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Employer Free Speech and the Right of Trade-Union Organization

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I. INTRODUCTION

In our society, one of the most cherished privileges is that of freedom of speech, but even it often conflicts with many of our other privileges. Specifically, in the field of industrial relations, it has run up against the right of freedom of association, which is the fundamental premise upon which our Labour Codes are written. The potential conflict between these two freedoms gives rise to the subject-matter of this paper, namely the issue of employer free speech during organizational drives and decertification attempts. One school of thought holds that an employer should be able to say anything, at any time, under any circumstances. The opposite position holds that the right of freedom of association is so very fragile that for it to have any practical meaning employers must be completely silenced.

A number of specific arguments have been advanced in support of each of these positions. First of all, those in favour of unfettered free speech include:

(1) The employer is vitally interested in the welfare of his employees, and hence the outcome of any event dealing with trade-union representation involves him directly.

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

(3) The employees have a right to all "the facts", and the employer should be able to explain the economic consequences of unionization to the employees in terms of competitive position, long-term growth and the firm's continued existence. These consequences may in fact directly affect the workers.

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

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

The arguments proposed in favour of restrictions on freedom of speech are as follows:

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

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

(3) The employer has had an opportunity to communicate with the employee throughout the employment relationship. Any communication made during an organization or decertification bid is more likely to consist either directly or indirectly of threats, promises and the like rather than representations of reality.

II. PROVISIONS OF THE LABOUR CODES

To begin this discussion of how these competing interests are handled, the provisions of the Labour Codes in various jurisdictions in Canada must be examined. The Codes are quite similar, and the Labour Relations Boards have generally differed only in how strictly they have applied them, that is, some Boards will interpret similar facts somewhat more harshly than others.

There are three types of restrictions that can be invoked under the Codes during organizational campaigns. The first prohibits an employer from doing anything that will intimidate or coerce an employee from becoming or remaining a member of a union or from exercising any of his rights under a Labour Code.[1] Second, the Codes also contain explicit prohibitions against specific types of behaviour including, in relation to the question of free speech, intimidation of the employees.[2] The third prohibition is a general one against interference with or participation in the formation or administration of a trade-union.[3]

These restrictions are sometimes accompanied by a statement that the Code does not intend to restrict the employer from any communication whatsoever; in some statutes, statements of fact and reasoned opinion are explicitly sanctioned.[4] Even if a specific Code does contain such apparent guarantees, however, the Boards still must wrestle with the boundaries to be placed upon employer free speech in the context of a union's organizational campaign.

III. THE RESTRICTIONS IN GENERAL

In general terms, the Boards have taken the position that any employer activity, including speech, sets a dangerous precedent. The classic statement of this doctrine was set out in the 1974 case of *Forano Ltd.*[5] in which the British Columbia Board indicated that due to the dependence of the employee on the employer for his economic well-being, "[c]omments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by management."[6] Therefore there is a great risk that any statements made by management will be in contravention of the Code, and thus the employer is admonished "to remain an interested bystander [and] to resist the temptation to become an active partisan in a campaign against a union."[7] The *Forano* case also stands for the proposition that an employer

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[1] *Labour Code*, R.S.B.C. 1979, c. 212, ss. 3(3) (c), 5 [hereinafter *B.C. Code*]; *Labour Relations Act*, R.S.O. 1980, c. 228, s. 70 [hereinafter *Ont. Code*]; *Canada Labour Code*, R.S.C. 1970, C. L-1, s. 186 (added by S.C. 1972, C-18, s. 1) [hereinafter *Federal Code*].

[2] *B.C. Code*, s. 3(3); *Ont. Code*, s. 64; *Federal Code*, s. 184.

[3] *B.C. Code*, ss. 3(1), (3) (c); *Ont. Code*, ss. 64, 66; *Federal Code*, s. 184(1).

[4] See text accompanying notes 64-75, *infra*.

[5] (1974), 6 C.L.L.C. ¶ 16,121 (Weiler).

[6] *Id.* at 982.

[7] *Id.*

cannot indicate any preference between unions which are competing for the support of the employees.

In the *Beechwood Const. Ltd.*[8] decision, the British Columbia Board reiterated these basic sentiments and put a slightly different light on its position.

> As has been noted on many occasions in the context of employer free speech arguments, the audience of employees is a captive one and particularly vulnerable to the overtones underlying such comments. *Reasoned debate is precluded by an appreciation of the employer's wishes and anticipation of the consequences that may follow from exposing a viewpoint at odds with that position.* That is not free speech nor any form of debate which can assist an employee in making an informed decision. That is why the legislative policy of the new Code is to bar employer influence of any kind when employees are seeking certification.[9] [Emphasis added.]

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

Similarly, the Ontario Board has held that,

> in view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.[10]

Although the Ontario Board has, at least historically, been more permissive toward "harmless" employer participation, there have been recent indications that a toughening of standards has occurred.

In the *Winson Const. Ltd.*[11] case, the Ontario Board held that "[*m*]*ere interference* by an employer in the selection of a trade union by employees is sufficient to constitute an offence"[12] under section 56 of the Code. The wording used by the Board seems to indicate that any interference whatsoever will be viewed unfavourably, but the facts of the case indicated that the employer, by originating an opposing petition, did participate in such a way that could be described as intimidation in any event.

Further, in the *Dylex Ltd.*[13] case, the Ontario Board held that an employer had contravened the Code through a combination of meetings, showcase displays, posters and letters to the employees. There were references to the lack of job security and to the possibility of the loss of benefits in a negotiated contract. There was also the threat of a loss of employment should a strike ensue. When all of these acts were viewed together, there was little

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[8] [1977] 2 Can. L.R.B.R. 218, [1977] B.C.L.R.B. Decisions No. 32/77 (Baigent).

[9] *Id.* at 228 (Can. L.R.B.R.), 24 (B.C.L.R.B.).

[10] *Piggott Motors (1961) Ltd.* (1962), 63 C.L.L.C. ¶ 16,264 at 1130 (MacLean).

[11] [1977] 1 Can. L.R.B.R. 138, [1976] O.L.R.B. Rep. 714 (Springate).

[12] *Id.* at 143 (Can. L.R.B.R.), 719 (O.L.R.B.) [emphasis added].

[13] [1977] 2 Can. L.R.B.R. 171, [1977] O.L.R.B. Rep. 357 (Springate).

doubt that employer interference had occurred. Finally in the *Viceroy Const. Ltd.*[14] case, after acknowledging the employer's dominant position due to his freedom to advance, preserve, impede or terminate the employment of an individual, the Ontario Board indicated that two employer letters and attached clippings containing references to the possibility of lengthy strikes, the unavailability of unemployment insurance, the potential loss of jobs, the right of the employer to hire new employees and the possibility of plant closure all combined to create an intimidating posture.

The landmark case under the federal statute is *Taggart Service Ltd.*[15] In that case, the federal Board adopted the strict view of the Ontario Board which had been expressed in the *Sun Tube Ltd.*[16] and *Wolverine Tube*[17] cases in the early 1960's:

> An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in the representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expression of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees.... He should take care that such expressions of views do not constitute and may not reasonably be construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere....[18]

It is interesting to note that the federal Board in the *Taggart* decision did not even mention the provisions of the *Canadian Bill of Rights*[19] which had been enacted four years earlier. The provision relating to free speech was finally mentioned in the 1975 Board decision of *City and Country Radio Ltd.*[20] In that case, the employer had often directly and indirectly indicated his negative attitude toward unions. He had also addressed a "captive audience," dismissed a number of pro-union employees and circulated memos to the employees.[21]

In its reasons, the Board expressed the opinion that its decision in *Taggart* had been the correct approach and that there was no incompatibility between it and the provisions of the *Canadian Bill of Rights.* In its opinion, section 184(1)(a) of the Labour Code of Canada "can be 'sensibly construed and applied' so that it does not abrogate, abridge or infringe the terms ... of the Canadian Bill of Rights, that is, the freedom of speech of an employer."[22] The employer is free to express his opinions and give facts "insofar as these directly affect him and to make appropriate reply to propa-

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[14] [1978] 1 Can. L.R.B.R. 22, [1976] O.R.L.B. Rep. 562 (Springate).

[15] (1964), 64(3) C.L.L.C. ¶ 16,015 (Brown).

[16] [1962-63] O.L.R.B. Rep. 28.

[17] (1963), 63 C.L.L.C. ¶ 16,296 (MacLean).

[18] *Supra* note 15, at 687-88.

[19] R.S.C. 1970, App. III (as am.), s. 1.

[20] [1975] 2 Can. L.R.B.R. 1, 75 C.L.L.C. ¶ 16,171 (Lapointe).

[21] *Id.*

[22] *Id.* at 7 (Can. L.R.B.R.), 1263 (C.L.L.C.).

ganda directed against him. . . ."[23] This defence, however, must not turn into uncalled-for intervention or interference.

The federal Board has indicated subsequently that the employer may also "accurately publicize the *existing* terms and conditions of employment [b]ut . . . must not make or imply any promises. . . ."[24] The Board seems to perçeive the employer's role as one of a purveyor of facts; however, the instant that interpretation or prediction appears in his comments or actions, the employer has undoubtedly overstepped the boundaries of the Code. In conclusion, it seems that over the last five years, there has developed a common ground that if there is any freedom of speech in Canada in relation to union organizing campaigns, it is certainly restricted to very innocuous mutterings (although it can be argued that the federal Board is more forgiving of "slight" indiscretions).

IV. SPECIFIC TYPES OF PROHIBITED BEHAVIOUR

It has become trite to observe that each case is different but that *caveat* is critical here. Often, one type of behaviour is accompanied by other acts. In some cases it was prohibited, but if it had been done in isolation or even in different circumstances, it is conceivable that it would have been permissible.

A. *Harassment, Intimidation and Surveillance*

Intimidation and harassment at work to the point that an employee quits his job constitutes a violation of the Code and is tantamount to a dismissal.[25] Similarly, any aggressive behaviour and undisciplined comments that have the effect of making an employee feel he is being intimidated or harassed are strictly prohibited as, for example, where a manager screamed and yelled at an employee and continually broke promises he had made to her.[26]

Inflexibility or intransigence on the part of the employer will also constitute intimidation under some circumstances. The British Columbia Board found this unfair labour practice in the *Robinson Little Ltd.*[27] case where the employer reacted to the union's organizational attempts with sarcasm, censure, heavy-handed tactics, continuous criticism, increased job surveillance and invitations to the staff to his home.[28] Close surveillance of the conversations and activities of union organizers may also constitute coercion.[29]

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[23] *Id.* at 7 (Can. L.R.B.R.), 1264 (C.L.L.C.).

[24] *Bank of Nova Scotia, Selkirk Branch*, [1978] 1 Can. L.R.B.R. 544 at 551 (Dorsey).

[25] *Fairmont Hot Springs Resort*, [1975] B.C.L.R.B. Decisions No. 56/75 (Morrison), [1976] B.C.L.R.B. Decisions No. 64/76 (Morrison)

[26] *Reddi Gas Propane Ltd.*, [1974] 1 Can. L.R.B.R. 544, [1974] B.C.L.R.B. Decisions No. 33/74 (Peck), [1974] B.C.L.R.B. Decisions No. 112/74 (Moore).

[27] [1975] B.C.L.R.B. Decisions No. 21/75 (Morrison), *aff'd* [1975] 2 Can. L.R.B.R. 81 (Weiler).

[28] *Id.*

[29] *Id.*

B. *Promises of Improved Conditions of Employment*

An indication from the employer that future negotiations will be much easier if the union does not get certified, has been held to violate various Codes.[30] Promises of stock options[31] or increased wages[32] are similarly prohibited. In fact, merely calling a meeting to discuss potential improvements in the conditions of employment has been held to be an unfair labour practice.[33]

C. *Threats of Reprisal*

Threats to discontinue operations,[34] to declare bankruptcy or to move a plant to another location[35] have been held to be coercive and intimidating as well as undoubtedly constituting general interference. The mere fact that the threats are veiled and can only be discovered after a careful analysis of what was said will not excuse the employer.[36] In the *Viceroy*[37] case, the Ontario Board noted:

> Fire, flood and other external conditions may also cause plants to close, but the employer has chosen to put before the eyes of its employees the example of a plant closing for the alleged purpose of destroying a union. The resulting suggestion, however factual, that some employers are prepared to destroy employees' jobs in order to destroy their union is an object lesson not wasted on employees of normal sensitivity. It is a statement by example that could reasonably be perceived by the employees as a clear threat to their jobs.[38]

The Boards in dealing with the free speech provisions have not attempted to draw distinctions between the meanings of threat and intimidation. It is sufficient to observe that there is considerable overlap between the two. Other types of prohibited economic threats include threats of lay-offs,[39] shorter working hours[40] or the loss of job security or other benefits.[41]

D. *Interrogation of Employees*

One of the most interesting areas related to the question of employer free speech is the issue of whether an employer is able to make inquiries of

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[30] *McCoy Bros. Ltd.*, [1977] 1 Can. L.R.B.R. 450, [1977] B.C.L.R.B. Decisions No. 9/77 (Munroe).

[31] *Supra* note 25.

[32] *Cam Chain Ltd.*, [1975] 1 Can. L.R.B.R. 187, [1974] B.C.L.R.B. Decisions No. 138/74 (Moore); *Gestetner (Canada) Ltd.*, [1971] O.L.R.B. Rep. 62 (Egan); *Hostess Food Prod. Ltd.*, 75 C.L.L.C. ¶ 16,175, [1975] O.L.R.B. Rep. 218 (Boscariol); *J.E. Martel & Sons Lumber Ltd.*, [1972] O.L.R.B. Rep. 811 (Boscariol); *Seven-Up (Ontario) Ltd.*, [1970] O.L.R.B. Rep. 198 (O'Shea).

[33] *Supra* note 8.

[34] *Supra* note 30.

[35] *Cam Chain, supra* note 32.

[36] *Bell & Howell Canada Ltd.*, [1968-69] O.L.R.B. Rep. 695 (Brown); *Kernohan Lumber & Sash Ltd.*, [1977] O.L.R.B. Rep. 676 (Davis).

[37] *Supra* note 14.

[38] *Id.* at 27 (Can. L.R.B.R.).

[39] *General Mills (Canada) Ltd.*, File No. 7411-74-R (Ont.); *Mink-Dayton Inc.* (1967), 166 N.L.R.B. 604 (McCulloch, U.S.).

[40] *Mink-Dayton, id.*

[41] *Supra* notes 15-17.

his employees concerning the events of an organizational campaign. If the surrounding circumstances are such that the questioning amounts to coercion or intimidation, the Boards will intervene.[42] In the British Columbia case of *Bulkley Valley Forest Ltd.*,[43] the manager called two employees into his office and questioned them extensively concerning the union's activities. It was felt that this was an overt act which gave the appearance of opposition to the union organizing activity and should be prohibited.[44] Similarly, where an employer visited an employee at his home and the employee then submitted his resignation from the union, it was concluded that the interrogation had obviously intimidated the employee.[45] It appears that there may be room for an innocent question of an employee about what generally is happening but any direct questions concerning his own opinions or membership status will lead the Board to conclude that the employer is interfering.[46]

E. *Institution of a Petition*

While strictly not part of the free speech question, the circulation of a petition that solicits anti-union support by an employer borders on expression of opinion and hence will be treated here. Employers should not become active participants in the solicitation of employee dissatisfaction.[47] Obviously, if the employees are intimidated or coerced into signing, there is a violation. The mere fact that an employer is aware that a petition is being circulated by a group of employees and does nothing to stop it, however, is not an unfair labour practice.[48]

In some earlier Ontario cases, management's participation in the circulation of a petition was found merely to undermine the purpose of the petition rather than to constitute an unfair labour practice itself. Thus, a petition requesting a vote, even though a majority of employees had signed union cards, would be rejected because of management's participation.[49] Recently however, the Ontario Board seems to have taken a stronger stand. In the *Winson* case, it was held that employer involvement in the origination, preparation or circulation of a petition itself constituted an unfair labour practice.[50]

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[42] *Supra* note 16; *Bank of Montreal, Tweed Branch*, [1978] 2 Can. L.R.B.R. 123, 26 Di 591 (Dorsey, Can.).

[43] [1976] 2 Can. L.R.B.R. 453, [1976] B.C.L.R.B. Decisions No. 17/76 (Peck).

[44] *Id.* at 456 (Can. L.R.B.R.).

[45] *Kidd Bros. Produce*, [1976] 2 Can. L.R.B.R. 304, B.C.L.R.B. Decisions No. 53/76 (Moore).

[46] *Cam Chain, supra* note 32.

[47] *Supra* note 5, at 988; *Langley Advance Publishing Co.*, [1974] B.C.L.R.B. Decisions No. 139/74 (Weiler).

[48] *Quadra Mfg. Inc.*, [1974] B.C.L.R.B. Decisions No. 97/74 (Moore).

[49] *Rubbermaid (Canada) Ltd.*, [1967-68] O.L.R.B. Rep. 336 (O'Shea); *New Ontario Dynamics Ltd.*, [1975-76] O.L.R.B. Rep. 845 (Adams).

[50] *Supra* note 11.

F. *The Holding of a Meeting*

This is one instance in which there seems to be a significant difference among the Boards. In British Columbia, a meeting to discuss union organizing has, in and of itself, been held to contravene the Code regardless of the content of the statements made. The Board seems to view the mere presence of management as interference and, in most cases, also coercive.[51]

In some jurisdictions, the Boards seem to prefer to deal with the *effects* of the meeting. Anything which results from such an event is viewed with great suspicion; for example, the Boards will often dismiss employee petitions that originate following a meeting with management.[52] In *New Ontario Dynamics*,[53] the Ontario Board noted that:

> such meetings convey the anti-union sentiments of the management regardless of their content and, because of this, tend to taint the following efforts of employees who decide to oppose the application. In fact the very formality of holding such meetings demonstrates an employer's concern, and may, in the eyes of other employees, align with management those employees subsequently circulating a petition.[54]

Of course, the repeated use of the "captive audience" technique when combined with other coercive practices will constitute an unfair labour practice.[55] In a case where a meeting is held, but the Board is convinced there really was no pressure on employees to attend, the employer may be on safe ground.[56] It may be difficult to convince the Board that the employees actually had a legitimate choice, however. The Nova Scotia Board in the now-famous *Michelin Tire*[57] case has adopted the position that an employer is free to express his views at meetings unless they actually constitute threats or undue influence.

The federal Board will review both the context and content of the meeting, but it appears that it automatically takes a very dim view of the use of the captive audience technique. In the *City and Country Radio*[58] case, concern was expressed over the fact that the employee does not have the option of "turning off" the employer. Therefore, when a meeting is combined with any other suspicious behaviour, there is likely to be a finding of an unfair labour practice. During the last couple of years, the federal Board has had to wrestle with this specific problem during the organizational drives in the banks; in a number of these cases, it has found violations of the Code.[59]

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[51] *Supra* note 25.

[52] *Bulk-Lift Systems Ltd.*, [1960-61] O.L.R.B. Rep. 431; *Travelaire Trailer Ltd.*, [1970] O.L.R.B. Rep. 829 (Brown); *Hayes Steel Prod. Ltd.*, [1964] O.L.R.B. Rep. 30.

[53] *Supra* note 49.

[54] *Id.* at 851.

[55] *Supra* note 16; see also *Savage Shoes Ltd.* (1960), 60 C.L.L.C. ¶ 16,178 (Reed, Ont.).

[56] *Greb Ind.*, [1979] 2 Can. L.R.B.R. 56 (Furness, Ont.).

[57] *Michelin Tires (Canada) Ltd.*, [1979] 2 Can. L.R.B.R. 388 (Christie).

[58] *Supra* note 20.

[59] See, *e.g.*, *Bank of Montreal, Tweed, supra* note 42; *Bank Canadian National*, File 745-357, Decision No. 189 (Foissy).

G. *Time Restrictions*

In Ontario, the rights of the employer (and the union) are further restricted during a period immediately preceding the representation vote. The Ontario Board has the power (and usually uses it) to direct that even innocent communication cannot occur for a seventy-two hour period immediately before the vote. This prohibition is virtually absolute and *any* violation of it, regardless of the quality or the likely effect of the communication, may bring severe penalties (such as the holding of a new vote).[60] In cases where the rule has been broken accidentally (for example, where mail was delayed unexpectedly), the Board may overlook the violation if in its opinion, no serious harm was done. There is, however, a heavy onus on the violator to prove that it was accidental and that it did not have serious repercussions.[61]

In the United States, there is a similar restriction known as the *Peerless Plywood*[62] rule. The rule explicitly establishes that "employers and unions alike will be prohibited from making election speeches *on company time* to massed assemblies of employees within twenty-four hours before the scheduled time for conducting an election. Violation of this rule will cause the election to be set aside whenever valid objections are filed."[63] The effect of this type of prohibition is to limit last minute assaults when the other side is denied a full opportunity to contest the points made. It is certainly a useful device but does not really solve the major questions in this area.

V. THE PERMISSIVE SECTIONS

As noted previously, some Codes contain provisions that seem to open the door for some type of employer involvement. Section 56 of the Ontario Code, for example, contains a clause which expressly guarantees the employer's right of free speech provided that it does not amount to coercion, intimidation, threat, promises or undue influence. The Ontario cases previously examined all were decided in the face of this provision. Its impact on the Board seemed greater in the years prior to 1975. In that period the Board seemed more willing to allow some degree of politicking. The test employed in deciding whether there had been a section 56 violation was whether the employer's statements would be considered by the average employee in the context that they were made as ordinary electioneering propaganda or whether they would impede his ability to express his true wishes, which would destroy the effect of a representation vote.[64] The Board had

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[60] See *Warkenhut of Canada Ltd.*, [1975-76] O.L.R.B. Rep. 738 (Armstrong); Automatic Electric *(Canada) Ltd.* (1961), 61 C.L.L.C. ¶ 16,226 (Finkelman).

[61] See *Hostess Food, supra* note 32; *Waterloo County Health Ass'n*, [1965-66] O.L.R.B. Rep. 121; *Windsor Telephone Answering Service*, [1973] O.L.R.B. Rep. 460 (Brown); *Automatic Electric, id.*; *Komoka Nursing Homes Ltd.*, [1973] O.L.R.B. Rep. 28 (O'Shea); *Kralinator Filters Ltd.*, [1966-67] O.L.R.B. Rep. 312 (Egan); *XDG Ltd.*, [1975-76] O.L.R.B. Rep. 936 (Furness).

[62] *Peerless Plywood Co.* (1953), 107 N.L.R.B. 427 (Farmer); see also *Mallory Capacitor Co.* (1967), 167 N.L.R.B. 647 (Fanning, U.S.).

[63] *Peerless Plywood, id.* at 429 [emphasis added].

[64] *Stauffer-Dobbie Ltd.* (1959), [1949-59] 1 C.L.L.C. ¶ 18,147 (Finkleman).

indicated that it would give the employer some lee-way, for it did not wish to "police election campaigns or to consider the truth or falsity of campaign literature or speeches unless the ability of the employees to evaluate such literature or speeches is impaired."[65] In one case, the employer sent two letters to the employees, but these did not contain what could be considered coercive statements. The Board held that in the absence of any intimidation, it would not police or censor propaganda; that was the task of the opposing party. Exaggeration, inaccuracies, partial truth, name-calling and falsehoods may be excused as legitimate election tactics as long as they are not so misleading as to prevent the exercise of the employees' free choice;[66] employees must be credited with a modicum of common sense.[67] From more recent decisions, however, it would appear that the Ontario Board is now more likely to prohibit propaganda campaigns although an employer is still entitled to express his views and is not confined to mere platitudes.[68]

In British Columbia, the original Labour Code enacted by the New Democratic Party government in 1973 did not contain any such permissive provision. The Social Credit government amended the Code in 1977; the changes included section 3(2):

> Nothing in the Act shall be so interpreted as to limit or otherwise affect the right of the employer... (g) to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business....[69]

The industrial relations community anxiously awaited an indication from the Board as to whether this amendment would require a change in the Board's approach but that opinion was not quickly forthcoming. The Board did use the section as a further basis for permitting direct employer contact with employees during negotiations,[70] but it had already permitted this in the absence of this section.[71]

In April, 1980, the Board finally was faced with the issue in the *Delta Optimist*[72] case. The source of the complaint was a number of activities carried out by the publisher of a newspaper. First of all, he asked three employees whether there was a union drive occurring and then specifically whether each of them had joined. Second, he called a meeting of the staff during working hours, addressed the employees for several minutes and produced a document opposing union representation for the employees to sign if they wished. Finally, following the meeting, he asked specific individuals

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[65] *Id.* at 1790.

[66] *Alcan Bldg. Ltd.*, [1971] O.L.R.B. Rep. 806 (O'Shea).

[67] *Id.* at 808; see also *Savage Shoes, supra* note 55; *supra* note 64.

[68] *Supra* note 56.

[69] *Labour Code of British Columbia Amendment Act, 1977*, S.B.C. 1977, c. 72, s. 2 substituting and repealing s. 3(2) of the *Labour Code of British Columbia*, S.B.C. 1973 (2nd Sess.), c. 122. The current *B.C. Code* contains a substantially similar provision [s. 3(3) (g)].

[70] *B.C. Sugar Refining Co.*, [1978] B.C.L.R.B. Decisions No. 49/78 (Weiler).

[71] *Insurance Corp. of B.C.*, [1978] 1 Can. L.R.B.R. 53, [1977] B.C.L.R.B. Decisions No. 59/77 (Peck).

[72] [1980] 2 Can. L.R.B.R. 227, [1980] B.C.L.R.B. Decisions No. 26/80 (Germaine).

to sign. Subsequently, some of the employees were dismissed. After failing to solve the issue through the use of informal hearings, the British Columbia Board issued a formal decision in which it reviewed previous decisions and dealt with the amendment. The employer claimed that three of his remarks were protected by this section; these statements were to the effect:

(1) that he was grateful for the loyalty of the employees who informed him of the union's efforts;

(2) that if the union was successful he might have to lay off employees; and

(3) that he had earlier refused an offer to buy the business because the firm making the offer had purchased another suburban newspaper and had then closed its printing shop.

The Board torpedoed these arguments. First of all, it held that the rights set out in what was then section 3(2)(g) "were not intended to reduce or impair the scope of the prohibitions against a wide variety of unfair labour practices."[73] Second, where a statement of fact is coercive, the "protection afforded an employer by section 3(2)(g) must depend, therefore, upon the context in which the facts are communicated and, given that context, the probable impact of those communications."[74]

In the result, the employer was found guilty of coercion on all counts:

> [W]e conclude that in relating this information in the context of the other statements made at the meeting, it was Bexley's purpose to induce the employees to abandon their support of the Union.... Bexley's purpose in calling the meeting and in making the statements he did, including his reference to an unsuccessful offer to purchase the Optimist, is established by the content of the document Bexley asked the employees to sign. Rather than merely indicating that the signatories had not joined any union (which was Bexley's stated purpose in requesting the signatures), the document went on to indicate that the signatories did not want union representation....
>
> Nor is there any doubt about the intimidatory character of this meeting. A number of Union witnesses testified that they were frightened, felt pressured and were concerned about the future of the Optimist and their employment as a result of the sentiments expressed by Bexley during the meeting....
>
> Bexley approached the three typesetters and he did so by pointing a finger at each of them individually and demanding in an agitated manner whether they were going to sign the petition.... [S]uch conduct, including as it did physical gestures to emphasize his request that the employees sign a document opposing the Union, must also be recognized as coercive and as reasonably having the effect of influencing an employee to refrain from supporting a trade-union.[75]

Therefore, it appears on the basis of this decision that any hope inspired by the SoCred amendment in the hearts of employer free speech proponents was premature, to say the least. Ironically, the federal Board, which seems to have been the most permissive of the large Boards, does not have in its legislative mandate any express statement of employer's rights.

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[73] *Id.* at 238 (Can. L.R.B.R.).

[74] *Id.*

[75] *Id.* at 239 (Can. L.R.B.R.).

VI. DECERTIFICATION APPLICATIONS

In order to complete the discussion of employer free speech in the case of union organizing drives, the issue of decertification applications must be addressed. It is safe to say that the Boards are even more restrictive towards employers when it comes to activity that can be viewed as encouraging employees to remove an existing trade-union certification. In some jurisdictions the Board is not bound even by a vote of the employees if it feels there has been employer interference.[76] In other jurisdictions the vote is binding but before the Board orders the decertification vote, it must determine whether the application petitions were "voluntarily signed".[77] This gives the Board the leverage it needs to prevent undesirable interference.

As with unfair labour practices during organizational campaigns, each case relating to decertifications is different. It is, however, useful to look at some of the typical behaviour that would likely be in violation of the various Codes in the country. The key ingredient is, once again, the necessity of getting at the true wishes of the employees.[78] Any activity which is viewed as an invitation to the employees from the employer to abandon the union is unacceptable.[79] This would include:

(1) a strong speech against the union to a captive audience delivered by a principal of the company;[80]

(2) the circulation with management approval (even if tacit) of the decertification petition on company premises during working hours;[81]

(3) an implication by the employer that the presence of the union is preventing an imminent wage increase;[82]

(4) the clandestine interrogation of the employees by the employer or his agent;[83]

(5) a continuing refusal to bargain in good faith with the union which leads to discontent among the rank and file;[84]

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[76] *E.g.*, British Columbia.

[77] *E.g.*, Ontario.

[78] See, for instance, *International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905*, [1977] O.L.R.B. Rep. 534 (Springate); *Westinghouse Canada Ltd.*, [1977] O.L.R.B. Rep. 651 (Springate); *J.A.K. Electrical Contractors Ltd.*, [1977] O.L.R.B. Rep. 275 (Burkett); *N-J Spivak Ltd.*, [1977] O.L.R.B. Rep. 462 (Burkett); *CCH Canadian Ltd.*, 77 C.L.L.C. ¶ 16,094, [1977] O.L.R.B. Rep. 346 (Picher); *Armbro Materials & Const. Ltd.*, [1976] O.L.R.B. Rep. 743 (Picher); *Bentley's Sporting Goods Ltd.* (1959), 59 C.L.L.C. ¶ 18,129 (Finkelman, Ont.).

[79] *Peel Block Ltd.* (1963), 63 C.L.L.C. ¶ 16,277 (MacLean, Ont.).

[80] *Mitten Ind. Galt Ltd.*, [1975-76] O.L.R.B. Rep. 154 (Carter).

[81] *C.J.R.P. Radio Provinciale Ltée*, [1977] 2 Can. L.R.B.R. 238 (LeBel, Can.).

[82] *Dominion Directory Ltd.*, [1975] 2 Can. L.R.B.R. 345, [1975] B.C.L.R.B. Decisions No. 65/75 (Baigent).

[83] *Kootenay Savings Credit Union*, [1978] 1 Can. L.R.B.R. 40, [1977] B.C.L.R.B. Decisions No. 54/77 (Peck).

[84] *Supra* notes 45, 82; *Imperial Optical Ltd.*, [1976] B.C.L.R.B. Decisions No. 67/76 (Morrison).

(6) the use by the dissident employees of counsel who normally acts for the employers;[85]

(7) the payment by the employer of some of the expenses incurred by the group of employees seeking decertification;[86]

(8) the attendance by the employer or senior management at a meeting of the employees called to discuss the decertification issue,[87] particularly if they explicitly attempt to persuade the employees to resign from the union;[88]

(9) the alteration of the company's payroll by including employees of a non-union company on the payroll of the union company to increase the base for a decertification petition;[89]

(10) apparent favouritism shown by management to employees who were known to be anti-union by dealing with them outside the terms of the collective agreement; this could include the payment of higher wages, better working conditions, or promises of advancement;[90]

(11) the creation of impediments to frustrate the union's attempts to communicate with the employees;[91] and

(12) the submission of many of the employees' letters of resignation[92] or the petition itself directly to the management[93] or Board of Directors.[94]

In conclusion, it must be noted that the Boards will not dismiss applications purely to punish the employer for his indiscretions where there is virtually no support left among the membership.[95] Unions do not have a property right in their certifications,[96] but the Boards have nevertheless repeatedly given employers a very strong and clear sign that their participation in decertification drives is most unwanted.

VII. REMEDIES

The various Boards have used a number of remedies to combat employer interference in union affairs. The first is of course the cease and

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[85] *Wilson-Munroe Co.*, [1976] O.L.R.B. Rep. 385 (Boscariol); *London Drugs Ltd.*, [1974] B.C.L.R.B. Decisions No. 149/74 (Moore).

[86] *London Drugs, id.*; *Imperial, supra* note 84.

[87] *Id.*

[88] *Supra* note 81.

[89] *Western Steak Restaurants Ltd.*, [1974] B.C.L.R.B. Decisions No. 124/74 (Moore).

[90] *Imperial, supra* note 84.

[91] *Id.*

[92] *Supra* note 81.

[93] *Genwood Ind. Ltd.*, [1976] O.L.R.B. Rep. 417 (Picher).

[94] *York Condominium Corp. No. 77*, [1977] O.L.R.B. Rep. 643 (Picher).

[95] *Labour Relations Bd. of Saskatchewan* v. *The Queen*, [1956] S.C.R. 82, [1955] 5 D.L.R. 607, *aff'g* [1954] 4 D.L.R. 359, 13 W.W.R. (N.S.) 1, 19 C.R. 308 (Sask. C.A.); *Fine Arts Dental Laboratories Ltd.*, [1977] 2 Can. L.R.B.R. 161, B.C.L.R.B. Decisions No. 20/77 (Bone); *Dominion Directory Ltd., supra* note 82.

[96] *Imperial Oil Ltd.*, [1977] 2 Can. L.R.B.R. 243 at 247, B.C.L.R.B. Decisions No. 45/77 at 9 (Moore).

desist order. Unfortunately, these orders are effective only in limited circumstances. If an employer has knowingly or flagrantly violated the Code, it is questionable how much impact a cease and desist order would have on him. He may either be willing to take his chances with the Board in order to attempt to beat the union for financial reasons or because of his personal distaste for unions. In these cases the order probably has very little deterrent value. Further, an employer who is willing to face the wrath of the Board could engage in a campaign that is characterized by suddenness and brevity. In many cases, this would be the most effective type of campaign; to discourage this type of behaviour the Board must have other remedies available under the Code. This remedy is a *post facto* mechanism to abort existing violations and is most useful against innocent but erring employers. Where there are continuous breaches of the Code, it would be necessary for the union to return to the Board and seek other remedies.

Another method of countering employer involvement is to order a representation vote in circumstances where on the face of it the union does not have a sufficient number of cards. The holding of a vote is predicated on the assumption that the effects of the employer's practices have disappeared, so that the employees will feel they can honestly express their free will. The more serious and intimidating the behaviour of the employer, the longer it will have an effect on the minds of the workers. It does seem reasonable to conclude that the longer the period between votes, the more likely it is that the coercion will have become remote. This time delay may, however, work to the employer's advantage in that the union organizers may lose interest, the pro-union workers may leave (with management's blessing) or the entire issue of union representation may lose its appeal.

Many Boards possess the power "to rectify" any acts that have violated the Code. These provisions offer a great deal of latitude to the Boards and have been employed to allow the union to address the employees on the company premises, to hand out literature at the meeting and to return one more time before the vote to distribute further information.[97] This rectification power has also been used to award monetary damages,[98] to require the employer to deliver a complete list of the names, addresses and telephone numbers of the employees to the union[99] and to issue a "make-whole" remedy.[100] This puts the union in the position it would have been in had the unfair labour practices not occurred.

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[97] *Supra* note 5, at 985; *supra* note 72; *Radio Shack*, [1980] 2 Can. L.R.B.R. 99; 80 C.L.L.C. ¶ 16,003 (Adams, Ont.).

[98] But only where other remedial orders would be ineffective or disobeyed; *CLRA* v. *IBEW*, [1977] 1 Can. L.R.B.R. 203, [1976] B.C.L.R.B. Decisions No. 75/76 (Munroe).

[99] *British Columbia Ry.*, [1976] 1 Can. L.R.B.R. 470, [1976] B.C.L.R.B. Decisions No. 20/76 (Weiler). It should be noted that this case was decided under an earlier version of s. 4 of the *B.C. Code*, S.B.C. 1973, c. 122 (as am. by S.B.C. 1974-75, c. 33, s. 3) which expressly authorized this remedy. It is suggested, however, that this remedy could still be used under s. 8(4) (b) of the present *B.C. Code*, R.S.B.C., 1979, c. 212, and this case could offer guidance as to when the remedy would be appropriate.

[100] See, *supra* notes 27 and 45 for a discussion of when these orders are appropriate. It should be noted that these cases both involved *more* than the exercise of the right of free speech.

One of the most severe and effective disincentives to the commission of unfair labour practices would be to automatically certify the union, thus removing the benefits of this unlawful conduct. This remedy, if used indiscriminately, however, could result in certifying unions in places where the employees really do not want them. Therefore, the Boards that do possess this remedy have been hesitant to use it except in cases where there was a real organizing momentum built up and it was *likely* that the union would have obtained a majority in the absence of the employer interference.[101]

VIII. OBSERVATIONS AND CONCLUSIONS

The major objective in this area of labour law is to strike a balance between the right of the employer to express his opinions and the right of the employees to organize without undue employer influence. There is particular concern about the "emotional" impact of any communication from the employer because this is the factor which ordinarily interferes with the exercise of a free and enlightened choice by the employee. A number of restrictions designed to lessen that impact are in place in some jurisdictions and there are others which the writer feels should be considered.

A. *Restrictions on the Use of the "Captive Audience" Technique*

A captive audience is normally a very receptive one, for whatever reason, be it interest, fear or a combination of the two. The Board's choices in this area are essentially to continue to view this technique as inherently coercive and intimidating or to permit its use in limited circumstances. For example, if a company did wish to address its workers, it would have to provide equal time for the union to do so. It would seem that the latter approach, which is occasionally used in the United States, would not fit into the overall framework of industrial relations in Canada. The legislation, both federal and provincial, tends to avoid confrontation politics whenever possible, and the use of organized confrontations seems to be inimical to the philosophical underpinnings of the Codes in Canada.

Another approach, which to some degree faces the same problems, is to restrict an employer's communication about an organizational campaign to a "controlled meeting". If the employer wished to express his opinions, he could request the Board to call and supervise a meeting at which both management and the union could address the employees concerning the benefits and disadvantages of unionization. Perhaps, in such a setting, there would be less potential for coercive and intimidating behaviour, than in an open meeting.

There are a number of obvious problems with this approach. First of all, it would be a very time-consuming chore, and the Boards have enough to do. Even if the budget could be found to supply the manpower, this forum

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[101] *Robin Hood Multifoods Ltd.*, [1976] 2 Can. L.R.B.R. 206, [1976] O.L.R.B. Rep. 250 (Kates); *Connors Bros. Ltd.*, [1980] 2 Can. L.R.B.R. 318 (Harrington, N.S.); *Smith Beverages Ltd.*, [1974] 1 Can. L.R.B.R. 289, [1975] O.L.R.B. Rep. 956 (Burkett); *Consumer Pallet Ltd.*, 74 C.L.L.C. ¶ 16,129, [1974] B.C.L.R.B. Decisions No. 37/74 (Peck); *Cam Chain, supra* note 32; *supra* notes 5, 8, 11.

could offer the parties a chance to see "what they could get away with" with the result that the very thing that is to be prevented would actually be encouraged. Furthermore, although the Board would have a better "feel" for the circumstances of the communication, the actual decision as to whether certain statements actually contravened the Code would still be most difficult.

B. *Written Submissions*

If there is to be communication of any sort, one of the most reasonable and practical solutions would be for the Board to restrict communication to written submissions either by way of letter or public notice. In that way, much of the emotional impact that accompanies these interpersonal opinions would be diffused. Employers who merely wish to "give the employees the facts" should not be adverse to this suggestion. In this way, any reasonable facts and opinions could be expressed with a clear conscience, the employee would be exposed to "both sides of the story", and the concern of employers in this regard would be overcome.

Similarly, the union's concern about subtle and oppressive influence would be partially alleviated by the "cold" nature of the communication. If any "heat" did in fact exist, it would also be obvious to third parties, including the Board. This approach has the added advantage of preventing disputes over the actual contents of the statements should a violation of the Code be alleged.

C. *Ombudsman*

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

The Labour Boards in Canada have basically accepted the premise that employers should not be party to this dissemination of information because of their vested interest in the outcome of the organizational drive. The unions also have vested interests that may be contrary to the wishes of individual employees. What is required is a mechanism that ensures the employees are aware not only of their basic rights, but also of the limits within which they may exercise their freedom of choice. This is perhaps a responsibility for a Labour Ombudsman[102] to whom all employees could be referred in the event of an organizational drive by a trade-union. By law, a notice could be posted advising employees of their basic rights and providing the means of getting in contact with the Ombudsman. The employer in the event of questioning could then be limited to merely advising the employees of this method of obtaining correct information as to their legal rights.

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[102] Ss. 128-33 of the *B.C. Code* (not yet proclaimed into law) establishes the office of Labour Ombudsman.