normally a district court and, in some cases, subsequently to the Supreme Court). Such appeals are treated in the same manner as would be the case for any lower court ruling and as such may be held to be of sufficient merit if there are grounds for believing that the board may have made an error of fact, law, or procedure. If the court decides that there are no such grounds, it may decide not to hear the appeal, in which case it issues a written explanation as to why. If it does hear the appeal, it may subsequently issue a decree enforcing, modifying, or setting aside in whole or in part the order of the board. However, it will normally uphold a board's decision if it believes that the board's finding of fact or interpretation of the law was 'reasonable,' even though the court may disagree with either or both.⁷⁵ Appeals regularly take three years to be completed. During the period of an appeal, the board's ruling is normally held

in abeyance and hence is not implemented until the appeals process is complete and its decision upheld.⁷⁶ In 2001, 425 cases were closed by a circuit court decrees. Three cases were closed after Supreme Court action.

The Effectiveness of the US regime

Although a few scholars have argued that the US regime should be further weakened, on the grounds that it interferes with a free market in labour⁷⁷, the overwhelming consensus of students of US labour law is that it fails to adequately protect the ability of workers to freely organise unions and engage in collective bargaining. The limitations to this regime have been documented by leading legal scholars, including Paul Weiler of Harvard University and William Gould of Stanford University⁷⁸, the latter of whom also served as the Chair of the NLRB from 1994 to 1998. However, the most thorough assessment of the NLRA, and one which is entirely consistent with those of these and other scholars, is the Human Rights Watch report, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, published in 2000.

It should be emphasised that although the Human Rights Watch report adopts a human rights perspective and may be read as biased in favour of unions, the limitations it identifies represent the predominant view of legal scholars in the United States. Underlying this view is a general belief that employees should have a right to choose for or against union representation without undue employer involvement and that employers in general are adverse to union recognition. It is also believed that employers will generally use all available means to undermine the exercise of this right. Thus, any opportunity for employer involvement tends to be pernicious in its consequences. The available evidence validates these assumptions. For example, one recent study suggests that at least nine in ten US employers take actions to discourage a union organising attempt when confronted with one.⁷⁹

In addition, most if not all of the criticisms of the US unfair labour practice regime apply to its implications for the ability of workers to organise. There has been little written as to the procedures of the labour board and how they might be improved, perhaps because these procedures have now had more than half a century to evolve and so now tend to be taken for granted. During his tenure as chair of the NLRB during the Clinton era, William Gould did implement some changes, including the use of administrative law judges to mediate unfair labour practice charges and granting these judges the authority to issue bench orders, both of which are discussed earlier in this chapter.⁸⁰ However, such changes would appear to be relatively rare.

It is useful to assess the US unfair labour practice regime with regard to three broad criteria: 1) time delays subsequent to a union's petition for certification, 2) restrictions on employer behaviour, and 3) board powers. These same criteria will be used to assess the Canadian system (chapter four) and to discuss the empirical research on unfair labour practices (chapter five). Where the first pertains to the certification process, the second pertains to specific unfair labour practices, and the latter to board remedies and implementation.

Time delays

The requirement of a ballot and for the board to first hold a hearing to resolve representation and bargaining unit issues prior to this ballot provides for substantial delays. Elections take place at least several weeks after workers file a petition seeking election, as indicated earlier. In many cases, the election can be held up for months by employer initiated disputes over which workers should be eligible to vote in the election as part of the appropriate bargaining unit. These delays provide employers an opportunity to engage in practices designed to discourage unions, either through intimidation or appeals to loyalty. They are especially serious given the anti-union animus of employers in the USA.

Restrictions on employers

The employer ability to undermine a union organising drive is enhanced by the various speech rights afforded employers under the act, including the right of employers to hold captive audience meetings and engage in anti-union propaganda up to 24 hours before a vote and to subject employees to one-on-one communications. This can be seen to provide employers with substantial opportunities for implicit intimidation and misinformation and to make the process highly unequal, especially in view of the lack of any equivalent access for union spokespersons. This inequality is heightened by the extensive use of consultants to coach supervisors on how to present union organisation as risky to employees' interests and by the use of often carefully scripted declarations to this effect. Moreover, the right of employers to legally predict workplace closures, firings, wage and benefit cuts, and other consequences can effectively undermine a union organising drive. These tactics are now widespread, and employers and consultants have become increasingly sophisticated in their use.⁸¹

Board powers

Board powers are considered to be weak in a number of respects. First, although firing a worker for union organising activities is illegal, the remedies available to the NLRB are often ineffectual and serve as too mild a deterrent. Many cases are settled with a small back pay settlement and workers' agreement not to return to the workplace.⁸² Thus, the costs to employers of firing workers involved in an organising drive may be minimal in comparison to the effectiveness of this tactic in undermining an organising drive.

Second, unfair labour practice complainants may be required to go through as many as four steps before a final decision is made. These include: an initial finding by the regional director that a complaint has merit, a hearing before an administrative law judge, a review and possible hearing by the board itself, and a hearing before a court. Even where a board or court appeal does not occur, it can be a year or more until some cases that go through the second of these stages are finally closed. Where they do occur, it can take several years before all processes are exhausted. Because remedies ordered by the board rarely take effect until this has occurred, these remedies can be rendered effectively meaningless by the time the process is completed.

Third, although the Board may seek an injunction halting employer unfair labour practices at any time, it does so only in a limited number of cases,⁸³ and workers are prohibited from engaging in secondary picketing or seeking help from workers at companies doing business with their employer. Thus, in the absence of an injunction, the ability to exert pressure on employers is limited.

Fourth, the limited use of Gissel orders where employers have engaged in egregious unfair labour practices, and the majority card sign-up requirement for their use, means that there is much less of a disincentive to engage in unfair labour practices. To the extent that these practices succeed in undermining a union organising drive, employers are in effect rewarded for breaking the law.

Fifth, although certification of a union legally compels employers to recognise and bargain with that union, there is little that the Board can do to ensure that this actually occurs. An employer is able to delay the start of bargaining for as long as one to two years by filing an unfair labour practice complaint against a union after an election and, if the Board rules in favour of the union, by filing a 'technical refusal to bargain.' Under this tactic, the employer refuses to bargain, forcing the union to file an unfair labour practice charge. The NLRB must then initiate an unfair labour practice case and seek support for its ruling from a federal appeals court. This can result in years of litigation, effectively rendering the right to bargain and hence the unfair labour practice regime meaningless. Even if this regime succeeds in deterring unfair labour practices from occurring, the right of workers to representation for purposes of collective bargaining is undermined.

Sixth, because of the minimal standards imposed to establish good faith bargaining, a failure to engage in good faith bargaining is difficult to prove. Moreover, because the board may only issue an order to return to the bargaining table, an employer can be repeatedly found guilty of bad faith bargaining, delaying the reaching of agreement indefinitely, with little or no penalty. This can also render the unfair labour practice regime meaningless.

Other limitations to the US system

Other major limitations have been identified with the US system of labour law. Of particular relevance to the unfair labour practice regime is the right of employers to hire permanent replacements in the event of an economic strike or lockout. Thus, an employer can undermine union recognition by forcing the union into a strike and then effectively firing its unionised workers.

Three additional limitations warrant mention because, although they do not have direct bearing on the unfair labour practice regime, they contribute to what many view as the failure of the US system, which has implications for the climate within which the unfair labour practice regime operates. First, eligibility rules exclude large segments of the labour force from coverage under the NLRA, including those in jobs with *any* managerial or supervisory duties, agricultural and domestic workers, and contract workers. Second, open shops, defined as certified workplaces in which members are not required to join the union or pay dues, are legal in all states and required in almost half, thus

lessening union security and resources.⁸⁴ Third, public sector employees are not covered by the NLRA and, although most are covered by some form of federal or state labour laws, their collective bargaining rights are often limited.⁸⁵

Problems with the US unfair labour practice regime and labour law system in general have been documented in numerous case studies reported in the Human Rights Watch report and in submissions to the Dunlop Commission (the Commission on the Future of Labor-Management Relations, held in President Clinton's first term of office).⁸⁶ These case studies are useful for illustrating how employers manage to undermine the unfair labour practice regime and help to establish how a culture of intense opposition to unions is able to become institutionalised over time. However, of perhaps greater relevance to this report is evidence as to how widespread employer unfair labour practices appear to be.

As of the later 1980s, one in every four elections involved unlawful dismissal of workers for union activities, an increase from one in 20 in the early 1950s.⁸⁷ Based on NLRB records, it has been estimated that, as of the mid-1990s, one out of every eighteen employees involved in union election campaigns was subjected to discharge or other discrimination intended to discourage union representation.⁸⁸ In 1998, roughly 24,000 employees won compensation for being illegally fired or punished for union activity.⁸⁹ In 2001, the NLRB received 4114 petitions for certification, and there were 21,211 unfair labour practice charges under sections 8a(1),(2), and (3), or an average of five charges per petition.⁹⁰ One recent national poll revealed that two out of every five non-union employees believed that they would lose their job if they tried to form a union.⁹¹ Another recent poll found that four out of five agreed that workers are 'somewhat' or 'very' likely to be fired for trying to organise a union.⁹²

Conclusions

This chapter has described the US system of labour law as it pertains to employer behaviour in the union recognition process. Focus has been on statutory and case law relevant to unfair labour practices and their remedies, and on the processes by which unfair labour charges are addressed. This chapter has also described the union organising and certification process, because it has considerable relevance to understanding and assessing the US regime. Finally, it has provided a general assessment of the US regime, identifying a series of limitations associated with time delays in the recognition process, employer practices permitted during this process, and limited board powers. Chapter five provides a more thorough review of the research on whether and how these limitations appear to matter and of debates associated with them. But before considering this evidence it is useful to consider the Canadian case. In Canada, many of the limitations identified with the US regime appear to be largely addressed. Thus, despite some of the institutional and cultural differences identified in chapter two, the Canadian case essentially allows for a quasi-natural experiment in which the efficacy of a more stringent unfair labour practice regime may be tested.

4

Canadian unfair labour practice regimes

In Canada, federal government jurisdiction over labour law is limited to its own employees and to those employed in selected industries, including grain handling, banking, uranium mining, inter-provincial transportation, and communications. All other employees are subject to the jurisdiction of the province or territory in which they reside. The result is that Canada in theory has fourteen separate jurisdictions, one for each of the ten provinces, one for each of the three territories, and one for the federal government. In practice, the territories cede their jurisdictional rights to the federal government, resulting in eleven such jurisdictions. Similarities across these jurisdictions make it possible to refer to a Canadian 'system,' though in discussing this system it is important to be mindful that cross-jurisdictional differences exist.⁹³ Within jurisdictions, there can also be variation between public and private sector laws. This chapter focuses on the latter.

As noted in chapter two, Canadian labour laws and hence unfair labour practice regimes are in general predicated on the same assumptions and model as their US counterpart, and the process through which unions attempt to organise workers tends to be similar. However, as also noted in chapter two, Canadian laws were not weakened, and may even have become more favourable to unions, from the 1960s to the 1980s. There has been some retrenchment since, especially in the Ontario jurisdiction, which accounts for roughly a third of the Canadian labour force. However, there continue to be a number of important differences from the USA. This chapter focuses on these differences.

Labour relations boards

Canadian labour boards differ from their US counterpart in a number of respects. First, they are tripartite and tend to be much larger in size than the NLRB. Although the number of members varies in accordance with the size and requirements of the jurisdiction, they consist of a chairperson and one or more vice-chairpersons (Ontario, the largest jurisdiction, has 15), and of an equal number of employee and employer representatives. A number if not all (depending on the board) employee and employer representatives and some vice chairs serve as needed, on a part time basis. The lone exception is the province of Quebec, where administration of the labour relations act is split between administrative officials, who decide all issues relating to certification, and a specialised labour court to which their decisions may be appealed.

As in the USA, the government appoints all board members. However, the selection of the chairperson and vice-chairpersons is usually subject to the approval of both employee and employer groups. Although their appointment has involved some partisanship in recent years in a few jurisdictions (Ontario and British Columbia), these members are expected to act as neutrals. The employee and employer representatives are also appointed by the government, but on the advice of their respective constituencies.

The structure of Canadian boards is also much simpler than that of the NLRB. The federal board has only four regional offices, and other boards have no such offices (although at least one, British Columbia, has individual agents distributed throughout its territory). In addition, no administrative law judges are employed and there is no Office of the General Counsel. These latter differences reflect differences in the processes by which certification petitions and unfair labour practice charges are dealt with, as discussed below.

The organising and certification process

The union organising process in Canada differs little from that of the USA. Professional union organisers also normally have no right to access employer premises, and employees involved in the organising drive may not engage in union activities during working time unless permitted by the employer or doing so does not interfere with order and efficiency in the employer's operations. However, the employer cannot prohibit personal discussion or distribution of union literature if this does not interfere with order and efficiency, unless there is a blanket prohibition against all forms of discussion or solicitation during working hours.⁹⁴

The statutory process through which a union is certified differs in a number of respects, however, and these differences are believed to have implications for the effectiveness of the unfair labour practice regime.

First, as in the USA, there is minimum card sign-up threshold before a union may apply for certification. Depending on the jurisdiction in question, this threshold ranges from 30 to 40 per cent of eligible workers. However, six Canadian jurisdictions have provision for automatic card certification, with the percentage of workers required to have signed cards ranging from 50 per cent plus one (the federal jurisdiction) to as high as 65 per cent (the Manitoba jurisdiction). Unfortunately, recent data are not available as to the percentage of applications involving automatic certification, although the convention is for unions to do everything possible to sign up enough members and avoid a ballot.

Second, in contrast to the USA, there is normally no requirement that the employer provide a list of employee names to the union prior to a ballot, although in at least one jurisdiction (Ontario) the board may order this if the employer has been engaging in unfair labour practices.

Third, in most jurisdictions requiring a ballot, there is a formal requirement for the board to normally hold a vote within five days (in three jurisdictions) to ten days (in one jurisdiction) of an application for certification. Similar requirements pertain in most if not all jurisdictions that allow for card certification, although

these are often stipulated in administrative procedures or regulations of the board rather than in the Act. In addition, a number of jurisdictions (e.g., Manitoba) allow boards to expedite a vote at their discretion, holding it within two or three days of a union's application if it deems this desirable to prevent an employer from unduly tainting the process.

Fourth, although the employer may contest the proposed bargaining unit or raise representation issues (as in the US), it must do so within a narrow time period subsequent to notification of a petition (e.g., two days). In contrast to the US case, boards are under no obligation to hold a hearing prior to holding a ballot and in at least one jurisdiction (e.g., Ontario) may not do so. In these cases, boards will hold the ballot first, marking ballots that may be excluded from the bargaining unit, and sealing the ballot box until such time that the outstanding matters have been addressed. Some jurisdictions require an oral hearing before addressing these issues if a party so requests. Most, however, leave this to the discretion of the board.

Unfair labour practices

Canadian law proscribes a broader range of unfair labour practices than does its US counterpart. These practices also tend to be more clearly defined in legislation, although the extent to which this is the case varies by jurisdiction. But perhaps the key underlying feature distinguishing Canadian regimes is a stronger presumption that the employer is in a position of superior power and is able to readily intimidate employees,⁹⁵ and that the decision to join a union is an employee's choice alone. For example, in *American Airlines Inc. vs. the Brotherhood of Railway Workers*, the vice chair of the Canadian Industrial Relations Board, Claude Foisey, ruled as follows:

we cannot stress enough the unique relationship that exists between an employer and his employees and the privileged position that puts the employer in to influence those employees... Any involvement by the employer in the exercise by the employee of his/her basic right to join a union puts unfair pressure on the employee. An employee joining a union must not be put in a situation of second class citizen who is adhering to a secret society and being ashamed of it. Either the right is recognised or it is not: if it is, it must be exercised in full light and without fear.⁹⁶

The standards of the federal board have tended to be stricter than for most provinces.⁹⁷ Nonetheless, Canadian unfair labour practices are in general much more stringently defined than in the USA. They are also much less subject to judicial review.⁹⁸ The relevant provisions from the federal jurisdiction appear in appendix C of this report.

Threats, coercion, and employer speech rights

As in the USA, employers cannot engage in threats, coercion, or intimidation. However, these restrictions are stronger in Canadian jurisdictions. It is an unfair labour practice to require one-on-one meetings, to engage in any form of interrogation of employees about their voting intentions, or to engage in any other behaviour that may be seen to be intimidating or coercive, even if it involves a mere statement of fact. For example, in *General Aviation Services Ltd.*,⁹⁹ the federal board ruled that 'the test is to what extent, if any, the employer departs from a stance of strict neutrality'. In *Fleetline Parts and Equipment*,¹⁰⁰ the British Columbia board ruled that 'the employer retains the right to communicate with its employees, however, the employer's exercise of this right must be squeaky clean'. In *Viceroy Cont. Ltd.*,¹⁰¹ the Ontario board found that an employer's statement that jobs may be lost if the plant were to be unionised, 'however factual... could reasonably be perceived by the employees as a threat to their jobs.'¹⁰² In *Wal-Mart Canada Inc.*,¹⁰³ it ruled that the employer's unwillingness to respond to employee questions as to whether the employer would shut down in the event of union certification was implicitly coercive and hence an unfair labour practice in view of the employer's policy of open communication.

Several Canadian jurisdictions also make it an unfair labour practice to hire spies, detectives, or infiltrators in order to acquire information about or influence union activities.¹⁰⁴ For example, in 2001 the Ontario board ruled that an employer had committed an unfair labour practice when it hired two members of a Sri Lankan criminal gang to intimidate its mostly Tamil employees during an organising campaign.¹⁰⁵

Again as in the USA, statutes also typically prohibit employers from unilaterally altering the terms and conditions of employment during an organising drive, unless this change would normally have occurred as a matter of tradition or established policy.¹⁰⁶ Employers also may not promise to alter the terms of employment in response to the results of that drive.

Finally, employers also may not shut down any establishment in order to avoid or eliminate a union.¹⁰⁷ Again, this protection is a stringent one, in which the employer must demonstrate that such an action was not in any way motivated by a desire to eliminate a union and that it had sufficient reason to do so even in the absence of a union.

Discrimination in hiring or tenure

As in the USA, discipline and dismissal can be ruled an unfair labour practice even if union activities are only one of a number of reasons for the employer's action.¹⁰⁸ Thus, dismissal for "poor work" has been held to be insufficient if there has been no previous complaint about the employee's work or if the employee has recently been promoted.¹⁰⁹ It is also unfair labour practice to discharge individuals on the grounds of "redundancy" if this discharge involves only union activists. Similarly, an employee cannot be dismissed for misbehaviour that they have already been disciplined or forgiven for prior to the employer's knowledge of the organising drive.¹¹⁰ Moreover, employers have

been deemed to have committed an unfair labour practice where a union activist has been transferred, demoted, over-burdened with work, or harassed to such an extent that she has been induced to quit.¹¹¹ Employees involved in union organising do not, however, have a carte blanche. Boards have upheld dismissal of union activists where employers have been able to make a bona fide case for their actions.¹¹²

The requirement to recognise and bargain with the union

This requirement is generally the same as in the USA. Although the scope of issues over which employers must bargain is not restricted by law as it is in the USA, there would appear to be little de facto difference from the USA in the issues that management is expected to bargain over if so requested or in the criteria applied to establish good faith bargaining.¹¹³

Union unfair labour practices

Although it is also an unfair labour practice for unions to intimidate or coerce workers, unions are not subject to the same speech restrictions as are employers, on the grounds that union organisers and peers do not hold positions of power over workers and so their actions do not carry the same weight as do those of employers. Thus, peer pressure and even statements that are incorrect or may seem rude or even distressing to some may be permissible unless they can be seen as sufficient to dissuade a reasonable employee from making his or her own decision.

Remedies for unfair labour practices

As in the USA, Canadian boards rely primarily on make-whole remedies. They may also issue cease and desist orders, require an employer to post notices affirming the right of workers to organise, and order reinstatement with back pay (again, minus pay earned in other employment) where practical.¹¹⁴ In contrast to the USA, however, a board may award damages, including union expenses and lost wages resulting from a lockout or a strike, if the employer is found to have engaged in bad faith bargaining. In addition, this award covers the period from which unfair labour practices were deemed to have begun and does not require an unconditional employee offer to return to work.¹¹⁵ Moreover, in fashioning make-whole remedies, some boards have awarded compensation for extreme stress and aggravation caused by an unfair labour practice, although such awards have been both rare and limited in amount.¹¹⁶

Make-whole remedies also apply where an employer has shut down or relocated operations and this has been found to have been motivated in part by anti-union animus.¹¹⁷ As in the USA, labour boards cannot require an employer that has gone out of business to re-open,¹¹⁸ but they may require an employer that has other establishments to either reopen or reach a satisfactory settlement with the union, imposing such a settlement if the parties cannot agree. This may include having to provide employees with new employment at establishments in the same local area, to pay their relocation expenses, and to recognise the union in the establishments in question.¹¹⁹

Employers can also be prosecuted in criminal court, although the complainant (rather than the board) must serve as the prosecutor and may do so only with the consent of the board and subject to a number of restrictions.¹²⁰ As such, criminal prosecutions are rare.¹²¹ Boards may also issue punitive damages under certain conditions, often in the form of fines for each day that an offence continues. In addition, any party in violation of a board ruling may be held in contempt of court and subject to punitive damages, a recourse recently affirmed by the Supreme Court of Canada.¹²²

In most provinces, the board may also issue a 'discretionary certification', in which a union is certified regardless of the level of support for it (the equivalent of a Gissel order in the USA) if it deems that employer unfair labour practices have prevented the union from attaining a majority. Resort to this alternative is also rare, but unlike in the USA, the Board need not require evidence that a majority at one time supported the union.

Finally, if the parties are unable to reach a first agreement, either the minister of labour or the board may in most jurisdictions order first contract arbitration. The arbitrator awards a contract of one to two years' duration (depending on the jurisdiction), based on settlements for similar workers in the same or a similar geographical area. However, boards resort to this alternative only as a last resort, in the belief that everything should be done to encourage the parties to reach their own settlement.¹²³ For example, in 2000-2001 the Ontario Labour Relations Board ordered arbitration in only 2 out of 521 cases where certification was granted.¹²⁴ One reason is that Canadian jurisdictions allow for mandatory mediation in some form if so ordered by either the Board or the Minister of Labour. This lessens the likelihood of first contract arbitration becoming necessary.

The processing of an unfair labour practice charge

As in the USA, any person or company may make an unfair labour practice complaint, subject to time constraints. These constraints vary.¹²⁵ But in the federal jurisdiction, for example, complaints must be made no later than ninety days after the complainant knew, or should have known, of the action or circumstance giving rise to the complaint (section 97(1)).

Also as in the USA, board officers (or, in the federal case, regional directors) seek to resolve disputes between the parties informally.¹²⁶ There is no system of administrative law judges. If an officer of the board is unable to assist the parties in resolving the complaint, the complaint is passed to the chair of the labour board, who in turn appoints a three person panel consisting of the chair or a vice chair, one employer member of the board, and one labour member. The specific process which then ensues may vary, but in the federal jurisdiction the panel holds an in camera meeting to decide whether to reject a charge, whether to grant it, or whether to obtain further information and/or hold a hearing. As in the USA, the panel may (in at least some jurisdictions) issue a bench ruling subsequent to a hearing. In all cases, the panel must issue a written statement as to the reason for its decision. Summaries of some of these decisions appear in Appendix D.

Unfortunately, available statistics for Canadian jurisdictions tend to be limited. However, in the Ontario jurisdiction, which accounts for about a third of the labour force, 763 of 1061 unfair labour practice cases disposed of in the fiscal year 2001-2002 were withdrawn or settled, another 276 were dismissed or terminated, and another 20 were granted (i.e., remedies were ordered). Of all of these cases, 88 per cent were resolved by a labour relations officer, before going to a board panel.¹²⁷ In one of the smaller jurisdictions, Manitoba (about one thirtieth of the labour force), 41 of 76 were withdrawn or settled, 22 were dismissed, and 12 were granted.¹²⁸ There are no data on the per cent settled by a labour relations officer.

In some if not all jurisdictions, there is provision for a pre-hearing conference to inquire into the possibility of settlement, to simplify the issues, and to estimate the duration and dates of the hearing.¹²⁹ In at least one (Ontario), it is also possible for the parties to request a 'consultation' with a vice chair or panel, which is less formal and in which there is limited opportunity to call witnesses or present evidence not already contained in the application and response, thus limiting costs. This process would appear to be similar to the administrative law judge settlement process adopted by the NLRB.

Where a hearing is held, it is normally open to the public. However, some if not all jurisdictions allow for hearings to be held in camera (i.e., closed) where the board is of the opinion that a) intimate financial and personal matters may be disclosed and b) the desirability of avoiding public disclosure of these matters outweighs the desirability of holding an open hearing.

In contrast to the USA, there is no use of board employed attorneys. Moreover, an important difference is that, with the exception of the Alberta jurisdiction, Canadian labour boards proceed from a presumption in favour of the complainant in cases of discipline and dismissal, reversing the burden of proof. It is incumbent upon the employer to demonstrate that there was sufficient reason for the action taken exclusive of the individual's union activities and that it was not triggered by these activities. Moreover, even where the employer can provide credible evidence as to a legitimate motive, this evidence may prove insufficient if the employer can be shown to have engaged in a series of anti-union manoeuvres.¹³⁰

Hearings can entail written as well as oral submissions, and the panel may accept such evidence as it sees fit, whether admissible in a court of law or not. In this regard, it would appear that evidentiary standards are 'softer' than in the USA, although boards do not lightly act on hearsay evidence particularly because doing so may violate principles of natural justice.¹³¹ In addition, efforts are made to operate in a flexible and informal style.¹³² However, a hearing is a legal proceeding, in which all witnesses are sworn, and normal courtroom rules are otherwise followed, as in the USA. The parties are thus normally represented by legal counsel. In addition, all statutes provide the board with the powers to compel the attendance and (contrary to the USA) discovery of witnesses, who may be charged with contempt if they fail to do so. Boards are required to provide written decisions, although in cases that a board considers to be clear cut, these decisions may be less than a page in length.

Implementation and appeal of unfair labour practice rulings

In contrast to the USA, orders of the board are self-enforcing. The board may allow the parties to determine the appropriate remedy between themselves, but if no such agreement is possible, the board will impose a remedy of its own making. The board's decision is enforceable as an order of the court in all but one jurisdiction and may be filed with the courts at the request of a party seeking to have the decision enforced. Enforcement is then effected by means of prosecution for contempt of court, and may result in sequestration of corporate property, fines, and even imprisonment.

A party may ask that the board conduct an internal review of a panel decision. The procedures for handling such requests vary by jurisdiction.¹³³ But in the federal jurisdiction, a request for review is first remitted to the chair of the original panel for review pertaining to possible errors of fact or breaches of natural justice. Questions of law, policy, or interpretation are referred to a specialist committee of the chair and vice chairs. At this point, the appeal may be dismissed, referred back to the original panel, or considered by the full board. Requests likely to receive full board reconsideration include cases where there is serious disagreement over the interpretation of the law, production of new evidence or representations, proof that the initial decision had unanticipated consequences that were contrary to public policy, and legal conclusions based on constitutional and other external law.¹³⁴

Rulings may subsequently be appealed to the courts, but contrary to the US case, Canadian statutes include 'privative' clauses, which are clauses that sharply limit the scope for such appeals. Appeals can be granted only on the grounds that the board has exceeded its jurisdiction, there has been a clear denial of natural justice, there has been an error of law on the face of the record, or there has been fraud or collusion.¹³⁵ To the extent that a board can be seen to have acted fairly and reasonably, the courts are likely to reject an application for judicial review, even if there may be grounds to question the content of the ruling. For example, in the Ontario jurisdiction, the courts accepted only 2 (of 33) requests for judicial review in the fiscal year 2000-2001.¹³⁶ Moreover, all board decisions stand unless and until they are overruled.

The effectiveness of Canadian regimes

As for the USA, analyses of Canadian unfair labour practice regimes primarily address matters of substantive law rather than procedure. Procedural issues are raised from time to time in the course of statutory reforms,¹³⁷ but such issues are typically minor and have received little attention. Again, therefore, this report focuses on substantive issues of law.

Time delays

The provision in the majority of jurisdictions for automatic certification, based on union membership evidence rather than a ballot, effectively eliminates the problem of time delays and hence precludes employers from engaging in

practices designed to undermine employee choice. Where a ballot is required, time restraints on the holding of a ballot, coupled with the ability of Boards in some jurisdictions to hold a 'prehearing' vote, makes for a more timely process and reduces the opportunity for employers to engage in practices designed to discourage unionisation if a ballot is required. In Ontario (the largest jurisdiction), for example, seven in eight elections are held in five days or less from the time that a union applies to the labour board for certification, and only one out of twenty-five is held after ten days.¹³⁸ Thus the time delay problem, although not eliminated, is lessened.

Restrictions on employers

Stronger restrictions on employer speech and actions in Canada substantially limit the ability of employers to coerce or pressure workers, rendering the process more equal. However, employers still have some speech rights, and unions do not have equal access in order to put their case to employees.

Board powers

Board powers are generally stronger than in the USA. First, although board findings that an unfairly dismissed employee be reinstated may serve as a weak deterrent, the greater ability of Canadian boards to allow non-monetary damages may not only help to ensure that dismissed employees are adequately compensated, they may also enhance any deterrence effects.

Second, the time required to process unfair labour practice cases tends to be shorter. The ability of complainants to go directly to the board and the limited scope for appeal mean that they normally face only one full stage once a formal complaint has been laid and even this stage appears to be shorter than its equivalent, administrative law judge stage, in the USA. In Ontario, for example, the median time is approximately 100 days, which is less than half that for an administrative law judge decision in the USA.¹³⁹ Thus, remedies are more likely to matter.

Third, although there is little evidence as to whether Canadian boards are more likely to make use of injunctions, the need for doing so is greatly reduced by time constraints on the holding of a ballot and by the ability of some boards to order a prehearing election within two or three days of a union's application.

Fourth, the ability of most boards to issue a discretionary certification, the equivalent of a Gissel order, without proof of a majority, means that this option provides a stronger deterrent against employer unfair labour practices.

Finally, the lack of any provision for a technical refusal to bargain in Canada, coupled with the right in most jurisdictions to order first contract arbitration, lessens the incentive for the employer to attempt to undermine certification through frustration of the bargaining process. Thus the Board's order to bargain carries much greater weight in Canada than in the USA.

Other strengths of Canadian regimes

The Canadian system is also believed to address the additional limitations identified earlier for the US system. First, and most relevant to the unfair labour practice regime, the hiring of permanent replacement workers is an unfair labour practice in all jurisdictions. Hiring even temporary replacement workers is illegal in two. These restrictions substantially limit the ability of the employer to effectively nullify certification by forcing the union into a strike or lockout and then hiring replacements. Second, exclusions are much narrower, so that employees are more likely to qualify for representation even if they perform some managerial duties or are not regular employees. Third, in all jurisdictions the union may at minimum request that the employer collect the equivalent of union dues on its behalf from all members of the bargaining unit, thus effectively rendering open shops illegal. Fourth, public sector laws confer rights and protections similar to those in private sector, making for more effective representation.

Some weaknesses of Canadian regimes

Canadian unfair labour practice regimes are not without weaknesses. Not only do they vary in the extent to which various laws associated with the Canadian system are indeed in place, even where all of these laws are in place they do not completely address the problems associated with their US counterpart. Although time delays are shorter, employers still have some opportunity to undermine a union organising drive where a ballot is required. Speech rights may be substantially more limited, but unions still have no corresponding access to employees and in this sense remain at something of a disadvantage. Furthermore, although board powers do appear to be stronger, the remedies at their disposal remain relatively weak, especially as boards are hesitant to grant discretionary certification except in the most egregious cases. Moreover, despite shorter time delays in the processing of unfair labour practice cases, there may still be a lengthy delay in a significant portion of cases. In Ontario, for example, a third of such cases take more than half a year to complete.¹⁴⁰

Perhaps in reflection of these weaknesses, slightly over half of 289 non-union participants in a 2003 random telephone survey of employed Canadians¹⁴¹ reported that it was somewhat or very likely that their employer would 'respond negatively' if they participated in union organising activities, and another quarter were unsure what their employer would do. A third also reported that they thought it somewhat or very unlikely that something could be done to remedy the situation if a co-worker was fired for union organising activities, and another third were unsure if anything could be done. Another recent poll, in this case of 2007 adults, revealed that the percentage of non-union respondents willing to vote for a union would increase by ten percentage points (from 33 to 43 per cent) if their employer could take no reprisals.¹⁴² Thus, a great many Canadians seem to lack full confidence in the protections afforded them under the law. This lack of confidence may be especially justified where a ballot is required, as illustrated by the statement in Box 4-1.

These problems may reflect a problem with the normative environment within which Canadian unfair labour practice regimes operate rather than with the

regimes themselves. Yet they also suggest that, although these regimes may help to protect workers from retribution, they may not fully protect them, nor do they fully address the broader climate of fear and intimidation that has come to characterise union organising and certification in Canada. This concern is returned to in chapter six.

BOX 4-1

I am a union organiser and have been for five years. The use of intimidation, coercion and harassment has increased substantially. With 90 per cent of applications we make, we have to file unfair labour practices. If unions had the same amount of time with a captive audience and three to eight hours a day for 7 to 10 days, it would become a fair, level, democratic playing field. Companies can hang up to 20 signs saying anti-union information on company sign paper and hang them all over the workplace, including the washroom stalls, so that you do not get a break at all from reading it. Those hang for 7 to 10 days before the actual vote takes place. I have a very serious concern with the people's fair rights, free of intimidation and harassment from the employers.

Another instance is an employee working to help the union was fired and out of work for five months, unable to collect employment insurance because of termination. The labour laws of Manitoba are there to protect employees. When I see employees, I assure them that the laws are there to protect them. How do I provide for these people who are being terminated? The employees have trusted the labour laws of Manitoba only to be shown clearly the companies think they can do what they want. We end up in a labour dispute, six-month dispute, at the Labour Board. The Labour Board has become swamped with unfair labour practices. Companies have the upper hand because the employees are at work where they are continually subjected to verbal and written intimidation.

— presentation by Heather Ostop, to the Legislative Assembly of Manitoba, Standing Committee on Industrial Relations, Monday, August 14, 2000.

Conclusions

This chapter has described Canadian labour law as it pertains to the regulation of unfair labour practices in the context of trade union recognition, and how Canadian regimes differ from their US counterpart. The overall conclusion is that Canadian regimes are more effective at protecting the right of employees to choose a union, primarily because they limit time delays in the recognition process, place stronger restrictions on employer behaviour, and allow stronger powers for labour relations boards. These regimes vary, and they do not appear to have succeeded in creating an environment free of intimidation, at least as perceived by workers. But their perceived effectiveness relative to the US regime¹⁴³ is believed to demonstrate just how important the design and administration of an unfair labour practice regime may be. The available evidence would appear to support this perception. Yet the laws and procedures surrounding unfair labour practices continue to be controversial in both the USA and Canada. The next chapter addresses both the evidence and the debate as it concerns these laws and procedures.

5

The evidence and debate

To this point, this report has outlined the context and characteristics of US and Canadian unfair labour practice regimes. A major finding has been that the US unfair labour practice regime would appear to have serious weaknesses, and that these weaknesses appear to be addressed in considerable measure by its Canadian counterparts. This, rather than economic or cultural variables, would appear to provide the primary reason for the divergent union density levels in these two countries.¹⁴⁴ In addition to differences in US and Canadian density levels, there is now quite substantial research evidence as to the importance of unfair labour practice regimes and specific components thereof for union organising success. There also, however, continues to be considerable debate and disagreement between employer and labour groups over the need for reforms and what these should be. This chapter first reviews the relevant evidence and then turns to the policy debate.

The research evidence

The available research evidence on unfair labour practice regimes primarily addresses substantive aspects of the law and has little to say about specific board procedures. For present purposes, this evidence may be considered in two stages: first, evidence as to whether the design of unfair labour practice regimes matters in general; and, second, evidence pertaining to each of the three broad criteria used to assess these regimes in chapters three and four.

Evidence that the design of unfair labour practice regimes matters in general

The main evidence has to do with union organising success rates, which in the North American context are assumed to vary largely in accordance with employer opportunities and success in engaging in illicit tactics.¹⁴⁵ From 1980 to 1995 (prior to the election of a government in Ontario that sought to weaken labour laws), the union success rates for certification applications to all Canadian labour boards combined and to the NLRB were, respectively, 69 and 48 per cent.¹⁴⁶ According to one author, this reflects a bias introduced by the inclusion of public as well as private sector applications in the Canadian data, but evidence from Ontario reveals any such bias to be small and unable to account for different success rates.¹⁴⁷

Unfair labour practice complaints against employers in Canada are also from one fourth to one tenth (depending on the jurisdiction) the US rate,¹⁴⁸ even though they are easier to file and win in Canada due to differences in administrative procedures, as outlined earlier (i.e., fewer stages, less opportunity for appeals).¹⁴⁹ These differences are again far too large to be explained by the inclusion of public sector cases in the Canadian data. They could reflect differences in employer animus towards unions, though as noted in

chapter two, there is little evidence that employer attitudes are appreciably more positive towards unions in Canada. It is likely that employers perceive unfair labour practices as less effective, because complaints are more expeditiously processed, more likely to generate strong and immediate remedies, and less subject to lengthy appeals.

There is evidence that these differences matter to union certification success. In the USA, Cooke found that employer unfair labour practices reduced the probability of certification by nearly 17 per cent¹⁵⁰. In Canada, Thomason found the effect to be much smaller, estimating a 1.3 per cent reduction in certification probability in Ontario, although at the time about 70 per cent of Ontario certifications were by card.¹⁵¹ In a more recent Canadian study, Riddell found unfair labour practices in general to reduce the likelihood of certification by 21 per cent, and dismissal unfair labour practices to reduce it by 31 per cent.¹⁵²

There is also indirect evidence as to the importance of differences between Canadian unfair labour practice regimes and their US counterpart. Lipset and Meltz, drawing on a 1997 survey of over 3,000 Canadian and US workers, found that 47 per cent of non-union workers in the USA would join a union if given the chance, compared to 33 per cent in Canada¹⁵³. One author (Leo Troy) has argued that this result, along with other (often highly dated) Canadian surveys of worker unionisation propensities, indicates that Canadian workers are if anything more anti-union than their US counterparts.¹⁵⁴ But it would appear that what these figures actually show is that it is more difficult for workers in the USA who would like to have a union to obtain one. This could reflect differences in addition to those in unfair labour practice regimes, but the evidence suggests that the latter in all likelihood play the key role.¹⁵⁵ Weak unfair labour practice regimes mean that union organising drives are less likely to succeed than otherwise in 'marginal' workplaces, where the union's potential majority is smaller. The Lipset and Meltz data tend to support this interpretation. They reveal similar overall public support for unions in general in Canada and the USA (67 per cent compared to 70 per cent), a finding that is consistent with previous surveys.¹⁵⁶

The Lipset and Meltz data also make it possible to calculate what union density might be in the USA *if workers who desire a union faced the same organising conditions* as those in Canada. Two different analyses, using these data yet relying on different methods of calculation, have computed that this density would be roughly equivalent to Canadian density if workers favourable to union representation in the USA had the same likelihood as their Canadian counterparts of actually finding themselves in a union workplace.¹⁵⁷

Finally, in a longitudinal analysis of three Canadian provinces, Martinello found that changes in labour laws are more important than either changes in government or in the economy for explaining variation in union density over time.¹⁵⁸ In a subsequent longitudinal analysis of Ontario data, he found that changes in labour law and in political party have had significant effects on union organising activity and success¹⁵⁹. Neither analysis was able to establish which legal changes mattered most, although these changes primarily involved changes to the unfair labour practice regime.

Evidence that the three assessment criteria matter

In addition to these general findings, there are research studies that address each of the three general criteria for assessing the design and operation of unfair labour practice regimes.

The importance of time delays. The length of time from application to election has been found to be associated with union success rates, thus suggesting that the longer time delays in the USA do indeed lessen the likelihood of certification. Cooke found that, for each month of delay prior to the holding of an election in the USA, support for the union dropped by about 0.5 percentage points and the likelihood of union success dropped by one percentage point.¹⁶⁰ Prosten found this likelihood to drop by 2.5 percentage points.¹⁶¹ In his study of Ontario certification procedures Thomason found each one month delay to reduce union success rates by 0.7 per cent.¹⁶² These estimates suggest only a small effect. However, one might expect employer activities to have the greatest effect within the first month. Because of data limitations, these studies could not explore the effects of shorter time periods.

Two studies have explored the implications of shorter periods. In their study of variation in US union success rates from 1952 to 1972, Roomkin and Juris found that the average delay in holding elections in a given quarter was negatively associated with the percentage of NLRB elections won by unions, at a rate of 0.29 per cent per day.¹⁶³ In an analysis of differences in certification success in the British Columbia jurisdiction, Riddell found no a priori effect for length of delay. However, where unfair labour practices were also involved, he found an approximately one per cent lower probability of success for every two days of delay.¹⁶⁴

There is now substantial evidence as to the importance of card certification, which effectively eliminates the time delay problem. Using cross-sectional Canadian data, Johnson estimated that mandatory ballot legislation reduces union success rates by from 6 to 9 percentage points.¹⁶⁵ She also estimated that, as of 1995, this alone accounted for 17 to 26 per cent of the US-Canada gap in union density,¹⁶⁶ and argued that this is a conservative estimate, because time delays are much shorter in Canadian jurisdictions requiring a ballot than is the case in the USA. In a study of the effects of changes to Ontario laws, Slinn found the shift to mandatory ballots to be associated with a 21.7 percentage point decline in the probability of a certification application being granted¹⁶⁷. In a survey of over 400 newly certified Canadian firms, Bentham¹⁶⁸ found that the availability of card certification lowers the probability of illegal employer tactics by 10 per cent, and increases the probability of certification by 11 per cent. However, one study of cross-jurisdictional differences in Canada failed to find an effect for card certification.¹⁶⁹

There is also descriptive data as to the importance of card certification. In the USA, a Wall Street journal article reported that only 73 per cent of those signing a union card vote in favour of the union by the time a ballot is held.¹⁷⁰ In Canada, Riddell observed that success rates were substantially higher (92 vs. 73 per cent) in the province of British Columbia when card certification was

allowed than when it was not¹⁷¹, while Godard reported similar evidence for the provinces of Ontario (77 vs. 59 per cent) and Manitoba (75 vs. 64 per cent).¹⁷²

Restrictions on employers. A number of studies have explored the implications of specific employer practices, many of which represent unfair labour practices in Canada but not the United States. A late 1970s study by Getman, Goldberg, and Herman found that such practices had little effect on employee voting intentions.¹⁷³ However, this study has been extensively criticised, and reanalysis of the Getman *et al.* data suggests that legal and illegal employer tactics can in combination reduce the likelihood of union success by 17 per cent or more.¹⁷⁴ Using data from the late 1986-87, Bronfenbrenner found a number of tactics considered to represent or be associated with unfair labour practices in Canada – including company wage or benefit increases during a campaign, company promises during a campaign, anti-union letters to employees, and the number of captive audience meetings – to bear negative associations with union certification success and the level of union support in the USA.¹⁷⁵ In another study using 1994 data,¹⁷⁶ Bronfenbrenner and Juravich found that, for every additional tactic used, the probability of union success dropped by 7 per cent. A Canadian study using data for Quebec and Ontario finds similar results to those of Bronfenbrenner's 1986-87 study.¹⁷⁷ Thus, restrictions on employer tactics during an organising campaign, and hence stronger unfair labour practice regimes, appear to matter.

Board powers. The only available evidence as to the importance of board powers is evidence that failure to reach a first agreement may be much greater in the USA than in Canada and hence that that provisions for first contract arbitration matter. In the USA, the Dunlop Commission estimated that a third of all first negotiations in the USA failed to reach settlement.¹⁷⁸ Weiler estimated this figure to be 37 per cent as of 1980, while Cooke found it to be three in ten in a sample of newly organised unions in Indiana in 1979/80.¹⁷⁹ In her survey of Canadian workplaces, Bentham found that a first agreement was not reached in only 8 per cent of cases¹⁸⁰. Of note, she also did not find provision for first contract arbitration to predict the likelihood of a first agreement, although this may reflect the distribution of her dependent variable (i.e., only 8 per cent did not achieve a contract, compared to 92 per cent that did).¹⁸¹ Consistent with this possibility, she found the availability of first contract arbitration to increase the probability of a third party being called on to help conclude a first collective agreement by 39 per cent.¹⁸²

The policy debate

The evidence that unfair labour practice regimes matter would appear to be underscored by the significance that both labour and employer groups have tended to attach to them. In the USA, the rancour over the aborted Labor Law Reform Bill of 1978 represents perhaps the most notorious illustration of this,¹⁸³ but employer groups in the USA have fought hard to weaken unfair labour practice regimes since the 1930s¹⁸⁴ and continue to do so (see below). In addition, the Dunlop Commission, established by President Clinton in 1992, was unable to obtain any concessions from employer groups on meaningful reforms to the unfair labour practice regime, perhaps the most recent evidence of the level of employer opposition.¹⁸⁵ The current perception that reform is simply not

on the cards in the USA due to this opposition may be seen as further evidence that it is considered important to union success. Although a bill (the Kennedy-Miller Bill) was introduced to Congress in November of 2003 to address some of the main limitations to the US regime,¹⁸⁶ this bill appears to be directed at raising public awareness of problems with this regime as one step in a longer term political strategy for reversing union decline. It would not appear that any party – including the AFL-CIO – gives it any chance of passing into law in any form.

In Canada, labour law has also been, and continues to be, a highly contentious area of public policy.¹⁸⁷ This is witnessed each time governments attempt to introduce reforms, as in British Columbia in 1992, Ontario in 1995, and Manitoba in 1996 and 2000. One possible exception involves reforms implemented within the federal jurisdiction in 1997. However, these reforms followed a review by a government commission, in which the commission proceeded from a narrow mandate and essentially avoided controversial issues involving the recognition process.¹⁸⁸ They also followed an extensive and difficult behind-the-scenes effort at consensus building.

It would be incorrect to suggest that all employers in the USA and Canada are intensely anti-union. Many may have relatively positive or at least neutral attitudes towards unions and the right of workers to join them.¹⁸⁹ But employer groups have been opposed to any reforms that might strengthen the position of unions or their ability to organise workers, and wholly favourable to any reforms that might have negative effects on unions. Not surprisingly, unions have adopted the opposite position, although perhaps without the same vehemence.

These rather one-dimensional positions mean that neither employer groups nor labour organisations appear to have well articulated positions or alternatives for reforms that could be viewed as of constructive value for moving beyond the current impasse. As demonstrated during the hearings of the Dunlop Commission in the early 1990s, employer representatives dismiss pro-labour reforms as pandering to special interests and claim that any problems faced by unions are unrelated to the law, while union representatives argue the opposite.¹⁹⁰

Underlying the polarisation between labour and employer groups would appear to be a classic difference in assumptions about what unions do. Labour groups typically see the economic effects of labour unions as relatively benign, viewing their main role as one of providing workers with dignity, fairness, and voice at work. Employer groups typically view unions as a threat to economic competitiveness. The North American research literature seems to provide little consistent, strong evidence that would support one of these views over the other.¹⁹¹ But even if such evidence could be mustered, it is not likely that much would change. This is especially so in the USA, where employer groups appear to view unions as a threat to management control and at odds with basic property rights entrenched in the US constitution. Similar sentiments may apply in Canada, although possibly not as strongly in view Canada's different institutional and historical contexts.

Although genuine debate over unfair labour practice regimes has been minimal, that debate which has occurred has centred on employer speech rights and card certification. The free speech argument would appear to have received greater weight in the USA than in Canada. In the USA, the right to free speech is in effect seen to trump any effect that employer statements may have on the ability of employees to truly exercise free choice, and is in the words of one commentator, 'the only genuinely based rights feature of the NLRA.'¹⁹² In Canada, employers have continuously sought to obtain both lengthier election periods and fewer speech restrictions, but have been largely unsuccessful.¹⁹³ As indicated in chapter 4, there is a stronger presumption that the employer is in a position of superior power and as such virtually any employer speech against a union may interfere with employee free choice.

Closely associated with the free speech issue has been the issue of card certification, which in effect precludes employer speech. Employer groups in both Canada and the USA have taken pretty much the same positions. As illustrated in Box 5-1, they argue that card certification interferes with employee choice by precluding employees from expressing their preference through a secret ballot, maintaining that employees often sign a union card in response to peer pressure and intimidation and may not intend to signify support for certification.¹⁹⁴ Unions in turn argue that the delay introduced by a vote only provides employers with an opportunity to attempt to undermine this choice, a position more consistent with the presumption that employer speech, however neutral on the surface, may interfere with free choice. An illustration of the union position appears on Box 5-2.

Who is right?

To support their case, employer groups in the USA have tended to point to individual cases where workers have felt undue pressure or intimidation or have signed a card based on false information. But the number of cases they have been able to identify has been limited, averaging only a few per year.¹⁹⁵ Contrary evidence also exists. In interviews with US employers that had agreed to recognise unions based on card certification, Eaton and Kriesky found little perception that peer pressure, intimidation, or false information had induced workers to sign a union card against their true wishes.¹⁹⁶ It is not clear, however, whether this evidence or that of employer groups can be considered reliable, for the very reason that the NLRA requires a ballot in all cases where a union's petition for certification is contested. Although card sign-ups are needed to qualify for a ballot, card certification only occurs when an employer agrees to accept card sign-ups as evidence of majority support and hence to not challenge the union's petition. Such agreements would still appear to be rare, tending to occur only under unusual circumstances.

Unfortunately, there has been no systematic research on this issue in Canadian jurisdictions that allow for card certification. But there is provision in Canadian unfair labour practice regimes for employees to inform their board in the case of

Box 5-1

We are strongly opposed to ... a card-based system for union certification. We believe it removes a democratic right of employees.... We think a secret ballot vote is the only fair and accurate mechanism in which to determine the true wishes of employees, and we have problems with the trade union claims that there is employer interference with the secret ballot vote. We find that a little self-serving given that The Labour Relations Act already gives a labour relations board the authority to ... remedy any serious unfair labour practices by employers.

Secondly, there is no obligation on the part of the union organiser to inform employees what the significance of the union card is, what the rules of certification are, what the obligations of certification are, and it is natural. Their objective is to sign as many employees as they possibly can, so they are not going to voluntarily provide a full and balanced account of what those responsibilities of being a union member mean.

We feel that a secret ballot vote is the only fair process in a democratic environment, and it allows employees to make an informed decision without interference from both employers and unions. The other thing about a secret ballot vote, it leaves no doubt in the minds of ... employees who maybe were never approached or rejected the union's approach as to what the majority really wants. It also gives employers that sure knowledge as well, which means that the collective bargaining process is not undermined right from the very start.

— presentation by Joyce Reynolds (Senior Director, Government Affairs, Cdn. Restaurant and Food Services Association), to the Legislative Assembly of Manitoba, Standing Committee on Industrial Relations, Monday, Aug. 14, 2000.

Box 5-2

In April '99, I was part of a group of fellow employees who helped organise a union in the workplace. Soon after management found out about organising through listening at private conversations, at break times and lunchtime. They targeted key people and tried to get rid of them through over-monitoring and intimidation. Some scare tactics were used and supervisors were telling employees to look for other employment because 'if the union comes in, we will all lose our jobs and the place will close.'

Just before the secret vote in June '99, there were meetings held in small groups with management telling how a union would not benefit the workers... and gave the workers a false security regarding wages and employee rights. After the secret ballot, someone from the management team even phoned laid off employees at home to see how they voted....

If over 60% of union cards were signed from approximately 220 employees, and only 56 people voted for the union in secret ballot, then 76 people were obviously scared and intimidated from management at the time of the vote....

— presentation by Ilene Lecker (private citizen) to the Legislative Assembly of Manitoba, Standing Committee on Industrial Relations, Monday, Aug. 14, 2000.

coercion or misunderstanding, in which case the board may require a ballot regardless of the percentage of workers that have signed a union card. Cases where boards have ruled this to be a problem would appear to be rare. It is far more common for labour boards to rule that an employer has threatened, coerced, or dismissed employees.

There is also evidence that employer anti-union activities are both widespread¹⁹⁷ and affect employee voting intentions. In addition to studies discussed earlier that address the implications of unfair labour practices and related tactics, one US study found that, for every two percentage point decrease in consent elections (where management does not oppose the election) held each year during the 1950s (when they were common) through to the late 1970s (when they were not), the overall percentage of workers voting for a union (in all elections combined) dropped by one percentage point.¹⁹⁸ Taken at face value, this suggests that, regardless of whether an employer actively opposes a union, its unwillingness to co-operate may send a negative message to prospective members, with implications for how they vote. There is also evidence that a variety of tactics considered to be legal in both the USA and Canada, such as the training of supervisors to deal with a union organising drive, reduce the chances of union success.¹⁹⁹ These results suggest support for the union rather than the employer position on card certification.

This conclusion is supported by the widespread use of consultants by employers to help them campaign against unions. This practice has been especially prevalent in the USA, where such consultants now virtually comprise an industry and are credited with the increased sophistication with which employers have been able to influence or even intimidate employees without strictly violating the law.²⁰⁰ The available evidence suggests that the use of consultants has been much less widespread in Canada.²⁰¹ But usage of these consultants does appear to have grown, with consulting firms offering "five step" programs for defeating a union in jurisdictions with a five day balloting requirement, with one step for each day within this period.

The critical issue?

Within the North American context, the assumption traditionally forming the basis for labour law has been that virtually any employer involvement in a union organising drive is undesirable. This assumption remains widespread, especially among academics and labour groups. It is possible, however, to view the decision to choose union representation as one involving governance and decision making processes in the workplace, in which case it can be argued that the employer should be allowed an important role. Under this view employers naturally take a keen interest in a decision which will directly affect them and it is important that workers hear the views of all interested parties in order that they may reach a fully informed decision.

There are two possible counter arguments. First, the ability of workers to form and join unions for purposes of collective bargaining is widely considered by both scholars and international organisations to be a basic right that is fundamental to democratic societies, on a par with other citizenship or even human rights. For example the International Labour Organisation's 1998

Declaration on Fundamental Principles and Rights at Work²⁰² identifies 'the effective recognition of the right to collective bargaining' as one of five fundamental rights at work. Thus, the choice of an employee as to whether to exercise this right may be argued to be no more an employer's business than is the exercise of any other basic right (e.g. religious affiliation). If the employer is to have any legitimate involvement, it should be after a union has been established.

Second, to argue that employer views should be heard because this facilitates better informed decision making is to assume that workers are able to exercise free choice and that the parties vying for their votes are in equal positions. Yet this is not the case in the employment relation, because workers are in a state of dependence on their employer. As discussed more fully in chapter four, Canadian law in particular proceeds from the premise that virtually any employer involvement can have the effect of intimidating workers, whether this is intended or not.

These arguments need not preclude all possible involvement. Rather, the critical issue may be how much involvement is possible without undue influence being exerted. A case might thus be made for allowing employer involvement provided that it cannot be construed as threatening to a typical worker and merely involves the provision of neutral information enabling workers to make an informed choice. As also discussed in chapter four, this is the Canadian standard. But although this may have appeal in theory, establishing that an employer may have intimidated workers can be difficult, and even where it occurs, much depends on the ability of a board to act quickly and decisively. As this report has demonstrated, this ability would appear to be much greater in Canada than in the USA, thus suggesting that some employer involvement is workable if the administrative body charged with regulating the recognition procedure has similar powers to those of Canadian labour boards. Yet even in Canada, there would appear to be limits to what boards can do, and employers still too often do not respect the law, perhaps explaining why a majority of non-union employees tend to be fearful of how employers will respond and a third believe that little could be done if a co-worker was fired for engaging in legal organising activities (see chapter five).

For these reasons, virtually all North American students of labour law advocate not only minimisation of legal employer involvement, but also minimisation of employer opportunities for illegal involvement (e.g., through card certification and, failing this, expedited balloting processes). To the extent that employers have such opportunities, it would in most cases appear to be not because it fosters a more democratic process or facilitates more informed choice, but rather because of various pressures and influences exerted by employer groups on policy makers. As discussed in chapter two, this has been especially true in the USA, where labour policy has been highly politicised. It is in this respect that institutional environments are important to accounting for variation in the effectiveness of unfair labour practice regimes, as discussed in chapter two and returned to in the next chapter.

Conclusions

This chapter has considered the research evidence on unfair labour practice regimes. Although there may be important limitations to this literature, it provides evidence that, in general, the design of unfair labour practice regimes is associated with union success rates and the likelihood that workers favourable towards union recognition are indeed represented by one. It also reveals that time delays, and provision for card certification in particular, bear associations with union success rates, as do specific restrictions on employers. Finally, although there is little research addressing the implications of board powers, there is evidence suggesting that provision for first contract arbitration is associated with the likelihood of a first agreement.

Despite this evidence, labour and employer groups have remained highly polarised over the need for reforms to unfair labour practice regimes. The main areas of debate involve two related issues: card certification, and employer free speech rights. There is little evidence that card certification has been abused by unions, and considerable evidence the employers often abuse the opportunities provided for by a ballot and by employer speech rights. Although a case may be made for allowing employers to play some positive role in the recognition process, the North American experience suggests that, in both the USA and Canada, employers' involvement is too often used negatively, to undermine the ability of workers to organise a union free from interference or intimidation.

6

Institutional environments and unfair labour practice regimes

The preceding chapters indicate that, within the North American context, the design of unfair labour practice regimes may substantially affect the likelihood of union success in gaining legal recognition and ultimately union density levels. They also indicate that there are three main considerations that determine the effectiveness of these regimes:

- (1) whether a ballot is required and, if it is, the delay between the time that a union petitions for certification and the holding of that ballot;
- (2) the extent to which employer behaviours are restricted during a union organising drive, and
- (3) the extent to which the body charged with administering a regime has sufficient powers to enforce it effectively.

This chapter briefly elaborates on these findings, and then turns to the importance of institutional environments for explaining them.

Overview

In the United States, the unfair labour practice regime has been substantially weakened since its initial establishment in 1935 under the National Labor Relations Act (NLRA). The requirement of a ballot, and of a formal hearing prior to this ballot, introduces a substantial time delay into the recognition process and hence provides substantial opportunities for employer interference. It is illegal for employers to engage in direct threats and intimidation or to discriminate against employees on the basis of their union activities. But employers are allowed strong speech rights, including one-on-one communications and captive audience meetings containing anti-union rhetoric. Moreover, the agency responsible for the administration of the regime, the National Labor Relations Board (NLRB), has limited remedies at its disposal. While it can order injunctive relief and make whole remedies, both of these powers are limited and the evidence would appear to suggest that neither serve as very effective deterrents to employers. Finally, the NLRB has little enforcement power to ensure that employers bargain with a union if it becomes certified, thus undermining the unfair labour practice regime.

In Canada, there are eleven separate jurisdictions and hence some variation in unfair labour practice regimes. However, although all (with the possible exception of Quebec) are based on the NLRA model, Canadian unfair labour practice regimes have, if anything, undergone some strengthening since their initial adoption in the late 1940s. Almost all jurisdictions now contain provisions to ensure that ballots are held within either five or ten days of a union petition for certification, and a majority allow for certification based on union card sign-ups. These provisions lessen the opportunity for employer interference. In addition, employer rights are highly restricted, essentially prohibiting any actions that may be even indirectly coercive or intimidating. Finally, board powers are stronger. They allow for non-monetary damages, for greater discretion to certify without a majority if an employer has engaged in unfair labour practices, and for arbitration in cases where the union is unable to win a first contract.

These differences would appear to represent the primary explanation for divergence in union density levels between the two nations. There is also substantial research evidence that they matter in terms of the outcome of the union certification process. Union organising success rates have been higher in Canada, and there is evidence that shorter time delays and card certification help to explain this. In addition, restrictions on employer practices are associated with higher success rates, and allowance for first contract arbitration is associated with the likelihood of achieving a first collective agreement.

At the same time, there remains considerable polarisation between employer and labour groups over the design of unfair labour practice regimes. This polarisation would appear, in the final instance, to reflect widespread employer hostility towards unions and collective bargaining. As a result, union organising typically occurs within a climate of fear and intimidation, even in Canada, where the restrictions on employers are much stronger. This may mean that, although unfair labour practice regimes make an important difference, their effectiveness is inherently limited, at least within the North American context.

The importance of institutional environments

Throughout this report, an underlying theme has been that these findings can be explained by the national institutional environments within which Canadian and US unfair labour practice regimes have been designed and administered, defined as the system of rules, norms, and customs that underlie and account for variation in a nation's institutions. These environments can be considered to be important in two respects.

First, institutional environments shape not only the degree of employer resistance to union organisation, but also the likely response of employers to an unfair labour practice regime. In both the USA and Canada, there is a long history of employer hostility towards unions, one that reflects the historical development of these nations and the economic conditions to which employers have been subject. It may also be argued that, within this environment, neither government policies nor the law carry sufficient moral force for employers to act in accordance with either in the absence of sufficient incentives. In such an

environment, there is need not only of strong policies and laws supporting the right of workers to form unions, but also of strong and effective sanctions to ensure that these policies and laws are obeyed.

Second, national institutional environments shape the ability of employer groups and unions to influence the design and administration of such policies and laws. In the USA, the institutional environment has meant that effective labour policies and laws have not proven sustainable. As discussed in chapter two, the state played a relatively limited role in the initial development of the US economy, and there is a tradition of distrust of state power. The result has been an environment in which direct government involvement in the economy is resisted and administrative law has been weak. In addition, the absence of a strong working class has, historically, meant that employers and their allies have been able to dominate the political system and as such have had little need to make historical compromises with labour. Coupled with an ability to appeal to anti-government sentiments within the US electorate, this has meant that employers have been more successful than otherwise at weakening the unfair labour practice regime established under the NLRA.

In Canada, such policies and laws have been more sustainable. In part, this is because the state has historically played a stronger role in the economy. In addition, although it might be argued that Canada's working class has historically tended to be weak relative to its European counterparts, Canada has historically been dominated by a political-ecclesiastical-commercial elite, in which employer power has been offset historically by the power of political and religious elites. This has given rise to a "Tory paternalism" under which concerns for the condition of working people have played a greater role than in the USA. Moreover, the Canadian labour movement has, at least since the Second World War, had a stronger political presence, as reflected in the existence of a labour-based political party (the New Democratic Party). This party has been elected a number of times in a few provincial jurisdictions, and at the federal level has been credited with pressuring established parties into adopting labour friendly policies. Finally, Canadians have tended to have higher levels of trust in the state, thus rendering appeals to anti-state sentiments less effective. Thus, although employer hostility towards unions may have been just as high as in the USA, unfair labour practice regimes have remained relatively strong.

There are at least two possible problems with these arguments. First, it is possible that both the need for and the limitations to unfair labour practice regimes are created by the statutory systems of which they are part and that, in fact, these systems may set in motion a vicious circle of sorts.²⁰³ Under statutory systems, especially NLRA style systems, a union organising attempt is seen as an attack on the employer. It has been argued that this induces a more hostile employer response than otherwise and means that workers are less likely to support a union, not just out of fear of retaliation, but also out of a sense of loyalty. Workers thus tend to organise a union only when highly dissatisfied, which, combined with employer responses, makes for unduly antagonistic bargaining relationships. This in turn further enhances employer hostility to unions and hence willingness to engage in anti-union tactics. It also creates an environment in which employees are more hesitant to organise.

This explanation thus suggests that both the need for and problems experienced by unfair labour practice regimes may be less a problem of institutional environments than of mistaken public policy. Yet, historically, union density in both Canada and the USA grew substantially subsequent to the enactment of statutory systems, and unfair labour practice regimes appear to have played a critical role in this regard. In addition, there is some evidence that a sizeable portion of employees may be fearful of employer retribution in other liberal market economies.²⁰⁴ While a statutory system, and especially the NLRA model, may aggravate rather than lessen the problem, the problem itself is more deeply ingrained.

The second possible limitation is that a focus on the implications of national institutional environments may risk over-estimating the importance of cross-national differences. Labour unions can introduce a number of costs and uncertainties for employers in any capitalist economy. This may be especially so in liberal market economies, which are defined by competitive market relations and a shareholder value orientation.²⁰⁵ It can be argued that, in these economies in particular, employers have increasingly come to focus on cost cutting and flexibility, creating an environment in which unions are inherently viewed as liabilities. National institutional traditions may still matter, as may the design of statutory systems. But employer hostility may increasingly reflect, more than ever, institutional factors that are not unique to North America.

A similar argument may apply to the future of unfair labour practice regimes. Although there may be important historical differences in the role of the state and of administrative law in the USA and Canada, these may have diminished in importance in an era of reduced trade barriers and increased competitive pressures. In liberal market economies in particular, this may mean that, regardless of state traditions, unions have become increasingly marginalised by policy makers and unfair labour practice regimes rendered increasingly vulnerable. This would appear, for example, to have been the case in Canada, where relatively stable union density belies a decline in the political power and influence of unions and a recent weakening of unfair labour practice regimes.²⁰⁶

There is a substantial literature suggesting that this latter argument is at best over-simplified.²⁰⁷ But to the extent that it holds, it suggests that differences in national institutional environments may be more important to the past development of these regimes than to their present and future development, and that the latter may be more readily explained by institutional factors common to liberal market economies in general.

To conclude

This report has pointed to the importance of national institutional environments for understanding differences in the design and functioning of unfair labour practice regimes. These environments help to explain both the history of employer hostility towards unions in the USA and Canada and the establishment of more effective unfair labour practice regimes in Canada. Yet, in view of contemporary developments, the extent to which cross-national differences in these environments still matter, or will continue to matter in future, is not

certain. Rather, commonalities between these environments may have become of equal if not greater importance, with all liberal market economies facing the same pressures associated with increased competition and globalisation. If so, the question of whether and how it is possible to design an effective unfair labour practice regime — the main focus of this report — could become moot.

APPENDIX A

THE NATIONAL LABOR RELATIONS ACT

SECTIONS 7 & 8a

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organisation, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorised in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [**Unfair labor practices by employer**]

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 [section 157 of this title];

(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 [section 156 of this title], 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 [subchapter], 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 [in this subsection] 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) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] 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 the 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 [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

APPENDIX B

Gissel Order of the NLRB

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes. Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park and International Brotherhood of Teamsters, Local No. 731, AFL-CIO.

Cases 13-CA-38061 and 13-CA-38185

April 20, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 12, 2000 Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found, inter alia, that a Gissel[4] bargaining order is necessary to remedy the Respondent's unfair labor practices. We agree. In Gissel, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')." [5] The Court found that, in determining a remedy in category II cases, the Board can take into consideration the extensiveness of an employer's unfair labor practices in determining whether [the possibility] of erasing the effects of past practices and ensuring a fair election . . . by the use of traditional remedies, though present, is slight and employee sentiments once expressed by authorization cards would, on balance, be better protected by a bargaining order." [6]

In agreeing with the judge that a Gissel bargaining order should be issued, we find, for the reasons set forth below as well as by those set forth by the judge, that the Respondent's course of misconduct clearly demonstrates that the holding of a fair election in the future would be unlikely and that the "employees wishes are better gauged by an old card majority than by a[n] election." [7]

We find this case falls within category II, and thus we have, as mandated by the Supreme Court in Gissel, examined the extensiveness of the Respondent's unfair labor practices and the likelihood that the coercive effects of these past practices would be erased by the use of traditional remedies. In this regard, we observe that the Respondent's unfair labor practices include "hallmark" violations such as threatening [to discharge] employees who started the Union's organizing campaign and subsequently discharging employee Michael Chiarito, the leading union advocate among the Respondent's employees. Similarly, the Respondent discharged employee Brad Patrylak for returning to the employees' strike against the Respondent after previously deciding to cross the picket line. The Respondent also committed other serious and pervasive unfair labor practices. It announced that its consideration of improvements to the employees' benefits plan had ceased because of the Union's organizing campaign, it threatened employees that they would be discharged for engaging in a strike,[8] it surveilled employees' strike activities,[9] and it refused to allow unfair labor practice strikers to return to work upon their unconditional offers to return to work.[10]

The coercive effect of the Respondent's misconduct cannot be denied. These serious violations began within days of the Union's distribution of authorization cards to employees when, upon learning of the employees' union activity, Service Manager Mike Maus asked employees who started the union activity and told them that when he found out he would fire the person. Only several days later, upon learning that the Union filed a representation petition, the Respondent's Vice President and General Manager Barry Taylor met with employees to tell them that in light of the union activity the Respondent had ceased the process of improving benefits for employees. Further, the Respondent continued its course of unlawful conduct in the following days with surveillance of the employees' strike activity, threats to discharge strikers, and the subsequent discharge of two employees for their union activity (including the leading union advocate) along with the refusal to reinstate the

unfair labor practice strikers upon their unconditional offers to return. This conduct “goes to the very heart of the Act” and is not likely to be forgotten.[11] Such action can only serve to communicate in the clearest terms that the Respondent was “willing to go to extraordinary lengths in order to extinguish the union organization effort” and that employees could very well lose their employment if they persist in engaging in union activity.[12]

The severity of the Respondent’s unlawful conduct is exacerbated by the involvement of high-ranking officials.[13] As noted above, upon learning that the petition had been filed, Vice President and General Manager Taylor swiftly moved to inform employees of the cancellation of any contemplated improvements in their benefits and specifically linked this action to the employees’ union activity. Indeed, “[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten.”[14]

Additionally, although the discharged employees and the reinstated strikers are entitled to reinstatement and [back pay], these remedies would not, in our view, erase the coercive effects of the Respondent’s conduct. The unlawful discharges and the refusals to reinstate the unfair labor practice strikers came on the heels of the repeated threats to discharge union activists and the strikers, with such threats beginning promptly after the Respondent learned of the employees’ organizing activity. Given the severity and the swiftness of this conduct, “[t]he reinstated employees would not likely risk again incurring the Respondent’s wrath and another period of unemployment by resuming their union activities.”[15]

We further note that there is no claim here that a Gissel order is not warranted because of the passage of time between the Gissel order and the unfair labor practices that warranted it, or because of an intervening turnover of employees and management. Indeed, at the time the judge issued his decision, Taylor (the Respondent’s highest ranking official), Nocera, and Maus, who together committed many of the unfair labor practices found here, were still employed in the same management positions they occupied during August and September 1999. There has been a relatively short time period between the date of the unfair labor practices and the issuance of the instant Order, and the Respondent has not argued that changed circumstances preclude the issuance of a bargaining order. Accordingly, these issues, which have concerned some courts in denying enforcement of our Gissel orders, are not present in this case.[16]

In concluding that a Gissel order is warranted here, we have examined the appropriateness of this remedy under the circumstances existing at the present time and we have considered the inadequacy of other remedies. See, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166 (D.C. Cir. 1998). We have also given due consideration to employees’ Section 7 rights. In *Gissel*, the Supreme Court rejected the argument that a bargaining order is a punitive remedy that “needlessly prejudices employees’ Section 7 rights.” 395 U.S. at 612. The Court reasoned as follows:

If an employer has succeeded in undermining a union’s strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to [re-establish] the conditions as they existed before the employer’s unlawful campaign.³³ There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer’s acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. For, as we have pointed out long ago, in finding that a bargaining order involved no “injustice to employees who may wish to substitute for the particular union some other . . . arrangement,” a bargaining relationship “once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,” after which the “Board may . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.” [395 U.S. at 612–613 (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705–706 (1944).]

³³ It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. [citation omitted.] Any effect will be minimal at best, however, for there “is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.” Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 *Harv.L.Rev.* 38, 135 (1964).

This passage clearly shows that in approving the Board’s use of the bargaining order remedy in category II cases, the Gissel court explicitly took into account the rights of employees who both [favoured] and opposed

union representation. The Court stated that if an employer's unfair labor practices have the tendency to undermine a union's majority strength and destroy election conditions, then "the only fair way to effectuate employee rights" is to issue a bargaining order.[17] In these circumstances, the interests of the employees [favouring unionisation] are safeguarded by the bargaining order. The interests of those opposing the union are adequately safeguarded by their right to file a decertification petition pursuant to Section 9(c)(1) of the Act. On the other hand, if the facts of a case fall within category III, i.e., the employer committed only "minor or less extensive unfair labor practices" with only a "minimal impact on the election machinery," then a bargaining order may not issue, notwithstanding the fact that a majority of employees signed authorization cards in support of the union. 395 U.S. at 615. In sum, the Gissel opinion itself reflects a careful balancing of the employees' Section 7 rights "to bargain collectively" and to refrain from" such activity.

Accordingly, for all these reasons, we agree with the judge that a Gissel bargaining order is an appropriate and necessary remedy in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park, Orland Park, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- (a) Interrogating employees about their own and other employees' union activities.
- (b) Threatening to discharge employees who start a union organizing campaign.
- (c) Telling employees they will be discharged because they have gone on strike.
- (d) Telling employees they have been discharged because they have gone on strike.
- (e) Telling employees that consideration of benefit improvements has ceased because a union has begun an organizing campaign.
- (f) Engaging in surveillance of employees' strike activities.
- (g) Discharging or otherwise discriminating against Brad Patrylak, Michael Chiarito, or any other employee for engaging in union activity or other concerted activity protected by the Act.

(i) Refusing to recognize and bargain with International Brotherhood of Teamsters, Local No. 731, AFL-CIO, as the [exclusive collective] -bargaining representative of all employees in an appropriate bargaining unit of All full-time and regular part-time porters, detailers, hikers, parts department employees and drivers employed by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park at its facility currently located at 8430 West 159th Street, Orland Park, Illinois; excluding all sales persons, mechanics, technicians, office clerical employees, service writers, dispatchers, professional employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Recognize and bargain collectively with the Union as the exclusive representative of all employees in the above unit concerning terms [and conditions] of employment and, if an understanding is reached, embody the understanding in a signed agreement.
- (b) Within 14 days from the date of this Order, offer full reinstatement to all employees who made unconditional offers to return to work on September 29, 1999, replacing, if necessary, any employees who occupy positions to which they are entitled to return and, if any of those positions no longer exist, to substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had they not been unlawfully denied opportunity to return to work on and after September 30, 1999.
- (c) Within 14 days from the date of this Order offer Brad Patrylak full reinstatement to the position of detailer from which he was discharged on September 3, 1999, and offer Michael Chiarito full reinstatement to the position of porter from which he was discharged on September 30, 1999, replacing, if necessary, anyone hired or assigned to either of those positions and, if either or both of those positions no longer exist, to a substantially equivalent position or positions, without prejudice to seniority or any other rights and privileges which would be enjoyed had those unlawful discharges not been made.
- (d) Make whole all strikers who unconditionally applied to return to work on September 29, 1999, and Brad Patrylak and Michael Chiarito, for any loss of earnings or other benefits suffered as a result of discrimination against them in the manner set forth in the remedy section of the judge's decision.
- (e) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amounts of [back pay] due under the terms of this Order.
- (f) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Brad

Patrylak on September 3, 1999, and Michael Chiarito on September 30, 1999, and any reference to the refusal to allow strikers to return to work following their unconditional offers to return of September 29, 1999, and within 3 days thereafter notify Patrylak, Chiarito and each of those strikers in writing that this has been done and that the discharges and refusals to allow strikers to immediately return to work will not be used against any of them in any way.

(g) Within 14 days after service by the Region, post at its Orland Park, Illinois office and place of business copies of the attached notice marked "Appendix." [18] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by its duly authorized representative, shall be posted by Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park has gone out of business or closed its Orland Park office and place of business involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the closed office and place of business at any time since March 7, 1999.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated, Washington, D.C. April 20, 2001

APPENDIX C

CANADA LABOUR CODE, PART I, SECTION 94

Unfair Practices

Employer interference in trade union

94. (1) No employer or 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 they

(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) permit an employee or representative of the trade union to confer with them during hours of work or to attend to the business of the trade union during hours of work without any deduction from wages or any deduction of time worked for the employer,

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

(iii) permit the trade union to use their premises for the purposes of the trade union;

(b) contribute 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; or

(c) express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Prohibition relating to replacement workers

(2.1) No employer or person acting on behalf of an employer shall use, for the demonstrated purpose of undermining a trade union's representational capacity rather than the pursuit of legitimate bargaining objectives, the services of a person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given and was hired or assigned after that date to perform all or part of the duties of an employee in the bargaining unit on strike or locked out.

Prohibitions relating to employers

(3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration 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 the person 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 on them 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 their refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike or subject to a lockout 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;

(d.1) where the requirements of paragraphs 89(1)(a) to (d) have been met, cancel or threaten to cancel a medical, dental, disability, life or other insurance plan, whether administered by the employer or otherwise, that benefits employees, so long as the bargaining agent tenders or attempts to tender to the employer payments or premiums sufficient to continue the plan;

(d.2) where the requirements of paragraphs 89(1)(a) to (d) have been met and the bargaining agent has tendered or attempted to tender to the employer payments or premiums sufficient to continue an insurance plan referred to in paragraph (d.1), deny or threaten to deny to any employee any benefits under the plan to which the employee was entitled before those requirements were met;

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial 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 the person 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 them, or take any other disciplinary action against such a person, by reason of that person having refused to perform an act that is 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.

R.S., 1985, c. L-2, s. 94; 1998, c. 26, s. 42; 1999, c. 31, ss. 158(E), 162(E); 2000, c. 20, s. 23(E).

Prohibitions relating to trade unions

95. No trade union or 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 the employee 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 the employee 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 that employee 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 that employee having refused to perform an act that is contrary to this Part; or

(i) discriminate against a person with respect to employment, a term or condition of employment or membership in a trade union, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person

(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 the person may be required to make in a proceeding under this Part, or

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

1972, c. 18, s. 1.

General prohibition

96. 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.

1972, c. 18, s. 1.

APPENDIX D

Summaries of Selected Canadian Industrial Relations Board Decisions *

BHP Diamonds Inc., Securecheck, and Klemke Mining Corporation

United Steelworkers of America, complainant,
BHP Diamonds Inc., Securecheck, and Klemke Mining Corporation,
respondents.

CITED AS: BHP Diamonds Inc., Securecheck, and Klemke Mining
Corporation

CIRB no. 81
(20460-C)
August 18, 2000

Complaints alleging violation of section 94(3) of the Canada Labour Code,
Part I.

Unfair labour practice - Discrimination - Refusal to employ - Timeliness -
The union alleges that the respondent employers refused to employ the
Grievor due to his prior union activities, in contravention of section 94(3) of
the Code - Complaint dismissed - Board found Securecheck was never the
grievor's employer; consequently the provisions of the Code did not apply
to it - Complaint against BHP found to be untimely and Board determined
that union's case did not merit an extension of the time limits pursuant to
section 16(m.1) - Board also determined that there was no anti-union
animus present in BHP's decision not to hire the Grievor or accept him for
on the job training - Complaint against Klemke also found to be without
merit and Board determined that union had no standing to file a complaint
relative to this matter as the Grievor had been represented by another
union while so employed - Complaints dismissed.

Practice and procedure - Extension of time - Section 16(m.1) - Although
section 16(m.1) does provide the power to extend the time limits for filing a
complaint, this power must be balanced against the objectives of the
legislation and the furtherance of the rights of the parties - Had the union
established at the very least a prima facie case and provided some serious
reasons why the complaint could not be filed until it was, the Board might
have been prepared to give the union's request some consideration - Union
failed to do so in this case.

Practice and procedure - Remedies - Costs - Board will not normally award
costs where a complaint is dismissed, even if the complaint was
capricious, frivolous and vexatious - Such complaints are to be considered
as one of the costs of doing business.

Transx Ltd.

Teamsters Local Union No. 31, complainant,
Transx Ltd., respondent.

CITED AS: Transx Ltd.

CIRB no. 82
(18584-C, 20537-C, 20548-C, 20646-C and 20821-C)

August 17, 2000

Determination of compensation to be paid pursuant to section 99(1) of the Canada Labour Code, Part I, to individuals discharged in violation of sections 94(3)(a) and 96 of the Code.

Unfair labour practice - Dismissal - Remedies - Damages - Poirier, Weibe and Werbiski (the affected employees) had previously been found by the Board to have been discharged (for the second time) in June/July 1999 due to anti-union motives on the part of Transx Ltd. (the employer) - Board must ensure quantum of damages for this second discharge was equivalent to the amount of remuneration each employee would have received had the breach (the discharge) not occurred - Prior average costs of the individual employee were applied in the case of Poirier as his period of employment (six months) was sufficiently long and he was assumed to have merited a raise in November 1999 as the employer had deprived him of the opportunity to be considered for a raise; mitigation income was deducted and amounts for tax gross-up and interest were added to total - Weibe's remuneration was determined with reference to average hours of work of comparable employees, as three months employment was not considered sufficient to determine individual prior average costs; tax gross-up was added but interest was not granted as Weibe had not actively sought employment during the period in question and thus had not mitigated his damages - Werbiski's remuneration was determined not on the basis of his net income for the purposes of the Income Tax Act (as preferred by the employer) but on the remuneration an average owner-operator would have expected in similar circumstances (amounts due from the employer to the employee less expenses incurred by the employee to earn them); mitigation income was deducted and amounts for tax gross-up and interest were added - Board left it to the parties (with the assistance of a Board employee) to finalize the necessary calculations respecting both periods of discharge and retained jurisdiction in case further Board attention was required.

Remedies - Compensation - Practice and procedure - Wrongdoer cannot be relieved from paying compensation merely because it is difficult to assess - However, party claiming compensation must provide adequate evidence to satisfy the Board that, on a balance of probabilities, the damages claimed were incurred.

S.G.T. 2000 Inc.

Transport Drivers, Warehousemen and General Workers' Union,
Teamsters Quebec, Local 106 (QFL), complainant,
S.G.T. 2000 Inc., respondent.

CITED AS: S.G.T. 2000 Inc.

CIRB no. 87
(20624-C)

September 14, 2000

Complaint alleging violation of section 50(a) of the Canada Labour Code,
Part I

Unfair labour practice - Duty to bargain in good faith - Collective agreement-
Existence - The union alleges that the employer has refused to [negotiate]
in good faith, in violation of section 50(a) when it refused to sign the
agreement which constituted the collective agreement concluded between
the parties before the Board heard the application for decertification - The
employer denies the validity of the agreement alleging that the majority of
members in the bargaining unit had not approved said agreement - The
Board determines that the agreement concluded between the parties
meets all the formal requirements of a collective agreement - The Board
finds for the complainant and determines the content of the collective
agreement pursuant to section 16(p).

NAV Canada et al.

Barry Hlushko, Dan Mahoney, Lambert J. Krenn, Bob Spence, Peter Reath, Bryan E. Hodgins and Michael L. Burgess, Wayne Gretzan, applicants,
NAV Canada, applicant/employer,
International Brotherhood of Electrical Workers, Local 2228, respondent/bargaining agent.

CITED AS: NAV Canada et al.

CIRB no. 88
(21109-C, 21258-C, 21241-C, 21260-C, 21267-C)

September 21, 2000

Applications for reconsideration pursuant to sections 18 and 16(p)(ii) of the Canada Labour Code, Part I.

Practice and procedure - Notice of proceedings to employees - Natural justice - Employee standing - Hearings - Reconsideration - Bargaining unit - Amendments to - Intended scope - Board had to determine whether the incumbents of the positions in dispute were entitled to notification of the proceedings dealing with an application for clarification of the intended scope of the bargaining unit before the original panel - On reconsideration, both the employer and the employees argue that the Board breached the principles of natural justice, i.e. the right to be heard, in failing to notify the incumbents - The employer also argued that the Board had breached the principles of natural justice in not holding an oral hearing - Applications for reconsideration dismissed - After analyzing the larger legislative context, and for the sake of consistency, the Board determines that whenever bargaining unit definition (scope) is at issue, employees do not have standing, whether dealing with section 18, 18.1 or 27 - Employees have no "party" status in relation to bargaining unit definition, unless accorded such status at the Board's discretion - The original panel did not see fit to grant such status and a reconsideration panel should be loath to interfere with the original panel's discretion - The reconsideration panel is also satisfied that the original panel had all the necessary information on which to ground its decision, acted appropriately and in accordance with the Board's practice when it decided the matter on the basis of the written submissions.

René Forcier

René Forcier, complainant,
Reimer Express Lines Ltd., employer,
Transport Drivers, Warehousemen and General Workers', Teamsters
Quebec, Local 106 (Q.F.L.), intervenor.

CITED AS: René Forcier

CIRB no. 93
(18368-C)

October 13, 2000

Complaint alleging violation of section 94(3)(a)(iii) of the Canada Labour Code, Part I.

Unfair labour practice - Discrimination - Deferral to arbitration - The complainant alleges that the employer has violated section 94 by altering his conditions of employment, in retaliation for his having exercised his rights under the Code - The employer asks that the Board refer the matter to arbitration pursuant to section 98(3) of the Code - The complainant submits that even if the arbitrator has jurisdiction to hear this grievance, his remedial powers are limited - The Board must therefore hear his complaint - The employer submits that the facts against it are in keeping with the business-as-usual approach, free of malice or anti-union animus - Hence, the Code has not been violated - The Board exercises its discretion pursuant to section 98(3) and refuses to hear the complaint - The Board finds that the essence of the dispute arises from the collective agreement, such that the determination of the rights arising from the said agreement falls exclusively under the arbitrator's jurisdiction; hence, it is up to the arbitrator to decide this case.

TELUS Corporation

TELUS Corporation, applicant,
Telecommunications Workers Union, International Brotherhood of
Electrical Workers, Local 348, Communications, Energy and
Paperworkers Union of Canada, and Civic Service Union Local
52, respondents.

CIRB no. 94
(21298-C)
October 19, 2000

Application for reconsideration under section 18 of the Canada Labour Code, Part I. Reconsideration - Natural justice - Review of bargaining unit structure - Bargaining unit - Amendments to - Employee wishes - Practice and procedure - Employer seeking reconsideration of a prior decision where Board determined that field sales and telemarketing employees were appropriate for inclusion in the single bargaining unit which had previously been agreed upon by the parties and approved by the Board - Employer argued five grounds of review, two of which alleged original panel had breached rules of natural justice when it (a) decided the double majority issue before counsel for the employer had an opportunity to reply; and (b) when it failed to give notice to employees whose rights were affected by its decision - Employer further alleged that the original panel's decision led to several errors of consequence, including: (c) that employees were being "swept in" without the opportunity to express their wishes and without the union having obtained majority support; (d) an error concerning the community of interest element with respect to the field sales employees; and (e) that the original panel incorrectly assumed the field sales position had remained static for 50 years - Reconsideration panel found application did not raise either "significant new factual issues" or "questions of law or policy" that required matter to be referred to original panel for further consideration - The allegation of denial of natural justice on the ground of failure to provide an opportunity to respond was defeated, as no new evidence was presented and the applicant's arguments on the issue were squarely before the panel - Notice was given to all employees of the application for review of the bargaining unit in accordance with the provisions of the Code and the relevant regulations thereunder; such notice was sufficient to satisfy the requirements of the rules of natural justice - The decision not to apply the double majority rule and assess majority support amongst the group to be added, did not depart from Board policy - The bargaining unit never was the result of a merger and union representation in the redefine unit was not compromised by the change in unit description - The reconsideration panel felt that the original panel relied upon appropriate indicators of community of interest to support its conclusion to include the relevant employees - Finally, in all the circumstances, the possibility that the original panel may have marginally misconstrued the degree of stability of the working situation of the relevant employees did not appear to be a basis upon which the panel's decision should be altered - In view of the conclusions on each ground of review, the reconsideration panel sees no reason to alter the original decision.

Maritime-Ontario, Parcel Division

Teamsters Local Union 938, applicant,
Maritime-Ontario, Parcel Division, employer.

CITED AS: Maritime-Ontario, Parcel Division

CIRB no. 100
(21105-C)

December 15, 2000

Application for certification pursuant to section 24 of the Canada Labour Code, Part I. Bargaining unit - Appropriateness - Dependent contractors - Community of interest - Board determines that "van drivers" are dependent contractors and therefore employees pursuant to section 3 of the Code, regardless of how they are described in the relevant contract - The individuals in question are required by contract in writing to provide the vehicle by means of which they perform the contract and operate it in accordance with the contract - Furthermore, they are entitled to retain for their own use from time to time sums of money remaining after the cost of their performance is deducted from the amount they are paid - The drivers are also subject to non-solicitation, non-competition clauses - The drivers are dependent upon the employer in question and under a contractual obligation to provide duties for that employer - The Board concludes that a unit comprised of "van brokers, Parcel Division" is appropriate for collective bargaining - The group is composed of individuals performing functions that are generally the same and have a significant community of interest - Although the bargaining unit is not the ideal unit and does not perfectly accommodate the employer's organizational structures, the Board must fulfill the objectives of the Code by allowing the employees in question the opportunity to bargaining collectively with the employer.

Practice and procedure - Amendment to application - The Board had to determine whether the applicant's request to amend the bargaining unit sought was indeed a real attempt at gerrymandering the unit in question in order to allow the applicant to have a majority in the bargaining unit found to be appropriate - After careful examination, the Board concludes that the bargaining agent's initial description was a mistake and its second submission was an attempt to describe the intended bargaining unit more accurately and not an attempt at gerrymandering as alleged by the employer.

National Bank of Canada

Syndicat des travailleuses/eurs de la Banque Nationale (CNTU),
complainant,
National Bank of Canada, respondent.

CITED AS: National Bank of Canada

CIRB no. 101
(21045-C)

December 15, 2000

Complaint of unfair labour practice pursuant to section 97(1) of the Canada Labour Code (Part I - Industrial Relations).

Unfair labour practice - Duty to bargain in good faith - Complaint of unfair labour practice filed pursuant to section 97(1) of the Canada Labour Code by the union, alleging violation of section 50(a) by the employer, the National Bank of Canada - The union alleges that the Bank's actions outside the bargaining table hindered recognition of the union as the bargaining agent - Three employee groups - The Board finds that some of the Bank's actions, taken together and given the overall context, lead to the conclusion that there was bad faith - The Bank must not use its resources to accomplish outside the bargaining table what it does not wish to negotiate directly with the union - After more than 21 bargaining sessions and 18 conciliation sessions, the contentious clauses are still unresolved.

Unfair labour practice - Duty to bargain in good faith - Work stoppage - Actions of the employer outside the bargaining table - The Board concludes to an unfair labour practice on the basis of the Bank's following actions: (1) subcontracting of the Telemarketing Unit work during negotiations to undermine the union's position; (2) use of the services of an outside consultant to officially evaluate the organizational climate when in fact he made anti-union statements and encouraged the employees to sign a petition for decertification of the union; (3) the unusual attendance of the Vice-President of Staff Relations at monthly meetings of the Telemarketing Unit, which gave the appearance of an attempt to bypass the union; (4) the implementation of changes to the unit's operational requirements during the open period for an application for decertification. These changes were intended to give employees the impression that without the conclusion of a collective agreement changes could be made unilaterally by the Bank, without consultation with the union; (5) the Bank's refusal to let employees take their usual coffee breaks away from the workplace supposedly because they would not return to work; (6) the Bank's actions against the union's President, that is, when it questioned her performance by suggesting the possibility of her dismissal; (7) the implementation of a new sick leave policy for all Bank employees, an issue being discussed in negotiations, in order to undermine effective representation by the union.

Unfair labour practice - Duty to bargain in good faith - Remedies - The Board allows the complaint of unfair labour practice and orders the Bank to cease immediately all activities that have been described in its decision

and to avoid in the future all identical or similar activities in regards to the ongoing negotiations - The Board sees in its remedial order the opportunity /continued from previous page

to provide the means to arrive at a positive settlement of the disputes, while ensuring union freedom and the basis for fruitful labour relations leading to good working conditions and sound relations between workers and employers - While the union and the Bank have returned to the bargaining table, the Board cannot ignore that bargaining has been underway for two years - It is in the best interest of the parties to have the opportunity to finish what they have started - The Board therefore orders the parties to recommence bargaining and make all necessary efforts to conclude a collective agreement no later than January 31, 2001 - If no memorandum of understanding has been concluded by then, the Board may decide on whatever remedial measures it deems appropriate.

UMG Cable Telecommunications Inc., c.o.b. Napanee-Deseronto
Cablevision Ltd. et al.

Communications, Energy and Paperworkers Union of Canada,
complainant,
UMG Cable Telecommunications Inc., c.o.b. Napanee-Deseronto
Cablevision Ltd., Northumberland Cable TV and Brockville Cable
TV, respondent.

CITED AS: UMG Cable Telecommunications Inc., c.o.b.
Napanee-Deseronto Cablevision Ltd. et al.

CIRB no. 105
(20981-C)

January 30, 2001

Complaint alleging violation of sections 24(4), 94(1)(a), 94(3)(a) and
94(3)(e) of the Canada Labour Code, Part I.

Unfair labour practice - Dismissal - Anti-union animus - Freeze provisions -
Remedies - The union complained to the Board that the employer had
violated sections 24(4), 94(1)(a), 94(3)(a) and 94(3)(e) of the Code by
having taken retaliatory actions against certain employees for anti-union
reasons during an organization drive - Board found that considering the
evidence of clear employer knowledge of the organization campaign being
conducted, along with the evidence of apparently heightened discipline
imposed on employees, the changes in policy respecting breaks and
overtime and the evidence that indicated that the employer might have
been "mad" about the organizing campaign, it appeared more probable
than not that anti-union animus rather than business reasons had
motivated the employer's actions in discharging and disciplining the
relevant employees - An employer with a reduced demand for technical
services can adjust its workforce; however, once a certification application
is filed, significant changes in working conditions are to be undertaken in
consultation with the bargaining agent - The employer was unable to show
"compelling business reasons" for doing what it had done - Breach of
section 94(1)(a) found.

Reinstatement and compensation ordered - As an interim remedy, the
issues of coffee breaks, changes in overtime policy, and other discipline
and dismissal matters not specifically dealt with would now become the
subject of discussions with the certified bargaining agent.

Denis Wilson

Denis Wilson, complainant,
ADM Agri-industries Ltd., employer.

CITED AS: Denis Wilson

CIRB no. 99
(20032-C)

December 13, 2000

Complaint alleging violation of sections 94(3)(a)(i) and 94(3)(a)(v) of the Canada Labour Code, Part I. Unfair labour practice - Intimidation - Timeliness - Arbitration - Practice and procedure - The complainant claims that his employer relieved him of his duties as senior miller, and subjected him to harassment because of his union activities - The Board rejects the complaint on preliminary argument since the complainant has been unable to establish a prima facie case demonstrating sufficient grounds for his complaint - The Board considers that the facts raised in the complaint and the evidence presented have not demonstrated recent union activity that can be linked to the period immediately preceding the complaint - Furthermore, the Board considers that the evaluation of the events must be limited to those that occurred during the 90-day period preceding the complaint, that is, October 1998, as the complainant has waited until January 1999 to file his complaint whereas he should have known of the action or circumstances giving rise to the complaint in 1997 - The Board also considers that the complaint before it, and its companion complaint pending in arbitration, can be determined in its entirety by the arbitrator.

Endnotes

1. For example, for the federal jurisdiction see: www.cirb-ccri.gc.ca; for the Ontario jurisdiction, see: www.gov.on.ca/lab/olrb/eng/homeeng.htm; and for the Manitoba jurisdiction, see: www.gov.mb.ca/labour/labbrd/index.html).
2. Godard, 2003a.
3. Jacoby, 1991
4. Freeman, 1998.
5. As Richard Freeman (1998: 282) points out, three quarters of the new recognitions in that year followed recognition strikes. He concludes that this is evidence that 'bottom up' factors (worker militancy) were more important than the NLRA. But it is just as likely that the NLRA, coupled with the Supreme Court ruling, served as spurs to worker organisation and to employer recognition, especially given the limited resources and hence capacity of the NLRB to process certification requests in a timely fashion. In essence, workers were asserting their legal rights even if the administrative process for realising these rights was not yet fully in place, and employers were more willing to concede these rights after support had been demonstrated through a recognition strike, in the belief that the union would in any case win certification through the board.
6. Brody, 1997; Flanagan, 1987.
7. See Logan, 2000, 2001; Atleson, 1995; Woodiwiss, 1990
8. Consolidated Edison v. NLRB, 305 U.S. 197 (1938).
9. Logan, 2001
10. Logan, 2000
11. Logan, 2000: 4
12. See, in particular, Jacoby, 1991, and Hutton, 2002.
13. See Howell, 1995; Penceval, 2000; Adams and Markey, 1997.
14. Taft and Ross, 1969: 221.
15. See Lipset and Meltz, 1998.
16. See Taras, 1997.
17. In North America, the term "international union" refers to unions with members in both the US and Canada.
18. Labour Canada, 1970.
19. Logan, 2000: 12-16.
20. See Godard, 2003a.
21. See Godard, 2003a.
22. See Godard, 2003a: 481. In addition, in a 1996-97 survey of Canadian 420 employers involved in a recent recognition campaign, 80 per cent reported some form of overt resistance. See Bentham, 2002. p172-173.
23. See Robinson, 1992, 1994; Kumar, 1991: 31-47.
24. See Bruce, Peter. 1989. "Political Parties and Labor Legislation in Canada and the United States" Industrial Relations vol. 28: 115-141.
25. This chapter draws extensively from the National Labor Relations Act, from the National Labor Relations Board Rules and Regulations – Part 102, and from the 2000 Human Rights Watch Report, Unfair Advantage: Workers Freedom of Association in the United States Under International Human Rights Standards. Note that the NLRB rules and regulations are lengthy and complicated, and contain numerous exceptions. Discussion in this section addresses these rules and regulations in general, referring to exceptions only where considered to be of major importance.

26. Hardin and Higgins, 2001: 2447.
27. See Eaton and Kriesky, 2001.
28. See Goldman, 1996: 196-205.
29. In *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court ruled that non-employee union organisers were comparable to trespassers and were not allowed on employer property unless the employees were inaccessible and the union had no other reasonable means to contact them. This decision was recently affirmed in *Lechmere* (1992). See Brody, 1997.
30. See Hardin and Higgins, 2001: 107.
31. See Hardin and Higgins, 2001: 549
32. Human Rights Watch, 2000: 56.
33. NLRB, n.d.: 151
34. See Bronfenbrenner, 1994; also Bentham, 2002:178.
35. See Cooke, 1983: 414.
36. NLRB Annual Report, n.d.: 151.
37. See <nrlb.gov/assist.html>
38. Human Rights Watch, 2000: 56.
39. See Goldman, 1996: 205-211.
40. See Goldman, 1996: 169.
41. *Comcast Cablevision*, 313 NLRB 220, 248 (1993).
42. For example, in *General Shoe Corporation and Boot and Shoe Workers Union, AFL*, 77 NLRB 124 (1948), the Board ruled that strong disparaging remarks made by the employer contained no threat of reprisal or promise of benefit and appear to be only expressions of opinion as are excluded from our consideration in an unfair labour practice case by reason of Section 8(c) of the amended act.
43. See, *Gissel* (1969), as discussed in Brody, 1997. Also, in *Livingston Shirt Corporation and Amalgamated Clothing Workers of America, CIO*, 107 NLRB 400 (1953), supervisors made statements predicting that the plant would close if the union was victorious and, although the president reassured workers of their right to organise, he was ruled to have subsequently made an 'anti-union, non-coercive speech to employees.' Yet the employer was held not to have violated the law.
44. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 at note 20 (1965).
45. *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961)
46. For cases, see Hardin and Higgins, 2001: 306-307.
47. See Goldman, 1996: 260-268.
48. *NLRB v. American National Insurance* 343 U.S. 395 (1952).
49. In 2001, 80 per cent of complaints found to have merit were issued were against employers. NLRB Annual Report, n.d.: 130.
50. *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938).
51. *Phelps Dodge Corp v. NLRB*, 313 U.S. 177 (1941).
52. Hardin and Higgins, 2001: 312, 2529-2531.
53. Hardin and Higgins, 2001: 2498-99
54. See Hardin and Higgins, 2001: 446-447.
55. Hardin and Higgins, 2001: 329.
56. *H.K. Porter vs. NLRB*, 397 U.S. 99 (1970), discussed in Gould, 1994.
57. *Ex-Cell-O Corp.*, 185 NLRB 107 (1970), discussed in Gould, 1994: 221.
58. This section draws extensively from Hardin and Higgins, 2002: 2466-2490. For more information, see the NLRB Rules and Regulations and the NLRB Casehandling Manual for Unfair labour Practice Regimes. The reported data is drawn from the 66th Annual Report of the NLRB, covering the year 2001. See especially table 1A (p. 126), table 2 (p. 128), table 7 (p. 146), table 8 (p. 149), and table 23 (p. 192).
59. The NLRB 2001 Annual Report also reveals that there were 6552 charges against

unions under Section 8b of the Act, 83 per cent of which involved section 8b(1) complaints, which are complaints that a union has violated section 7 guaranteeing the right of employees to freely choose whether to support a union. Hence these may be associated with the recognition process. But of the total section 8b complaints (there is no breakdown for 8b(1) complaints) , 84 per cent were either withdrawn or dismissed, and 16 per cent were settled informally (see below), suggesting that cases are almost always tactical.

60. The other two provisions outlaw domination of a labour organization and discrimination against an employee for filing a charge or testifying under the act. These categories accounted for 2 and 3 per cent of charges, respectively.

61. NLRB, n.d.: 146.

62. This is discussed in Gould, 2000: 60-61.

63. Hardin and Higgins, 2001: 2479-80.

64. Hardin and Higgins, 2002: 2474

65. NLRB, n.d.: 192.

66. NLRB, n.d.: 130.

67. See Hardin and Higgins, 2001: 296-298.

68. For cases precedents, see Hardin and Higgins, 2001: 248-262.

69. This paragraph draws from sec. 102.45 and 102.46, NLRB Rules and Regulations.

70. Hardin and Higgins, 2001: 2477.

71. NLRB, n.d.: 192.

72. NLRB, n.d.: 149.

73. Hardin and Higgins, 2001: 2477.

74. This paragraph draws from sec. 102.52 to 102.54, NLRB Rules and Regulations.

75. This is discussed at length in Hardin and Higgins, 2001: 2582-2589

76. Human Rights Watch, 2000: 66.

77. See, e.g., Richard Epstein, 1983.

78. See, e.g., Weiler, 1983, 1984; Gould, 1993. Also see Block, 1994, 1997; Gross, 1994; and Block et al, 1996.

79. See Kate Bronfenbrenner, 2000. Her statistics find that 9 in 10 require employees to attend anti-union meetings, 8 in 10 subject them to one on one anti-union meetings, and 7 in 10 mail anti-[union] leaflets to employees.

80. See Gould, 2000: 58-74.

81. See AFL-CIO, 2002.

82. Human Rights Watch, 2000. chapt. 4: 11.

83. Under 50 are issued per year. In the mid-1990s, the NLRB increased its use of injunctions, but was subject to considerable congressional pressure and therefore returned to its earlier policy of using them sparingly.

84. See Taras and Ponak, 2001.

85. Lund and Marranto, 1996.

86. Chapter five of the Human Rights Watch report contains over 100 pages of cases documenting how employers manage to undermine the US unfair labour practice regime. For submissions to the Dunlop Commission, see chapter four of Block, Richard et al., 1996.

87. Human Rights Watch, 2000: 72.

88. Estimate by Charles Morris of Southern Methodist University, reported in Human Rights Watch, 2000: 71.

89. Bronfenbrenner, 2000.

90. NLRB, n.d.: 127-128.

91. Human Rights Watch, 2000:71

92. Green, 2000.

93. See Thompson and Rose, 2003.

94. For cases, see Arthurs et al, 1993: p.451 and Adams, 2003: 10-42 ff.
95. See Taras, 1997: 321-323.
96. Cited in Taras, 1997: 322.
97. Logan, 2002: 142. For cases, see Adams, 1996: 10-52ff.
98. The province of Alberta contains perhaps the weakest provisions (and, at 22 per cent, the lowest union density level). Contrary to most if not all other provinces, it does not provide for reverse onus in the case of alleged unfair labour practices (see below) and it allows considerable latitude for employer speech. It also requires a ballot in all cases. But unlike in the USA, ballots are normally held within 10 days of a union's application, thus limiting the opportunity for employer interference.
99. (1979)2 Can. LRBR 98 (Can.).
100. (1980) BCLRB 29/80.
101. (1978) Can LRBR 22 (1976) Rep. 562
102. Logan, 2002: 139.
103. C.L.L.C. 220-046 (O.L.R.B.)
104. For relevant cases, see Adams, 1996: 10-20 to 10-23.
105. Logan, 2002: 141.
106. For cases, see Adams, 1996: 10-61 ff.
107. For cases, see Adams, 1996: 10-24.2 to 10-33.
108. R. v. Bushnell Communications (1974) 4 O.R. (2d) 288 (C.A.).
109. Forano (1974) 1 C.L.R.B.R. 13 (BCLRB).
110. National Automatic Vending (1963) 63 C.L.L.C. para 16,278 (OLRB).
111. See Adams, 1996: 10-15.
112. E.g., International Wall Coverings Limited, (1983) O.L.R.B. 1316.
113. A major difference is that the USA distinguishes between "mandatory" issues, which are issues pertaining directly to the terms and conditions of employment, and "permissive" issues, which are issues that do not. Otherwise, Canadian boards have used similar criteria to those in the USA. For a discussion, see Adams, 1996: 19-91 ff.
114. See G. Adams, 1996: 10-125 to 10-126.
115. National Automobile, Aerospace Transportation and General Workers Union vs. Buhler Versatile Inc. No. 220/01//LRa (MLB).
116. See Adams, 1996: 10-131 to 10-132.
117. See Adams, 1996: 10-134 to 10-136.
118. City Buick Pontiac (Montreal) Inc. v. Roy et al (1981) 81 C.L.L.C. para 14, 108 (T.T.)
119. Westinghouse Canada (1980) 2 C.L.R.B.R. 469 (O.L.R.B.)
120. Criminal Code, R.S.C. 1985, c.C-46,s.425. See Adams, 1996 10-2260 to 10-2290.
121. In the Ontario jurisdiction, the board processed 10 applications for consent to prosecute in 2000-2001. None were granted. OLRB, n.d.: 10.
122. United Nurses of Alberta v. Attorney General (Alberta) (1992) 92 C.L.L.C. para. 14,023.
123. See Adams, 1996: 10-137 to 10-142.
124. There were 15 applications: in 9 a settlement was reached by the parties; 2 applications were dismissed, and 2 were pending. See OLRB, n.d: 12.
125. See Adams, 2003: 5.450-5.540.
126. In 2000-2001, for example, the Ontario Labour Relations Board processed 4099 cases. Of these 87.5 per cent were resolved with the assistance of board officers or dropped. OLRB, n.d.: 7.
127. OLRB, n.d.: 11.
128. MLRB, n.d.: table 1.
129. see CIRB, n.d.: 25(1).
130. Fielding Lumber, (1976) 1 CLRBR 216 (OLRB).
131. see Adams, 2003: 5.360.

132. see Adams, 2003: 5.320
133. See Adams, 2003: 5.300 to 5.440.
134. See Adams, 2003: 5.400.
135. See Adams, 2003: 4.100 to 4.170.
136. OLRB, n.d.: 14.
137. For example, a 1995 report reviewing the federal system contained a chapter on these and related issues. See chapter 13 of Sims et al., 1995.
138. OLRB, n.d.: 29.
139. OLRB, n.d.: 20.
140. OLRB, n.d.: 20.
141. See Godard, 2003b.
142. This was a Vector Research Poll commissioned by the Canadian Labour Congress (CLC) and were provided to the author by the research director of the CLC, Andrew Jackson.
143. For example, see Gould, 1994; Weiler, 1983.
144. Godard, 2003a, 2004.
145. It is possible that employers are in some cases able to persuade employees not to join a union without engaging in such tactics, but there is little evidence that this occurs. There is also a widespread assumption among students of labour law that union representation represents a public good in itself and that any tactics that may dissuade employees from joining or voting in favour of a union should be condemned under the law. Thus, variation in union success rates is a key dependent variable in much of the research on the effectiveness of unfair labour practice regimes. Given the North American context, this is a reasonable (if imperfect) approach.
146. Meltz and Verma, 1996: 6; also see Rose and Chaison, 1996: 83.
147. See Troy 2000: 705 for the argument and Godard, 2003: fn. 17 for the finding that the inclusion of public sector certifications makes little difference.
148. Rose and Chaison, 1996: 3. Also see Riddell, 2001: 401.
149. Also see Bruce, 1993, 1994.
150. Cooke, 1985.
151. Thomason, 1994.
152. Riddell, 2001. For other studies, see Solomon, 1985; Reed, 1989; Lalonde and Meltzer, 1991; and Bentham, 1999, 2002.
153. Lipset and Meltz, 1998. The US figure exceeds that of Freeman and Rogers (1999), who found that 32% of non-union workers would vote for a union. This may in part reflect differences in sampling methods: for example, the Freeman and Rogers survey sampled only those in private companies and non-profit organisations with over 25 employees. The Lipset and Meltz survey contained no such restrictions. In addition, Freeman and Rogers allowed respondents to report if they were undecided, with 13% reporting that this was the case. In contrast, the Lipset and Meltz survey allowed undecided respondents to indicate whether they would "probably" join, with the 47% figure including these responses. In any case, the Lipset and Meltz survey is the only survey to date to ask the same questions of a large sample of both US and Canadian respondents.
154. Troy, 2000: 707.
155. See Godard, 2003.
156. Bruce, 1994: 276.
157. Godard, 2003: 478; Gomez, Lipset, and Meltz, 2001.
158. Martinello, 1996.
159. Martinello, 2000.
160. Thomason, 1994; Roomkin and Block, 1981; Cooke, 1983.
161. Prosten, 1978..

162. Thomason, 1994.
163. Roomkin and Juris, 1978.
164. Riddell, 2001: 407.
165. See Johnson, 2000, 2003.
166. Johnson, 2000: 2-24.
167. Slinn, 2003.
168. Bentham, 1999: chapt. 7: viii,lii.
169. Martinello and Meng, 1992.
170. Wall Street Journal, 1991, A16.
171. Riddell, 2001.
172. Godard, 2000: 299.
173. Getman, Goldberg, and Herman, 1976.
174. Dickens, 1983. This paper also briefly reviews other articles critical of the Getman et al findings.
175. Bronfenbrenner, 1997.
176. Bronfenbrenner and Juravich.
177. Thomason and Pozzebon, 1998.
178. Commission on the Future of Worker-Management Relations, 1994.
179. Weiler, 1983, 1984; Cooke, 1985.
180. Bentham, 1999, chapt 4: lviii. The accuracy of this estimate may, however, be in doubt due to a low response rate (20 per cent).
181. Bentham, 1999: chapt. 7: lv.
182. Bentham, chapt. 7: lxi.
183. see Brody, 1980: 246-49; Davis, 1986: 132-35.
184. See Logan, 2001.
185. See John Logan, 2004.
186. As of January, 2004, information about the Kennedy-Miller bill was on the AFL-CIO web site, at <www.aflcio.org/aboutunions/voiceatwork/efca.cfm>. The bill itself was available at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01925>>. It essentially focuses on three sets of reforms: 1) allowing automatic certification based on union membership evidence (i.e., card certification), (2) mediation and arbitration of first contracts, and 3) implementation of stronger injunctive relief and remedies for unfair labour practice violations.
187. Thompson, 1996; Logan, 2002.
188. See Sims et al, 1995.
189. For Canada as of the early 1990s, see Godard, 1996. In a survey of 341 managers responsible for HRM in their firm, I found (among other things), that only 42 per cent agreed with the statement that "employers should do everything legally possible to keep workers from unionizing." However, only 13 per cent disagreed with this statement – the rest were neutral. Moreover, it is likely that HR managers are "softer" on unions than their counterparts in other functional areas.
190. John Logan provides an excellent account of this impasse. See Logan, 2004.
191. Although unions are associated with wage premiums in the 10-20 per cent range, US research suggests that they on average have neutral or slightly positive effects on productivity. US research also reveals that as of the 1970s and early 1980s, they appear to have had negative effects on profits and investment, though recent Canadian research suggests that these effects largely occur in less competitive industries and involve a sharing of economic rents. Consistent with this interpretation, recent US research also shows that unions have no effect on employer survival rates. With regard to workers, research into the implications of unions for satisfaction has yielded mixed results. There has been little research into their effects on other subjective outcomes (e.g., stress). However, a 1994 survey of beliefs about

unions in Canada found that, while roughly two thirds believed unions to put high levels of effort into performing various roles, only about a third believed them to be highly successful. This literature is reviewed in Godard, John, 2000.

192. Compa, 2003: 24.

193. See Logan, 2002.

194. This is a standard argument used by employer organisations in both the USA and Canada. It is perhaps best illustrated by the publications of the Human Resource Policy Association (previously the Labour Policy Association), an organisation that represents over 200 of the largest employers in the United States. See, for example, see Yager, Bartl and LoBue, 1998.

195. See Yager, Bartl, and LoBue, 1998. Table 1. They are able to identify only slightly over 100 cases since the passage of the NLRA. In a subsequent table (Table 2), they merely duplicate cases in their initial listing (Table 1).

196. See Eaton, and Kriesky, 2003.

197. This is so even in Canada. In Bentham's 1997 survey of over 400 Canadian employers recently subject to an organising campaign, 80 per cent of respondents admitted to tactics involving open opposition to a union (2002: 172).

198. Seeber, and Cooke, 1983: 40.

199. See Bentham, 2002. Notably, some practices, such as closely monitoring employees and tightening work rules, may actually tend to backfire on the employer and increase the chances.

200. For a thorough study of the US anti-union consulting industry and its implications, see Logan, 2003.

201. Thomason and Pozzebon, 1998: 759.

202. Discussion of this declaration and of other international declarations may be found in chapter III of the Human Rights Watch Report (2001), discussed in chapter three.

203. See Adams, 1993, 1995.

204. See Godard, 2003c

205. Under this argument, so-called 'co-ordinated market economies' (e.g., Germany) continue to be dominated by more of a stakeholder orientation and to operate in more co-ordinated markets, in which unions are seen to have some positive role. Thus, unions continue to be viewed as legitimate 'social partners.' See Hall and Soskice, 2002, for discussion of the differences between liberal market and co-ordinated economies, and Thelen, 2001, for a discussion of the different roles of unions.

206. Godard, 2004.

207. For example, Freeman, 2000, Fligstein, 2001, and Hall and Soskice, 2001.

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