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**NONUNION REPRESENTATION AND EMPLOYER INTENT:
HOW CANADIAN COURTS AND LABOUR BOARDS DETERMINE THE
LEGAL STATUS OF NONUNION PLANS**

Daphne G. Taras
Haskayne School of Business
University of Calgary

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Institute for Advanced Policy Research
University of Calgary
Calgary, Alberta
Canada

<http://www.iapr.com>
iapr@ucalgary.ca

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Correspondence: daphne.taras@haskayne.ucalgary.ca

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Daphne G. Taras
Professor of Industrial Relations
Institute for Advanced Policy Research and Haskayne School of Business
University of Calgary
2500 University Drive N.W.
Calgary, Alberta, Canada
T2N 1N4
Phone: 403-220-7846
Fax: 403-282-0095
e-mail: daphne.taras@haskayne.ucalgary.ca

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Nonunion Representation and Employer Intent: How Canadian Courts and Labour Boards Determine the Legal Status of Nonunion Plans

Daphne G. Taras

ABSTRACT: Nonunion employee associations are neither banned nor protected by Canadian law. Issues arise when the employer's intent, or the effect of these associations thwarts unions or deprives employees of their right to unionize. 30 Canadian cases between the 1960s and 2003 are examined. Three streams of cases are reviewed: (1) the treatment of employee associations when they apply for union status; (2) how nonunion associations collide with union organizing campaigns; and (3) a Supreme Court case that favoured nonunion association status for the national police force over the right to unionize. In this legal regime, it is important that employees have the right to freely choose to be represented by *bonafide* unions. Employers' activities must be constrained during union organizing periods. Canada's laws are powerfully crafted using a three-pronged approach to prevent employer activities that have the *intent, effect, or practice* of intruding in union organizing.

Employers operate nonunion employee representation systems for a variety of purposes. Managers may have a genuine desire for input from employees to make the business better. Managers wish to improve productivity and lower costs in order to remain competitive, and to achieve these goals they desire higher worker engagement and a leaner employment roster. Sometimes nonunion systems are operated to prevent unions from gaining a point of entry, and union avoidance is a common motivator. For some companies, attentiveness to employee needs has the welcome side-effect of decreasing the propensity of employees to unionize; while for other companies this is the primary motive for their human resource practices. If employees have a right to unionize, then a nonunion plan *clearly designed* to deprive them of this right is unethical and illegal. Even if the *effect* (but not the *intent*) is to lessen the ability to unionize, unions will find nonunion associations objectionable, and management will defend its practices by arguing that this is not deliberate. Hence, employer intent is important.

Employer intent is difficult to discern. First, often there are a variety of motives behind

representation plans - the notion that they are unidimensional poorly represents the aims of all but the most base or unsophisticated employers. Employee representation is one tactic in a panoply of management practices that interact with each other to form a larger human resource strategy. Second, as the representation plan evolves, it might be harnessed for different reasons to suit emerging firm challenges and accommodate new generations of workers and managers. Third, in any statutory regime that contains punishments for interfering with the rights of workers to unionize, managers are reluctant to compromise themselves by admitting to unfair labour practices and will downplay union avoidance objectives. It is very easy these days for managers who operate nonunion plans to say they are merely following decades of advice from the burgeoning human resource literature that has been extolling the virtues of high involvement. How does the law deal with employers who operate nonunion employee representation or participation schemes?

This article examines nonunion representation within a statutory regime that is relatively silent. In Canada, unions are protected by collective bargaining statutes, but nonunion systems are neither promoted nor banned.¹ Unlike the European Community, there is no works council system (Frege, 2001). Unlike the United States, there is no prohibition against groups of nonunion employees dealing with management regarding their terms of employment (LeRoy herein; Kaufman and Taras, 2000; Kaufman 1999; LeRoy 1999; Aaron 1992). Instead, there is latitude for employers to innovate a variety of nonunion vehicles. If the nonunion association ratifies a lengthy written deal with management, it may resemble a collective agreement but the legal status is quite different. Employees covered by such an agreement are considered to have individual contracts of employment with the employer, even though they are collectively applied (Taras, 1997a). Such employees would have to go to the courts to seek redress for a violation of

¹ Kaufman and Taras (2000, 4-7) discuss Canada-US differences in statutory treatment of nonunion representation systems. Taras (2000, 128-33) provides a comprehensive list of Canadian labour law provisions (including the provinces) with regard to definitions of labour organizations and prohibitions against management domination.

this contract. By contrast, a genuine collective agreement between a union and an employer has the protection of collective bargaining laws, and aggrieved parties would be directed to labour boards rather than the courts (MacNeil, Lynk and Engelmann, 2003; Adams 2004).

Every so often, one of these nonunion plans may collide with a union organizing drive or a determined pro-union employee, giving rise to difficult cases requiring labor boards or courts to determine employer intent. I examine 30 cases arising in multiple Canadian jurisdictions between the 1960s and 2003, seeking patterns that have guided jurisprudence on employer intent regarding nonunion systems.²

After a brief introduction to Canadian labour law, three distinct streams of cases involving nonunion representation are presented: (1) the treatment of employee associations when they apply for union status; (2) how nonunion associations collide with union organizing campaigns; and (3) the important Supreme Court case that favoured nonunion association status for the national police force over the right to unionize. Each section reviews the relevant cases and summarizes the legal approach to employer intent.

Canadian Labour Law

Canada fits comfortably within the Wagner Act model of industrial relations. Employees have the right to unionize, to bargain collectively, and to have protection through labour boards. Unfair labour practices for both unions and management are specified by statutes. Only one union can represent any group of employees, and generally speaking, a simple majority will determine whether the union gains representation rights for the whole of the bargaining unit (including employees who opposed unionization). To maintain labour stability, Canadian law prevents raids by other unions during the life of the collective agreement.

² These cases were selected first through a search of Quicklaw using keywords such as “nonunion plan,” “employee association” and similar permutations. Once a group of appropriate cases were located, I examined the cited cases within them to broaden the search. I stopped at 30 cases because the findings and fact situations became repetitive and there was little point in continuing beyond the point of saturation.

Canadian public policy is crafted to reflect the basic concern: Is the proposed union a “viable entity for collective bargaining purposes” (MacNeil et al, para 1.370). It must be fit to represent employees by establishing an independent, arms-length relationship with the employer. A trade union is defined by law as an organization of employees having collective bargaining among its purposes. In order to demonstrate that it is a *bona fide* trade union, the organization should show evidence of its constitution, by-laws, and activities.

A Canadian employer may not dominate, interfere with, or participate in the operations of a trade union. Note that it is permissible for an employer to conduct itself in such a manner with nonunion employee plans, but a trade union is protected from an overzealous employer.

It is not particularly relevant to the Canadian law as to exactly why, how, by whom, or to what end a nonunion association is formed – so long as it is not run to thwart unions. Canadian legal decisions rarely describe the actual representation system in any detail, using the term “association” to cover a broad range of structures and functions. These “associations” could be highly-structured and formal nonunion plans or amorphous forms such as town hall meetings or ad hoc committees. (This is in sharp contrast to US law, in which the exact character of the nonunion plan is of vital importance to the outcome of the case.)

Estimates of the extent of nonunion representation in Canada are that one-fifth of employees indicate that their worksites have a formal nonunion representation vehicle operating (Lipset and Meltz 2000, 226). However, cases involving such plans are surprisingly sparse.

1. Associations Seeking Trade Union Status

The first cases that began appearing with regularity involved representation plans that were seeking union status. In some cases, the employees had been operating within a plan for some time and wanted to transform it into a local independent union. In other situations, the employer was anxious to have the plan certified and conclude a collective agreement in order to repel a national or international union from organizing its workforce.

A typical early case arising in Ontario involved the attempts of a hospital staff association to become a local independent union (*Burlington-Nelson Hospital* [1962]).

In 1961, the applicant staff association adopted a constitution codifying its objectives as:

1. Recreational and Social
2. Improve interdepartmental relations and create “a harmonious working atmosphere”
3. Make recommendations to management regarding improving hospital service, working methods and conditions, safety, elimination of waste, etc.

The group always met on the employer’s premises with the employer’s permission. Notices of meetings were announced on the employer’s public address system.

The Ontario Labour Board dismissed the application, finding that the organization was employer dominated and also gently chiding the association to understand that there “may be some doubt” as to whether the third goal of the constitution would be sufficient to meet the test of trade union status that it is an “formed for purposes that include the regulation of relations between employees and employers” per Ontario law.

A subsequent series of cases involved employee associations that came to the Ontario Board for certification. Here there was little doubt that the associations wished to bargain collectively. Because they had held meetings on company premises with the permission of employers, or had used employers’ resources in association activities, they were found to be employer-dominated. This domination made them unfit for the purpose of collective bargaining, and their applications were dismissed. See, for example, *Kemp Products* [1966], and *Alco Compounders* [1979]. In some cases, an association purported to have concluded a valid collective agreement with the employer, but the Board found that it was not a true collective agreement and therefore did not constitute a bar to the application for certification by a competing trade union (*Beef Terminal* [1969]).

In *S.W. Fleming* [1964], a situation arose involving 71 unionized employees, some of whom were not satisfied with the manner in which their certified union represented their interests. A group of employees wanted to form an employees’ association to displace their union. They

met with their company President, who stated that he would give the association the same offer he had made to the union. A meeting was held in the plant at which both the pro-association employees and the President addressed employees and the President gave the impression that an association would receive more favourable treatment than the union had achieved.³ Management allowed a vote during working hours, in which employees indicated whether they wished to remain with the union or form an association. The company owned the ballot box and paper. The President and a pro-association employee toured the plant to solicit “secret ballot” votes. The association won a majority, and proceeded to adopt a constitution, elect officers, and welcome members. When the association sought status under the law, the existing union claimed intervenor status at the Labour Board. The Board found the employer’s conduct violated the law because the association was employer-dominated. A similar case arose a few years later (*Crowe Foundry* [1969]), in which striking employees sought to form an association and the employer cooperated in allowing for dues check-off for employees who returned to work, to the new association’s “benevolent fund.” The association wrote a constitution and went to the Board for certification. Again, the Board concluded that the association was employer-dominated and refused to certify it.

What if an employer is tempted to use the employee’s association as a shield against union organizing? That is, the employer voluntarily recognizes the association as a union, and enters into a collective agreement that has the effect of preventing any “raids” from *bona fide* unions during most of the life of the collective agreement. Concluding a valid collective agreement creates a pre-existing contract bar to another union seeking to organize workers. Here the case law is well established (e.g., *Delta Hospital* [1977], and *Sie-Mac Pipeline* [1991]). Labour boards have considerable scope to scrutinize the arrangements entered into between an

³ For an employer to interfere in employees’ attempts to decertify their union also is an unfair labour practice in Canadian law. In many of these Ontario cases, rather than tackling every issue that arose, the Labour Board tended to simply address whether or not the association could be certified, and made a decision based on the most pertinent and simplest of the many issues.

employer and a voluntarily recognized employee organization. For example, all labour codes contain provisions that prohibit employers participating in or interfering with the formation or administration of a trade union (similar or identical to the American *NLRA* Section 8(a)(2)) and this provision is essential to prevent sweetheart deals with ersatz unions. Boards can void any collective agreement where the bargaining agent does not genuinely represent workers or is management-dominated.

Labour boards consider six elements in making determinations about improper employer influence (Foisy, Lavery and Martineau 1986, 109-112 and *CJRC Radio Capitale Ltee* [1977]):

1. The applicant association is an independent union created in the wake of an organizing campaign by a recognized trade union.
2. The application association is created in great haste and recruits a majority of members very quickly.
3. The applicant association's meetings are held at the work place during working hours.
4. The applicant association recruits members during working hours, often with the knowledge and assistance of the employer.
5. The applicant association has few financial resources, but it can afford technical and professional help.
6. Management representatives attend the applicant union's meetings or encourage employees to attend.

In this line of cases involving applications of nonunion associations for union status, labour boards tend not to scrutinize employer intent. Rather, the actions and behaviours of the employer – regardless of intent – are carefully considered. Management counsel may argue strenuously that management innocently helped employees achieve their desired aims to work collectively, and had no anti-union motive, but this reasoning will not prevail if management took any actions that supported the establishment or ongoing activities of the associations. To achieve trade union status and the legal protections that are conferred upon union certification, employee associations must be free from the “taint” of employer participation, interference or domination.

Of course, the Canadian approach allows “tainted” nonunion organizations to exist, and allows management to meet and deal with them. However, without significant changes to their structures or activities, they can rarely become unions, and the employees who are represented by

them cannot consider themselves protected by collective bargaining statutes. The requirement that a transition request from a nonunion association to a union must come to labour boards with clean hands, free from any entanglement with management, is a difficult hurdle for most nonunion associations. The federal Labour Board lowered this hurdle considerably, declaring in *Royal Aviation* [2000] (affirming *CJRC* [1977]),

the fact that a union [in this case, an employee association trying to become an independent local union] may have been influenced by an employer at certain stages of its organizing campaign does not in itself constitute grounds not to grant certification to the union as long as, at the crucial moment when the Board decides on the fitness of the union to represent the employees at the bargaining table, there is clear evidence that, on the balance of probabilities, the union has asserted its independence vis -à-vis the employer (para. 26).

How can a nonunion association meet the requirement for independence? This question is especially perplexing, since the North American empirical evidence on the formation of nonunion associations over the last century clearly concludes that most associations are established with management encouragement of one kind or another (Kaufman and Taras 2000; US Department of Labor 1937; Canada Department of Labour 1921). As a practical matter, in these types of cases there is often another, *bona fide* independent union with intervenor status at the Board, offering compelling evidence of management domination in order to defeat its rival nonunion association.

In most situations, in order to become a legitimate union, the association would be well-advised to steer clear of management in all dealings involving its foundation, election of officers, drafting of a constitution and by-laws, and organizing of employees. Management should decline any invitation to assist the nascent organization. If the association did have management domination in its inception, it probably should reconstitute itself anew, as an independent entity. Often, the best and easiest strategy is to ally itself with a well-known national or international union and aid that union in organizing the workers. This eliminates the taint of management domination.

2. Nonunion Associations and Union Organizing

There is a continuum involving nonunion representation that captures much of the case law that is stimulated during union organizing. The continuum ranges from the opportunistic mentioning of a hypothetical future association in preference to a union, to the existence of a well-established and functioning nonunion association that pre-dated union organizing. I shall present the various scenarios beginning with the former and concluding with the latter situations. Most cases arise in Ontario, and this section will produce a fairly comprehensive portrait of one Canadian jurisdiction's treatment of nonunion representation.⁴

Cases in which an employee association is not pre-existing, but came into existence during the course of a union organizing campaign include *Homeware Industries* [1981] and *Upper Canadian Furniture* [1981]. In *Homeware*, *Zehr's* [1971] and *W. Bolen* [1973], the employers responded to union organizing by suggesting to their employees that they form their own employee associations. To suggest that an as-yet-unformed association is an alternative to a union is improper interference. The Board held in *Upper Canadian Furniture* that:

If there is a simultaneous union campaign then even if the employee association is not seeking certification an employer must exhibit considerable caution in his relationship with persons known to favour an employee association over the union... For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected. . . . Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of ... the Act. (para 38).

In the shadow of a union organizing campaign, labour boards will severely curtail the employer's free speech rights if he tries to initiate an employee association. Even situations in which

⁴ The Ontario treatment is not anomalous in the Canadian context. Each province, and the federal sector, have exclusive jurisdiction over matters involving employment and labour relations within their employment settings. Federal law does not trump provincial law. There are 11 jurisdictions in Canada, adding tremendous complexity to any study of Canadian labour relations. However, in broad strokes, the Ontario labour statute is similar to those of most Canadian jurisdictions. The two most important distinctions, for my purposes in this paper, are that Ontario (along with the federal statute, and the labour laws of British Columbia, Manitoba, New Brunswick and Nova Scotia) allowed labour boards to certify a bargaining agent without a representation vote when they felt the true wishes of employees could not be ascertained in a vote (if, for example, the employer committed egregious unfair labour practices). This practice was disallowed in Ontario in a 1998 amendment. The second distinction is the rapidity of Ontario's representation votes. Ontario labour law specifies that the vote must occur within five days of the union's application. This is extraordinarily rapid for such a large and complex jurisdiction.

employees responded to union organizing by suggesting to the employer that an inactive employee committee be reconstituted, a move warmly received by the employer which revived the committee, were found by the Ontario Board to be undue influence (*Seven-Up (Ontario)* [1970]).

In *Primo* [1982], the employer voluntarily recognized and bargained a purported collective agreement with an employee association in the shadow of the organizing campaign of a *bona fide* union. The *Primo* Association was formed by reviving an existing employee committee that developed after the trade union lost an earlier representation vote. The Board held that the employer's earlier support of the employee committee tainted the Association, and that it could not be certified as a union.

However, an employer preference to continue collective bargaining with an incumbent employee association was not found to be improper support or undue influence when the association had trade union status and a history of collective bargaining. (*Smith Beverages* [1975] and *Milltronics* [1981]).

An employer cannot, however, rush to voluntarily recognize trade union status of an incumbent association in order to prevent an external union from organizing, as it tried to do in *Primo* [1982]. In *Trent Metals* [1979], the Board commented:

The Board can think of no more meaningful support in the context of a bi-union contest of membership, as in this case, than the extension of recognition to one of the two unions. The effect of such recognition is to indicate the employer's desire to deal with that union to the exclusion of the other and to thereby chill, if not destroy, the organizing campaign of the unrecognized trade union. (para 8).

Hence the recipient of employer support was not allowed to have trade union status because the employer interfered with representation rights.

Sometimes employer intent is patently obvious. In *Seven-Up* [1984], the union commenced organizing in the summer of 1983, and filed 13 unfair labour practice complaints against Seven-Up in one month. There had been an employee Association in place since at least 1979, but this (correctly) was not considered to be a bar to union organizing by the union, the

company, the Association, or the Ontario Labour Board. However, in the fall of 1983, less than one week before the Board-supervised vote, the Seven-Up President sent a letter to each employee in the prospective bargaining unit, urging them to remain with the Association.⁵ The letter pointed out that “Your Association charges no dues whatever, that with the Association “you will be represented by your fellow employees” rather than “With a Union, outside persons move in to intervene,” and that the Association would “represent you regarding *any* problem – as it has in the past – of a personal or family nature.” Further, the President wrote that “Over the past years your Association has served you very well – and its services will improve in the future.”

Union counsel argued that this letter constituted the fourteenth violation. The employer argued that the mere expression of the employer’s views (expressly reserved in section 64 of the Ontario *Labour Relations Act*– as well as in the statutes of many other Canadian jurisdictions) was not an unfair practice, as the employer did not make any threats or promises. The Board found objectionable three elements of the letter: first, that “*any* problem” implies that there might be some issues over which the company would not negotiate with the union but would with the Association; second, the promise that the Association’s “services will improve in the future” seems to be a reward for voting against the applicant union; and third, that the employer misrepresented the vote as a choice between two bargaining agents in order to express its preference for the Association. In fact, the only option on the Board-supervised vote was for or against the applicant union. In the atmosphere of significant employer interference, a vote was held and 150 out of 160 eligible members of the prospective bargaining unit voted; 73 favoured the union and 77 opposed it. Because of employer’s activities, the Board set aside this vote and

⁵ A similar fact situation, with a similar outcome, is in the earlier *Bolen Enterprises* case before the Ontario Labour Board in 1973. In *Faultless-Doerner Manufacturing* [1980], following an unsuccessful attempt by an outside union to gain certification, management referred an existing employee association to a “union buster” who provided a draft of the by-laws for the association. The right to strike was discussed with management. The association’s organizational meetings were held on company premises and on paid time. The Board dismissed the association’s application for union certification.

destroyed the ballots, and ordered a number of remedies including giving the union greater access to the employees and ordering a new representation vote.

The words of the Ontario Board in the *Seven-Up* [1984] case are an excellent summary of the Canadian approach to the legality of employee associations:

Here the Association was formed long before the applicant commenced its current organizing campaign. The respondent's past dealings with it were part of its approach to employee relations. Provided it is not done in the shadow of a trade union organizing campaign, an employer may legitimately deal with and, indeed, encourage the formation of an employee committee or association as a vehicle through which it conducts its employee relations, so long as there is no pretense by either the employer or the Association that the latter is a trade union. (para 32)

In Canada, nonunion employee associations are not illegal *per se*:

So long as neither the employer nor the association pretends the latter is a trade union [as defined by labour relations statutes], the mere existence of the association is not a legitimate ground of complaint by a trade union seeking to organize the employer's employees, and that is so even if the association is clearly under the control of the employer. When the employer expresses a preference for continued dealings with such an association, and no one makes any pretense that the association is a trade union, this no more violates [the law allowing free speech] than would an expression of preference for the non-union status quo made by an employer during a trade union campaign to organize his employees. The pre-existence of an employer supported employee committee or association is, however, an additional potential avenue for improper employer interference in a trade union organizing campaign... If the employer responds to a trade union organizing campaign by changing the character or consequences of its dealings with a pre-existing employee committee or association, or by threatening or promising to do so, that behaviour may constitute [an unfair labour practice]. (para 32)

The "taint" of employer support renders almost all employee associations inappropriate for the purpose of collective bargaining. However, labour boards tend not to disband these associations. They simply refuse to certify them, and will not add them to the ballot in representation elections. Sometimes, the Board also directs the employer to cease supporting the nonunion association.

Where employee associations pre-exist the union organizing period and form a part of the worksite culture, unions can have an exceedingly difficult time organizing. In *Primo* [1983], the UFCW had tried between 1975 and 1979 to organize employees, without success. The union

tried again in 1983, and ended up competing against the bargaining gains made by a nonunion association (the Primo Workers' Committee). The UFCW organizer (in paras. 8 and 9) describes the campaign as "very difficult", "very confusing", and "at times... very depressing." The existence of the Workers' Committee muddied the campaign: "We knew there was a contract [between Primo and the Committee]. We didn't know if it was signed or not. We knew there was an association. We didn't know if it was legal or not. We didn't know if the association could even come to the Board. We didn't know where we stood." The Board found the employer's motivation for entering into what purported to be a collective agreement with the Committee was interference with employees' right to select a trade union of their choice.

In *Elgin* [1987], a union organizing campaign was hotly contested by members of a pre-existing nonunion association. In contrast to many of the other cases previously cited, this case did not involve employer domination or interference with the employee's committee; nor was the committee established in the shadow of an organizing drive. The committeemen were actively involved in circulating an anti-union petition and being outspokenly against the union. The Board allowed the petition (and followed this approach again in *Aluminum Reduction* [1985]) arguing that the committeemen's actions

are much more akin to 'salesmanship' by the committee seeking to defend the association structure, and would be perceived as such, than threats to job security by persons part of, or associated with, management. In this regard, it is critical to note that there was no evidence to indicate that the association was permitted greater leeway in its dealings with employees because of the union organizing campaign. Management did not seek to bolster the association's role or facilitate the association's opposition to the union drive. (para 29)

In Manitoba, the Faroex company greatly desired to create an employee association that it would voluntarily recognize rather than be certified by the UFCW (*Faroex* [2000]). In 1998, the company recruited two employees to help circulate a petition and form an association, in the wake of UFCW organizing. Managers also threatened job loss and plant closure. The Vice President of Operations tried to impose an employee association through an open letter informing all employees that they would be required to vote in a show of support for the employer's

employee association, and that a ballot would be attached to their monthly payroll information. The two employees who had spearheaded the employee association balked, and became instrumental in UFCW organizing. The plant was certified by the UFCW in 1999. Faroex then found other reasons, later found by the Manitoba Labour Board to be specious, to fire the two employees. The Board reinstated them, fined the company, and forced the company to post the Board's ruling that the company had engaged in unfair labour practices.

During union organizing, both employer motives and actions in operating nonunion systems are more closely scrutinized by labour boards. If there is a nonunion system in tandem with a variety of anti-union activities, the clear inference may be that the employer has an anti-union animus. The labour boards then take remedial steps to allow unions a temporary advantage in organizing. The issue in this cluster of cases is not so much employer domination and the lack of fitness of the nonunion association to bargain (as it was in the previous section of cases). Rather, it is whether the employer has committed unfair labour practices.

In Canadian labour codes, there are three relevant sections that address unfair labour practices. In the first section, the employer's *intent* to deprive workers of free choice is, in itself, and unfair labour practice. Hence, unions try to muster evidence in these cases that the employer's motivation was unlawful. Such evidence might include the actual words spoken by managers when they support nonunion systems or encourage employees to develop in-plant associations in preference to unions. Employer communication is examined in exquisite detail to determine the anti-union meaning of even the most subtle nuances in word choice or phraseology. Free speech is not as absolute a right in Canada as it is in the United States. Employers are allowed to express their preference to remain non-union, but their communications must be "squeaky clean" if they intrude on union organizing.

The second statutory section involving unfair labour practices involves the *effect* of managerial actions. Were employees, in fact, intimidated? Did employees change their minds about supporting a union as a result of managers' behaviours, even if the behaviours were not

intended to deprive workers of their rights? Unions might provide evidence of the pattern of support for the union before and after management took objectionable actions. Unions might call individual employees to testify.

A third section in the laws invokes a freeze on any change in the terms and conditions of employment during union organizing, or even the promise or threat of a change – because a management decision, say, to relocate a plant or offer a Christmas bonus, could have the unintended effect of interfering with union organizing. Managements' action to constitute a nonunion association during organizing is a substantial change in the conditions of employment, regardless of motive.

These three sections of statutes have a pincer grip on employers' freedom of action during organizing. Further, the manner in which Canada's administrative tribunals interpret these statutes also adds considerably to their power to limit employer activities. Generally, labour boards carefully examine all employer actions *in the context of the employee*: what would a reasonable employee conclude about managerial behaviours, particularly if he or she was concerned about job security and management reprisal? The *vulnerability* of the individual employee is expressly taken into account by Canadian labour boards (Taras 1997b). Managerial support for a nonunion association is dangerous territory during union organizing, and managers would be well advised to keep even their thoughts to themselves.

3. The Right to Unionize

There also is the more unusual situation in which a group of employees are not permitted to unionize and instead must be represented through a nonunion association. Employees exempt from the right to unionize have included essential service personnel, agricultural workers (until a recent Supreme Court decision), domestic workers, and some categories of professionals. The famed Canadian para-military national police, the Royal Canadian Mounted Police (RCMP) "mounties" are not permitted to unionize under explicit provisions in two statutes, both the *Public Service Staff Relations Act (PSSRA*, paragraph e in section 2 definition of "employee") and the

Canada Labor Code (CLC, Section 6). Instead, they deal collectively through an elaborate non-union system known as the Division Staff Relations Program (MacDougall 2000; Hardy and Ponak 1983). In 1999, the Canadian Supreme Court issued the *Delisle* decision that hinged on the trade-offs between depriving the rights of workers to unionize versus the features of their alternative nonunion system. Establishing the motive of the employer became an exceedingly important feature of the case.

Here is a situation in which the Supreme Court examines employer intent when Parliament is the employer and the employees form an essential ingredient in the keeping of public order. *Delisle* argued that the exclusion was against the *Canadian Charter of Rights and Freedoms* as it deprived RCMP workers of the freedoms of association and expression granted to other federal workers. He argued that because of the exclusions, he is denied protection against unfair labour practices. His association is vulnerable to employer interference in its design, structures, rules and practices, none of which would be permitted in a unionized environment. Further, he argued at para. 118 of his factum that “the whole purpose of forming a union is to send the following message to the employer: ‘We have joined together in our own union. We are expressing our collective solidarity. We will be heard.’”

Seven justices deliberated, and the majority found that the exclusion was not unconstitutional. The majority were guided by the notion of proportionality: given that nonunion plans may have multiple objectives, on balance, the Court found that the union avoidance objective did not overwhelm the other aims. The majority argued that the exclusion merely precluded RCMP members from all the rights and particular proscribed remedies contained in *PSSRA* and the *CLC*. Even if there were significant “strategic motives” to stop RCMP members from unionizing, the actual purpose of the legislation was to prevent the RCMP to be “governed by a statute it considered inappropriate to the appellant’s situation.” (Bastarache, J. p. 14 para 20). It did not deprive them of rights. Further, because the RCMP is subject to the provisions of the *Charter*, employees already are appropriately protected from employer interference with their

fundamental rights, in contrast to employees in other industries without such protection (L'Heureu-Dube, p 11 para 7). Finally, the message of solidarity argued by Delisle is “not a distinct message from that which might come from an association that is not recognized under *PSSRA*.” (Sopinka J, p. 20, para 39). In other words, the medium is not necessarily the message.

However, two justices (Cory and Iacobucci JJ.) wrote an unusually lengthy dissent because they clearly concluded that “A statute whose purpose or effect is to interfere with the formation of employee associations will thus clearly infringe s. 2(d) of the Charter. The effect is to distort the type of employee association that RCMP members could contemplate by removing the prospect of unionization from the table.” The key question, argued these justices, “*what is the reason for the decision to exclude*” (emphasis added). Was the decision “anti-associational” and thus impermissible? The dissenters argued that Parliament’s purpose in writing RCMP exclusions was

to ensure that individual RCMP members remained vulnerable to management interference with their associational activities, in order to prevent the undesirable consequences which it was feared would result from RCMP labour associations - the perceived threat of a divided loyalty among RCMP members. The perception which informed the imposition of these restrictions was that RCMP members might disobey superior orders if they were both union members and members of a quasi-military institution, and would be unable to exercise their duties impartially and effectively in controlling the illegal acts of other workers, or indeed in the event of their own labour unrest. (p. 4)

The justices found evidence for their assertions from numerous sources including legislative history, executive orders of Parliament, authoritative statements regarding the purpose of the legislation, and the government’s past practice of preventing RCMP unionization. For example between 1918 and 1974, RCMP members were to be instantly dismissed for any union-related activity. The justices also noted that they found it significant that there was no compelling evidence presented in support of any other purpose.

In Canada, the rights guaranteed to individuals under the *Charter* (the Canadian “constitution”) are not absolute. The courts can find that individual rights to freedom of association or expression are violated, but that such violations can be “demonstrably justified in a

free and democratic society.” The dissenting justices argued that there was little proportionality between the legislative objective and the means used to achieve that objective. Indeed, “the means chosen engender the very mischief sought to be cured: the exclusion of RCMP members from the entirety of the *PSSRA* to secure a stable national policy may actually contribute to the very labour unrest sought to be avoided.” Unionization could have included limitations on the right to strike, the requirement for compulsory arbitration, and other measures to avoid unrest (as it did for members of various municipal and provincial police forces), and to these justices would have been preferable to depriving a group of people of the right to unionize. Hence the RCMP’s individual rights were violated, and such a violation could not be “demonstrably justified” because there were other, superior alternatives available.

Nevertheless, despite the evidence and cogency of the minority’s dissent, this was not the position that prevailed.

In summary, the topic of employer intent received two different treatments. The majority’s notion of proportionality allowed discussion of a variety of possible motives for the employer’s encouragement of a nonunion plan, one of which could include anti-union sentiment. As long as it did not “overwhelm” the other, more legitimate aims, it was appropriately proportional and the nonunion system could prevail over the right to unionize. The second treatment of proportionality, articulated by the dissenters, was that upholding the exclusion was rather draconian in view of the other alternatives available to meet public order while allowing for unionization.

It will be interesting to observe whether, and how, the important precedent set by the highest court will trickle down into the holdings of lower courts and labour boards. It could simply be that the fact situation in *Delisle* is so unique that it becomes readily distinguishable from the vast majority of cases that appear on the Canadian landscape.

Conclusions

Here is a country that tries to create a balance between the existence and promulgation of

nonunion employee representation systems and the interests of legitimate trade unions. In Canada, the union and nonunion systems may be used as alternatives to each other, and may interact with each other particularly during union organizing, but they exist in entirely different legal regimes. Employers and employees have the right to use nonunion vehicles, but by and large the status afforded to legitimate unions trumps that of nonunion associations. It is important in such a regime that only employee associations considered fit to represent the interests of employees – that is, are independent and arms-length from management – should have the protection of collective bargaining laws.

In this regime, it also is important that employees have the right to freely choose to be represented by *bona fide* unions. Since the nonunion plan alternative is quite common, and can be used as an anti-union vehicle by employers, it is imperative that employers' activities be constrained during union organizing. Although employers have free speech rights under the law, adjudicative tribunals severely curtail employer expression of preference, particularly when the employer favours the nonunion plan over the union, and erroneously holds it up to employees as a genuine mechanism for collective dealing. In order to restrict employer activities that limit employee choice, the laws are powerfully crafted using a three-pronged approach to prevent employer activities that have the *intent, effect, or practice* of intruding in union organizing.

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