CANADA INDUSTRIAL RELATIONS BOARD

IN THE MATTER of the *Canada Labour Code (Part I – Industrial Relations)* and an application filed pursuant to section 97

BETWEEN:

UNIFOR

Applicant

-and-

WESTJET, an Alberta Partnership

Employer

APPLICATION OF UNIFOR

A. THE NAME, POSTAL AND EMAIL ADDRESSES AND TELEPHONE AND FAX NUMBERS OF THE APPLICANT AND OF THEIR LEGAL COUNSEL OR REPRESENTATIVE, IF APPLICABLE:

Unifor
115 Gordon Baker Road
Toronto, ON M2H 0A8

Attn: Billy O'Neill, National Representative
Tel: 416-605-1443
Email: billy.oneill@unifor.org

Unifor Legal Department
115 Gordon Baker Road
Toronto, ON M2H 0A8

Attn: Erin Masters, Counsel
Tel: 647-546-2116
Fax: 416-495-3786
Email: erin.masters@unifor.org

B. THE NAME, POSTAL AND EMAIL ADDRESSES AND TELEPHONE AND FAX NUMBERS OF THE RESPONDENT AND OF THEIR LEGAL COUNSEL OR REPRESENTATIVE, IF APPLICABLE:

WestJet, an Alberta Partnership
22 Aerial Pl NE
Calgary, AB T2E 3J1

Attn: Virginia Swindall, Senior Manager, Labour Relations
Email: virginia.swindall@westjet.com

Attn: Nina Wallinder - Program Manager, Contact Centre
Email: Nina.wallinder@westjet.com

Attn: Alexis Von Hoensbroech, Chief Executive Officer
Email: alexis.vonhoensbroech@westjet.com

Hicks Morley Hamilton Stewart Storie LLP
77 King Street West, 39th Floor, Box 371, TD Centre
Toronto, ON M5K 1K8

Attn: Simon Mortimer, Counsel
Tel: 416-864-7311
Email: simon-mortimer@hicksmorley.com

Attn: Andrew Morvin, Counsel
Tel: 416-864-7257
Email: andrew-movrin@hicksmorley.com

C. REFERENCE TO THE PROVISION OF THE CANADA LABOUR CODE UNDER WHICH THE APPLICATION IS BEING MADE:

24(4), 94(1)(a), 94(3)(a)(i), 94(3)(a)(v), 94(3)(a)(vi), 94(3)(e)(i), 94(3)(e)(ii), 94(3)(e)(iii), 96, 97

D. FULL PARTICUALRS OF THE FACTS, OF RELEVANT DATES AND OF GROUND FOR THE APPLICATION:

Please see attached Schedule “A”.

E. A COPY OF THE SUPPORTING DOCUMENTS:

Please see attached Schedule “A”.

F. A DESCRIPTION OF THE ORDER BEING SOUGHT:

Please see attached Schedule “A”.

Schedule "A"

INTRODUCTION

1. This is an application pursuant to section 97 of the *Canada Labour Code* (the "*Code*") alleging violations of sections 24(4), 94(1)(a), 94(3)(a)(i), 94(3)(a)(v), 94(3)(a)(vi), 94(3)(e)(i), 94(3)(e)(ii), 94(3)(e)(iii), 96 of the *Code.*

2. WestJet, an Alberta partnership, breached the *Code* when it discriminatorily withheld a reasonably expected wage increase from a group of employees, for the express reason that these employees were subject to an application for union certification.

BACKGROUND FACTS

Application for Certification (CIRB File No: 039437-C)

3. The Applicant, Unifor (the "Union"), is a trade union within the meaning of section 3(1) of the *Code*.

4. On December 18, 2025, the Union filed an application for certification to represent a group of the employees of the Responding Party, WestJet, an Alberta partnership (the "Employer") (CIRB File No: 039437-C). The Union's proposed bargaining unit for which certification is sought includes the employees of WestJet, an Alberta partnership employed in Calgary as described below:

> *"All employees of WestJet, an Alberta Partnership, engaged in contact centre operations excluding team leads, persons above the rank of team leads and persons covered by an existing certification order."*

5. This proposed bargaining unit includes but is not limited to Support Agents (APPR), Central Baggage Service, Guest Support, Reservation Support Desk, Rewards Support Agents, Sales and Service Agents, Travel Support Team, Facilitation Team, and Special Care Desk.

6. On December 24, 2025, in its response to the application for certification, the Employer advised that it was “assessing the proposed bargaining unit and reserves any and all rights to raise any disputes or objections with regard to Unifor’s proposed bargaining unit.” At that time, the Employer also provided an organizational chart which placed the “Groups” classification within the Contact Centre reporting structure. The Groups department is comprised of agents who provide quotes, make bookings, and remain the primary point of contact for passengers travelling in large groups (ten or more travellers).

7. On December 29, 2025, the Employer filed further submissions and an updated organizational chart. In those materials, the Employer did not raise any objection to the inclusion of the Groups classification and continued to reflect those employees as part of the Contact Centre structure within the proposed bargaining unit.

8. On January 7, 2026, counsel for the Employer, for the first time, asserted that the Group Sales Specialist and Groups Senior Specialist positions were in dispute and ought to be excluded from the bargaining unit.

9. On January 9, 2026, the Employer formally advanced that position to the Board, asserting that the Groups Senior Specialist and related Group Sales positions should be excluded from the bargaining unit, while simultaneously confirming that other classifications, including Schedule Change Agents, fell within the scope of the proposed unit and had been previously identified as included.

10. At the time of this writing, the parties are awaiting the Board’s decision with respect to the Union’s application for certification and the appropriateness of the Union’s bargaining unit description. Depending on the Board’s decision in this matter, the proposed bargaining unit may be subject to a representation vote at some point in the future.

Employer's decision to discriminatorily withhold merit increases

11. This complaint arises from the Employer's decision to discriminatorily withhold a reasonably anticipated wage increase from employees in the Groups classifications for the explicit reason that this group had taken steps to unionize.

12. For context, employees in the Groups classifications fall within the category of "General Band" employees for the purposes of compensation. The Employer's typical and historically established practice with respect to compensation increases for General Band employees includes an annual percentage increase to an employee's wage rate based on corporate performance and the performance rating earned by the individual employee (a "merit increase"). For great clarity, the Employer's established practice with respect to merit increases involves the following:

    - On an annual basis, in advance of performance review meetings, the Employer will announce what percentage increase, if any, is available to employees if they are determined to have earned, at minimum, a "meets expectations" performance rating. For example, the Employer might announce that there will be a two-percent merit increase in wages for General Band employees who have met their performance expectations in the previous year;

    - Following this announcement, General Band employees are scheduled to meet with their Team Leads for one-on-one for performance review meetings;

    - Following the performance review meetings, each General Band employee receives their individual performance rating;

    - In the event a General Band employee achieves, at minimum, a "meets expectations" performance rating, they will receive the merit increase available for that particular year.

13. On or about March 18, 2026, the Employer issued a communication to employees in the Groups department via email (**Tab A**). The opening paragraph of this email reads as follows:

> *In advance of the meetings on performance ratings and merit that will be happening for general band, I wanted to inform you that the company will be announcing an increase to merit for non-unionized groups effective May 1, 2026.*

14. That email goes on to address the recipients of the email in the Groups department stating that:

> *…[D]ue to the pending application for union certification by Unifor, the increase will not be applicable to you.*

15. On or about April 16, 2026, the Employer began scheduling performance review meetings with all Groups department employees in the normal course. Over the following week or two, all workers in the Groups department employees attended performance review meetings. However, in a departure from normal practice, the Employer did not disclose to Groups department employees what their individual performance ratings were. To the best of the Union's knowledge, General Band employees in all other departments received their performance ratings prior to May 1, 2026, while the Employer withheld this information from, specifically, Groups department employees.

16. After this matter came to the Union's attention, the Union sent a letter to the Employer on or about April 29, 2026, informing the Employer of its view that, the Employer's decision to withhold merit increase from all Groups department employees would constitute a violation of the freeze provision under section 24(4) of *Code*. The Union sought to discuss this matter further and notified the Employer that the Union may pursue an unfair labour practice complaint with the Board in the event the matter is not resolved (**Tab B**).

17. On or about May 1, 2026, to the best of the Union's knowledge, General Band employees in all other departments who had received at least a "meets expectations" performance rating began receiving a two-percent merit increase to their wages. All employees in the Groups department were denied this merit increase. According to the Employer, this denial of the merit increase was not based on the individual performance ratings of the employees in the Groups department. Rather, there was and continues to be a blanket denial of the merit increase to the Groups department on the basis that these employees are subject to an application for union certification (see **Tab A**).

18. On or about May 5, 2026, the Employer responded to the Union's April 29, 2026 letter by way of letter from its legal counsel (**Tab C**). The Employer's May 5, 2026 correspondence largely focussed on its arguments as to why it believes that the Groups department employees should be excluded from the bargaining unit. It concludes:

> *This claim for "a scheduled wage increase" appears to reveal why the union ought to consent to their exclusion.*

19. The Employer's letter also asserts that Groups department employees:

> *…are rewarded based on corporate and individual performance and there is no set or established annual ATB or increase.*

Chilling Effect

20. Among General Band employees, it is only those in the Groups department who have been denied a merit increase for 2026. The explicit message communicated by the Employer to the Groups department is that their expected compensation adjustment was withdrawn, not based on merit considerations, but due to Contact Centre employees pursuing unionization.

21. The timing of the Employer's announcement is highly relevant in view of the outstanding application for certification and the possibility that the proposed bargaining unit may be subject to a representation vote in the near future.

22. The Employer's decision to withdraw access to the merit increase from all Groups department workers can be expected to have a chilling effect on union support, particularly as the Employer ascribed this decision to the Union's involvement at the workplace.

SUBMISSIONS

23. The relevant sections of the *Code* are as follows:

> **24(4) Terms or conditions of employment not to be changed** Where an application by a trade union for certification as the bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay, any other term or condition of employment or any right or privilege of such employees until
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> > (a) the application has been withdrawn by the trade union or dismissed by the Board, or
> >
> > (b) thirty days have elapsed after the day on which the Board certifies the trade union as the bargaining agent for the unit,
>
> except pursuant to a collective agreement or with the consent of the Board.
>
> …
>
> **Employer interference in trade union**
>
> **94 (1)** No employer or person acting on behalf of an employer shall
>
> > (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union
> >
> > [….]
>
> **94(3) Prohibitions relating to employers**
>
> No employer or person acting on behalf of an employer shall

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

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

[…]

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

[…]

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

[…]

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

24. The Union submits that the Employer's conduct constitutes a violation of the Canada Labour Code. By excluding those employees who are subject to the

Union's application for certification, the Employer has breached the statutory freeze provisions and sent a strong message to employees that they will be punished for exercising their rights under the Code to organize, contrary to sections 24(4), 94(1)(a), 94(3)(a)(i), 94(3)(a)(v), 94(3)(a)(vi), 94(3)(e)(i), 94(3)(e)(ii), 94(3)(e)(iii), and 96 of the *Code*.

Violation of section 24(4) and the "business as before" principle

25. The purpose of sections 24(4) is to preserve the *status quo* conditions of employment during the process of union certification.[1] However, the Board has consistently rejected the notion that these sections should be interpreted as a "static freeze" preventing *all* changes to other conditions of employment.[2]

26. The statutory freeze provisions do not prohibit the continuation of established compensation practices, including reasonably anticipated wage increases.[3] In *Lifelabs LP*,[4] the Ontario Labour Relations Board provided a helpful summary of the principles relevant to interpreting the freeze provisions of the Ontario statute, relying on its seminal decision in *Spar Aerospace*:[5]

> In the oft-quoted decision of *Spar, supra,* the employer had provided employees with annual merit and cost of living increases for "some years" prior to the union's certification. However, the employer asserted that the recently unionized employees were no longer eligible for such increases, alleging that they were now "negotiable matters." The Board quoted from the decision of *Canadian General Electric,* [1965] OLRB Rep. Dec. 649 and noted that the following considerations applied when interpreting the statutory freeze provision:

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[1] *Teamsters Local Union No. 31 v 669779 Ontario Limited O/A CSA Transportation*, 2018 CIRB 894 (CanLII), at 128-130
[2] *Ibid* at para 129.
[3] *DHL International Express Limited,* 2001 CIRB 129, at paras 91-92.
[4] *Ontario Public Service Employees Union v Lifelabs LP*, 2022 CanLII 12320 (ON LRB), at para 8.
[5] S*par Professional and Allied Technical Employees Association v Spar Aerospace Products Limited,* 1978 CanLII 2255 (ON LRB)

- The aim and policy of this section is to protect the union's bargaining rights and to promote meaningful and effective collective bargaining;
- The provision seeks to do this by preserving and maintaining the union's bargaining position on the basis of the contracts of employment existing between the employer and the employees on the date notice is given;
- The legislation is directed to maintaining the *status quo* of wages and other terms and conditions of employment;
- The union is given the opportunity to bargain a collective agreement, having regard to a fixed point of departure, namely the wages and working conditions existing at the time of notice; and
- Therefore, the union's bargaining during this time will not be undermined, nor will it be required to keep pace with and alter its position in accordance with changes in terms or conditions of employment which might otherwise be made as a result of the employer being at liberty to deal directly with the employees.[6]

27. These principles have been adopted by this Board, which has found that section 24(4) is intended to preserve existing pattern of employment in its totality and prevent unilateral changes that would undermine employees' representational rights.[7] Quoting from the Board's predecessor's decision in *Bank of Canadian National*:

> As soon as a union begins certification procedures or, *a fortiori,* holds a bargaining certificate, the employer must act as before and in an impartial manner, and must continue to apply the same policies and the same terms and conditions of employment to everyone without making a distinction and discriminating between those who are unionized and those who are not

[6] *Lifelabs LP, supra,* at para 8.
[7] *DHL International Express Limited,* 2001 CIRB 129, at paras 91-92.

> unionized or who are taking steps to become so. The whole problem is to determine whether the employees have the impression or are convinced that they are at a disadvantage or are being penalized because they exercised a right conferred on them by the Code. In the case before us, it is clear that the employer's action in applying its cash deficit policy in a different and a discriminatory manner to the unionized and non-unionized employees constitutes a violation of the principle of "business as before".[8]
>
> [emphasis added]

28. In determining whether an Employer is complying with the “business as before” principle, the Board has provided the following direction:

> The Board will look at the employer’s normal business practices and will attempt to determine, through the evidence, whether the changes made are part of the employer’s normal practices or whether the alterations effected by the employer do not conform to the same business practices that were practised previously.[9]

29. Accordingly, the Board has repeatedly found that the requirement for an employer to maintain the “status quo” under section 24(4) does not necessarily mandate that precise wage rates remain stagnant in all cases where a group of workers are subject to an application for certification. Rather, the Board has found that the established compensation structure—including the mode and model of providing wage increases to employees—must remain unaltered as compensation structure is a pre-existing and reasonably contemplated benefit.[10]

30. As an example, the Union directs the Board to *Union of Bank Employees, Locals 2104 & 2100 v Canadian Imperial Bank of Commerce.*[11] In that case, the employer announced a 9% increase, generally applicable to employees of all branches of

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[8] *RCIU v Bank Canadian National* [1980] 1 Can LRBR 470, at para 27 [Appendix 1].
[9] *DHL International Express Limited,* 2001 CIRB 129, at para 93.
[10] *Union of Bank Employees, Locals 2104 & 2100 v Canadian Imperial Bank of Commerce* 1979 CarswellNat 725, 1979 CarswellNat 726 [Appendix 2] at para 73-74.
[11] *Ibid.*

the bank, except for "employees in certified bargaining units and those whom the employer considered to be in bargaining units where applications for certification were pending" at the time increase was announced.[12] At paragraphs 73-74, this Board's predecessor found that:

> There is no question in the mind of this Board that by past practice, this employer had established general salary increases as an integral part of its compensation package for employees. The employment officers of the employer would definitely point out, as a matter of course, to any applicant for a position with the bank, that, salary wise, the candidate would benefit from promotional and merit increases and furthermore, general increases. Once the announcement was made on December 8, the 9% increase became an integral part of the salary structure and every employee was quite correct in perceiving that this increase was owed to him or her.
>
> Section 124(4) of the Code makes it mandatory for the employer to not *alter* the salary structure except pursuant to the provisions of the section. The employer failed to do so.

31. As indicated in the quote above, merit-based increases to wages may constitute an aspect of salary structure and thus, would be an expected benefit. This is also supported by the Ontario Labour Relations Board's findings and reasoning in its *Spar Aerospace* decision which, as noted above, has been repeatedly relied upon by this Board. In that case, the Ontario Board considered the Employer's argument that, because merit-based increases were discretionary in nature, wage adjustments of that type could not be captured by the freeze provision (section 70(1) of the Ontario *Labour Relations Act*). The Ontario Board disagreed and found the following:

> The respondent, however, emphasized the discretionary nature of the merit adjustment, arguing that its discretion to determine both the total amount to be awarded for merit, and to grant individual merit increases, made it

[12] *Ibid* at para 31.

impossible for the Board to supervise a freezing of this element of the employment relationship. While this aspect of the case gave the Board some concern at the hearing, it is our conclusion that this is not a situation where there exists a complete discretion. A policy governing merit adjustments and a policy for implementing such adjustments has existed for a number of years. It was clear from the respondent's letter of May 30th that an amount has already been set aside for such adjustments, and that implementation of individual increases was possible. Even if these facts were not taken into account, it is clear that the freeze can extend to these elements of the respondent's discretion that had hardened into a well-established pattern. The freeze requires a party to carry on business as before, and any order directing compliance with the freeze would only require this standard from the respondent. The discretionary aspects of the adjustments in this case, therefore, do not prevent the freeze under section 70(1) from applying.

On the facts the Board must conclude that the respondent's failure to implement the merit adjustments on July 1st was in violation of section 70(1) of the Act.[13]

32. Applying the above jurisprudence to the case at hand, the Employer's decision to single out the Groups department and deny their access to the May 1, 2026 merit increases clearly constitutes a breach of section 24(4). Like the situation in *Spar Aerospace*, the employer has a well-established practice for the provision of merit-based pay increases, as outlined in the Background Facts above.

33. Based on the established pattern, Groups department employees, like all General Band employees, had a reasonable belief that they would receive a merit-based increase where two, well-established conditions are met. General Band employees could expect to receive a merit increase where:

[13] *Spar Professional and Allied Technical Employees Association v Spar Aerospace Products Limited*, 1978 CanLII 2255 (ON LRB), at paras 26-27.

1) the Employer has determined, based on its corporate performance, that a merit-based percentage increase ought to be made available to General Band employees who “met expectations”, and;

2) the individual employee has received a performance rating that indicates that their performance in the previous year “met expectations”.

34. In view of the Employer’s March 18, 2026 email to the Groups department, as well as its implementation of a two-percent merit increase to all other General Band employees with sufficient performance ratings, it is clear that the first condition is met.

35. With respect to the second condition, while the Groups department employees engaged in the performance review process, the Employer has continued to withhold individual performance ratings. While this makes it difficult to comment on whether any particular individual ought to receive the merit-based increase, it is nevertheless the case that the existing protocol dictates that all employees who “met expectations” ought to be entitled to that two-percent increase.

36. Merit-based increases are an important aspect of General Band employees’ compensation package. Like all other workers in this category, Groups department employees have performed their job duties over the preceding months with the expectation and understanding that their hard work would be compensated by an increase to their wage rate in the coming year. However, they have now been told that this benefit will be denied to them—not because their performance was inadequate or even because the Employer was unable to meet its financial targets. Rather, they have received the message that the anticipated increase is being withheld from them due to their efforts to unionize. This is precisely the situation which section 24(4) seeks to prohibit.

Interference and Discrimination

37. The Union submits that, in breaching the freeze provision, the Employer has also engaged in discrimination and interfered with the formation of the union in

violations of sections 94(1)(a), 94(3)(a)(i), 94(3)(a)(v), 94(3)(a)(vi), 94(3)(e)(i), 94(3)(e)(ii), 94(3)(e)(iii), and 96 of the *Code*.

38. It is well established that a breach of the freeze provisions of the *Code* may also constitute violations under various subsections under section 94.[14] As the Board's predecessor noted:

> The Board states that in some circumstances, as exemplified in this particular instance, there could be the existence of a violation of section [94] and concomitantly, a violation of the provisions in the Code of either or both of the "freeze" mechanisms. Conversely and further, the correct application and respect of the freeze provisions does not automatically absolve employers from scrupulously avoiding, in the implementation and application of the freeze periods, any action which could be viewed as a prohibited act, under section [94].[15]
>
> [emphasis added]

39. In that case, the Board's predecessor went on comment regarding section 24(4):

> The objective is to ensure that no action by the employer as regards rates of pay or any other term or condition of employment or any right or privilege of employees is going to deny the employees full freedom in the exercise of their right to seek collective bargaining and to opt for a specific bargaining agent. This is paramount.[16]

40. In the present case, the Employer's March 18, 2026 email to the Groups department, which communicated that the sole reason those employees would not receive their merit increase was "due to the application for union certification," leaves no doubt that the Employer discriminated against these workers with respect to pay in contravention of section 94(3)(a)(i), 94(3)(a)(v), and 94(3)(a)(vi). As noted above, the Board is concerned with actions taken by employers which

[14] Appendix 2 at para 51
[15] *Ibid* at para 52.
[16] *Ibid* at 66.

could give employees the impression that they are being punished for accessing their rights under the *Code*. When the Employer ascribed the denial of an expected benefit to the involvement of the Union in the workplace—while conversely highlighting that that benefit would be afforded to "non-unionized groups"—the Employer sent the message that workers who exercise their rights under the *Code* will be discriminated against.

41. Likewise, the withdrawal of access to the merit increase constitutes the imposition of a financial penalty to compel a person (or, in this case, a group of employees) to refrain from becoming a member in a trade union in contravention with section 94(3)(e). The Employer is seeking to chill union support in advance of a potential representation vote under the pretext of compliance with the freeze provision. Further, the Employer's communication sent to the Union on May 5, 2026, supports the Union's belief that the Employer withdrew access to the merit increase in order to erode support for the Union and compel the Union to agree to exclude the Groups department from the proposed bargaining unit. As the Employer stated in its May 5, 2026 letter, the Union "ought to consent to [the Groups department's] exclusion" from the proposed bargaining unit, if the Union wished to see this group receive their merit increases.

42. These facts also support the conclusion that the Employer breached the freeze provision in an effort to interfere with the formation of the Union in contravention of section 94(1)(a) and sought to intimidate workers from joining a trade union in violation of section 96.

Anti-Union Animus and Onus

43. Anti-union animus need not be demonstrated for the Board to find that an employer has violated the freeze provision under section 24(4) or has interfered with the formation of a union in contravention with section 94(1)(a).[17] The Board is

[17] *Teamsters Local Union No. 31 v 669779 Ontario Limited O/A CSA Transportation*, 2018 CIRB 894 (CanLII), at paras 130 and 133.

concerned with the impact of the Employer's actions on the proposed bargaining unit as opposed to the Employer's motivations.

44. When the Board is considering allegations of anti-union animus, the Board has observed that "[t]here is seldom direct evidence showing that an employer's actions are motivated by anti-union animus."[18] As such:

> [T]he Board generally examines the employer's conduct in light of the circumstantial evidence, including any coincidence between the time of the union activities and the decision or actions giving rise to the complaint… any indication of anti-union animus in an employer's decisions or actions will taint the outcome and will be found to be a violation of the *Code*.[19]

45. Accordingly, evidence of anti-union animus may be circumstantial and indirect. Further, anti-union motives need only be proximate cause for employer action to be found to be a violation of the *Code*.[20]

46. In the present case, there is significant circumstantial evidence to indicate that the Employer's decision to withhold the merit increase was tainted by anti-union motivations. The manner in which the Employer framed its decision to withhold the increase—tying it to Union involvement at the workplace and highlighting that non-unionized groups would receive the increase—is one such indicator. The timing of the decision to withdraw the benefit—while the parties await a decision on an application for certification, potentially resulting in a representation vote—is relevant and indicative of an intention to cause a chilling effect. The Employer's May 5, 2026 letter indicates the Employer's motivation to leverage the chilling effect caused by the denial of wage adjustments to compel the Union to agree to exclude this group of employees from the proposed bargaining unit.

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[18] *Ibid* at para 21.
[19] *Ibid* at para 23.
[20] *Ibid* at para 21; see also *Bizeau* 2004 CIRB 261 at paras 70-71.

47. Further, if the Employer was truly only motivated to withhold the merit increase out of a desire to comply with section 24(4), the Employer could have applied to the Board for consent under that section. As the Board noted in *Canadian Imperial Bank of Commerce, supra,* at paragraph 77:

> On receipt of an application for consent [under section 24(4)], the Board, through its normal investigatory processes, will be in a position to confirm the authenticity and motive for the alteration. It will also have the necessary information and insight to assess the effect, if any, on the wishes of the employees and the consideration of maintaining a balance of rights.
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> …
>
> Employers will not be prejudiced if they apply pursuant to section [24(4)] in cases of doubt. They can apply to the Board to make a determination as to whether a certain course of action would constitute a prohibited change and argue that the course contemplated is not a prohibited change. They can convince the Board that "business as usual" must be departed from.[21]

48. Instead of accessing this process to ensure their compliance with section 24(4), the Employer opted to withhold an expected wage increase and communicate that decision in a manner it knew had the potential to undermine Union support and to apply pressure to the Union to concede on the application for certification. The fact that the Employer made no effort to seek the Board's consent to provide merit increases to those Groups department employees who met the performance standards strengthens the Union's position that the Employer's true motivations lied in anti-union sentiment not in a desire to comply with the *Code*.

49. Finally, pursuant to the section 98(4) of the *Code,* the onus is on the Employer to demonstrate that its decisions (those which gave rise to the Union's complaints under section 94(3) of the *Code*) were free from the taint of anti-union animus[22]:

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[21] *Union of Bank Employees, Locals 2104 & 2100 v Canadian Imperial Bank of Commerce* 1979 CarswellNat 725, 1979 CarswellNat 726 [Appendix 2] at para 77.
[22] *Bizeau,* 2004 CIRB 261 at paras 70-71.

It is well established that in complaints alleging a violation of section 94(3)(a), the employer bears the onus of demonstrating that its actions or decisions were not motivated by anti-union animus and were solely based on legitimate business concerns …The employer must prove, on a balance of probabilities, that its action was not tainted by any anti-union animus.[23]

REMEDIES REQUESTED

50. In light of the foregoing, the Union respectfully requests that the Board make the following declarations and/or orders:

    a) Declare that the Employer has violated sections 24(4), 94(1)(a), 94(3)(a)(i), 94(3)(a)(v), 94(3)(a)(vi), 94(3)(e)(i), 94(3)(e)(ii), 94(3)(e)(iii), 96 of the *Code* of the *Code*, as particularized above;

    b) Order that the Employer compensate all affected Groups department employees by providing the same merit increase rates provided to non-unionized employees, based on the same criteria, with compensation retroactive to the date on which the increases applied to those employees unaffected by the application for certification;

    c) Order the Employer to pay general damages to all Groups department employees for the violations of the *Code*;

    d) Order that the Union be permitted to hold meetings, paid by the Employer, with all Groups department employees, on the Employer's premises, during working hours, to discuss this decision and to answer any questions that employees may have arising from the Board's decision;

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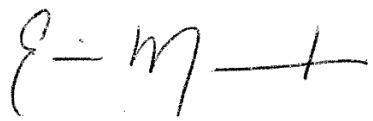
[23] *Teamsters Local Union No. 31 v 669779 Ontario Limited O/A CSA Transportation*, 2018 CIRB 894 (CanLII), at paras 130 and 133.

e) Direct that a copy of the Board's decision be posted in a place or places in the workplace where it will come to the attention of employees affected, and that it remain posted for a period of 90 days; and

a) Any further relief counsel may request, and the Board may deem appropriate, in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Erin Masters
Unifor Legal Department
115 Gordon Barker Road
Toronto, ON M2H 0A8

Tel: 647-546-2116
Email: erin.masters@unifor.org

Lawyer for the Applicant,
Unifor

Table of Content

TAB A

Good afternoon, Team

In advance of meetings on performance ratings and merit that will be happening for general band, I wanted to inform you that the company will be announcing an increase to merit for non-unionized groups effective May 1, 2026.

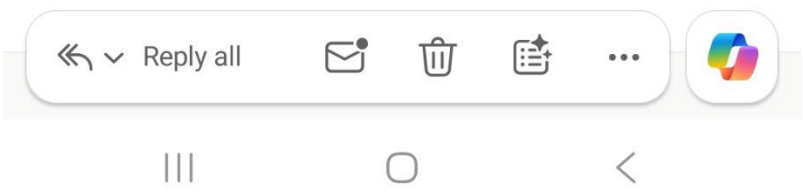
As your role within Groups is under a statutory freeze due to the pending application for union certification by Unifor, the increase will not be applicable to you.

Once the Canada Industrial Relations Board (CIRB) has made its determination on representation for this team, the company will be able to determine next steps. We will provide more information as it becomes available.

Thanks
Colleen

Colleen DeSantis
Senior Manager, Contact Centre & Groups
westjet.com

WESTJET Where your story takes off.



TAB B

National Office
115 Gordon Baker Road
Toronto, ON M2H 0A8

UNIFOR
theUnion | lesyndicat

Bureau National
115 chemin Gordon Baker
Toronto (Ontario) M2H 0A8

Len Poirier
National Secretary-Treasurer
Secrétaire-trésorier national

Lana Payne
National President
Présidente nationale

Daniel Cloutier
Quebec Director
Directeur québécois

April 29, 2026

VIA EMAIL

WestJet, an Alberta Partnership
Attn: Virginia Swindall, Senior Manager, Labour Relations
22 Aerial Pl NE Calgary, AB T2E 3J1
virginia.swindall@westjet.com

WestJet, an Alberta Partnership
Attn: Nina Wallinder - Program Manager, Contact Centre
22 Aerial Pl NE Calgary, AB T2E 3J1
Nina.wallinder@westjet.com

Dear Ms. Swindall and Ms. Wallinder,

Re: Discriminatory premium increases and policy changes

I am a National Representative of Unifor and have been actively involved in the organizing effort with respect to the Union's proposed bargaining unit, comprised of Contact Centre employees employed by WestJet in Calgary.

As you are aware, Unifor filed an application for certification on December 18, 2025. The parties are currently awaiting a determination from the Canada Industrial Relations Board regarding the appropriateness of the proposed bargaining unit.

Unifor has received evidence that on or about March 18, 2026, WestJet communicated to employees in the Groups department that they would not receive a scheduled wage increase, consistent with WestJet's regular compensation practices applicable to other non-unionized employees, with such increases set to take effect May 1, 2026.

Employees were explicitly advised that they were being excluded from this increase on the basis that their roles are subject to a statutory freeze arising from the Union's application for certification and therefore would not be treated the same as other employees.

The Union's understanding is that WestJet stated:

"As your role within Groups is under a statutory freeze due to the pending application for union certification by Unifor, the increase will not be applicable to you."

This conduct raises serious concerns and appears to constitute a violation of the *Canada Labour Code*.

The statutory freeze provisions are intended to preserve existing terms and conditions of employment, not to deny employees the benefit of established or anticipated wage increases. By selectively excluding employees in the proposed bargaining unit from a wage increase that is being applied to other

employees, WestJet has:

- improperly applied the statutory freeze provisions;
- unilaterally altered compensation practices; and
- communicated to employees that they will be disadvantaged as a result of exercising their rights under the *Code*

Such conduct appears to be contrary to sections 24(4), 94, and 96 of the *Code*.

Unifor requests that WestJet immediately confirm that employees in the Groups classification will receive the same wage increases as other non-unionized employees, including retroactive application where appropriate.

Please provide your response no later than **May 4, 2026**.

Should this matter not be resolved, the Union will take all necessary steps to protect employees' rights, including pursuing relief before the Canada Industrial Relations Board.

We look forward to your prompt response.

Yours truly,

Billy O'Neill, National Representative/Organizing
Unifor

BO/jrcope343

CC: *Alexis von Hoensbroech, Chief Executive Officer – alexis.vonhoensbroech@westjet.com*

TAB C

Hicks Morley Hamilton Stewart Storie LLP
77 King St. W., 39th Floor, Box 371, TD Centre
Toronto, ON M5K 1K8
Tel: 416.362.1011 Fax: 416.362.9680

SIMON E. C. MORTIMER
simon-mortimer@hicksmorley.com
Direct: 416.864.7311
Cell: 416.579.2656

File No. 8671-469
May 5, 2026

VIA EMAIL

Billy O'Neill
National Representative / Organizing
Unifor
115 Gordon Baker Road
Toronto, ON M2H 0A8

Dear Mr. O'Neill:

Re: In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application for certification filed pursuant to section 24(1) thereof by Unifor, applicant; WestJet, an Alberta Partnership, employer. (039437-C)

Increases in Compensation

As you know, we represent the Employer with respect to CIRB File 039437-C and as a result we were provided your letter of April 29, 2026 that relates to the compensation of certain employees who are in disputed positions in Unifor's application for certification.

As you are aware, it is our position (and we believe also the position of the employees) at the CIRB that these persons are not properly part of the bargaining unit as they do not share a community of interest. Unfortunately, given the union's position to the contrary these employees are currently captured by the "freeze" on terms and conditions of employment established by section 24(4) of the Code.

You have indicated that the statutory freeze is to preserve existing terms and conditions of employment and, as you will agree, those remain unchanged. You have then gone on to state it also serves to prevent the denial of "established or anticipated wage increases". You have referred to a "scheduled wage increase" and "the same wage increase as other non-unionized employees".

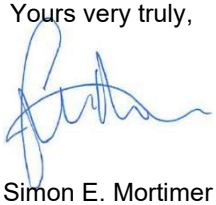
With respect, this is one of the major distinctions that we identified to the Board in our Response to your application. These employees are General Band employees (distinct from Step Band employees such as the undisputed bargaining group in the contact centre) and they do not have a common and established wage increase.

In our March submissions to the Board we expressly requested that this workgroup (Group Sales Specialist and Group Sales Senior Specialist) be excluded from the proposed bargaining unit and were very clear that “They are also compensated on the General Band performance pay scale model, as compared to the fixed pay step model applicable to Contact Centre employees.”

These employees are rewarded based on corporate and individual performance and there is no set or established annual ATB or increase. Furthermore, given the application for certification and the Unifor claim that they share a community of interest with the contact centre, such individual performance movements and other individualized recognitions cannot be implemented.

Given the differences in scheduling, pay bands, account responsibilities, accountabilities, and their specialization, we had suggested that they ought not be swept into the bargaining unit. This claim for “a scheduled wage increase” appears to reveal why the union ought consent to their exclusion.

Yours very truly,



Simon E. Mortimer

SEM/dg

c: Client

Appendix 1

1979 CarswellNat 717
Canada Labour Relations Board

R.C.I.U. v. Bank Canadian National

1979 CarswellNat 717, 1979 CarswellNat 718, [1980] 1 Can. L.R.B.R. 470, 35 di 39, C.L.S. 6-2539

Retail Clerks' International Union, complainant, and Bank Canadian National, Montreal, Quebec, respondent

Retail Clerks' International Union, complainant, and Bank Canadian National (Branch at 3571 Ontario Street East, Montreal, Quebec), respondent

M[e] Claude H. Foisy, Vice-Chairman, and Messrs. Norman Bernstein and Jacques Archambault, Members

Judgment: July 6, 1979
Docket: 745-341, 745-357, Decision No. 189

Counsel: *M[e] Hélène LeBel* representing the complainant.

M[e] Paul Jolin and *M[e] Jean-René Ranger* representing the respondent.

Subject: Labour

Headnote

Labour Law --- Unfair labour practices — Employer practices — Unilateral change in working conditions

Majority decision of *Messrs. Norman Bernstein* and *Jacques Archambault*:

I

1 This case involves four complaints of unfair labour practices filed on June 1 and 27, 1978 and amended on October 12, 1978. The Board held hearings into these cases on July 31, October 12, 13, 18, 19 and 20 and December 11 and 12, 1978. The evidence relating to all four complaints was presented jointly.

2 The complainant alleges that the respondent violated sections 184(1)(a), 184(3)(a) subparagraphs (i), (v) and (vi), 184(3)(b) and 184(3)(e) of the *Canada Labour Code*. Specifically, it alleges that the respondent refused, because of the applications for certification, to grant Mr. Michel Théberge a transfer which he had been promised before the application for certification was made, that it refused to apply to the three branches, hereinabove mentioned, the new cash deficit policy under which the tellers, effective April 3, 1978, were no longer responsible for their cash deficits, that it was the instigator of a meeting held in the basement of the Ontario Street branch during which the employees resigned from the union with which they had previously affiliated, and finally, that it gave its employees working in other branches, the impression through groups composed of communications advisers, that it was not in their interest to join the union.

II

3 The hearings revealed that after the initial applications for certification were made by a union within its organization, specifically at the Quebec City regional office and the Rouyn-Noranda branch, the employer, the Bank Canadian National (hereinafter called the B.C.N.), gave instructions and established the policy to the effect that after any application for certification was made, employees' terms and conditions of employment were to be frozen and, in particular, that the number of employees of a branch was not to be altered. The evidence also revealed that after directives to this effect were issued by the Bank, officers of the Board advised representatives of the Bank to continue this policy and to be very careful not to alter the number of employees in a branch, as a number of other chartered banks had already done, because such a practice affected the representative character

of the union and could leave the Bank open to a charge of unfair labour practice. Before the application for certification involving the Ontario Street branch was made and received at the said branch on March 20, 1978, two employees, Mr. Michel Théberge and Miss Anne Chevalier, had been notified that they would be transferred. In Mr. Théberge's case, he was to replace an employee at another branch temporarily. For Mr. Théberge, this temporary transfer constituted a temporary promotion. In Miss Chevalier's case, the transfer to another branch was a permanent promotion. After the application was made, the two employees were notified that their transfers were suspended. Mr. Théberge, who was to be transferred on April 10 to the Beaubien-Châteaubriand branch, was notified two weeks before the transfer date by the branch's accountant, Mrs. Plakidas, that he would not be transferred because the B.C.N. did not have the right to do anything whatever and, in particular, to make transfers, so long as no decision on certification had been made. On April 4, 1978, the union sent the following letter to the branch manager:

> Retail Clerks' International Union
>
> 5125 du Trianon, Suite 550
>
> Place Versailles
>
> Montreal, Quebec
>
> 351-3777
>
> April 4, 1978
>
> Mr. J.G. Giroux
>
> Manager
>
> Bank Canadian National
>
> 3571 Ontario Street-East
>
> Montreal, Quebec
>
> **SUBJECT: Mr. Michel Théberge's request for transfer**
>
> Dear Sir:
>
> Further to the negative response which you gave Michel Théberge concerning his request for transfer to another branch as general clerk, I wish to inform you that the Retail Clerks' International Union, banks section, has no objection to the transfer.
>
> If you wish further information, please contact the undersigned.
>
> Michel Brunet
>
> Union Steward
>
> cc: Michel Théberge
>
> Director of Personnel — B.C.N.
>
> (Translation ours)

On April 21, 1978, the Board certified the complainant as the bargaining agent for a group of employees in the Ontario Street branch. Subsequent to this certification, Miss Chevalier was transferred, but Mr. Théberge was not. At the beginning of May, a position of general clerk became vacant at the Ontario Street branch and Mr. Théberge was assigned to fill it. This position was temporary since Mr. Théberge was replacing a person on sick leave. The evidence also revealed that at the end of March,

after the application for certification at the Ontario Street branch was made, the Board's investigator paid a visit to this branch, during which he reminded the employer that it was preferable not to alter the terms and conditions of employment and, more particularly, that it should avoid insofar as possible making transfers. Another of the Board's investigators gave the Bank the same advice during the investigation into the certifications of the Quebec City regional office and the Rouyn branch.

4 The evidence revealed that on March 27, 1978 the B.C.N. decided to assume responsibility, effective April 3, 1978, for all cash deficits. Prior to this date, these deficits had been borne in part by the tellers. This decision was announced to the employees in a circular-memorandum which was sent to the branch managers. The managers circulated this document among their employees, who were to initial it as proof that they had examined it. This decision taken by the B.C.N. did not apply to the three branches which were either certified or involved in certification procedures. The evidence on this point also revealed that the circular-memorandum was not sent to the managers of the above-mentioned three branches and that no one from senior management informed the managers of these three branches of the policy change. The evidence revealed that the employees of the Ontario Street branch learned of the policy change from other B.C.N. employees working in other branches where the new policy was in effect. On a number of occasions, the Bank had examined the possibility of adopting this new policy in response to pressure from employees who wanted to see the directive in effect concerning cash deficits done away with. When Mr. Rémi Bourdages, who has been Labour Relations Manager at the B.C.N. since May 1978, joined the Bank as assistant to the personnel manager, he began to compare the benefits enjoyed by B.C.N. employees with those enjoyed by the employees of other chartered banks in Canada. With regard to the cash deficits, a study was launched and, at one point, at the beginning of 1978, when it was realized that the B.C.N. was the only chartered bank which still made its employees assume responsibility for part of its cash deficits, it was decided to terminate the studies and change the old directive. The new directive, as we stated earlier, was not and has still not been applied in the three branches mentioned above, although it has been applied in all other branches and continues to be applied in those which have since been certified or are currently involved in certification procedures.

5 The evidence also revealed that after the application for certification was made, when the employees learned that transfers had been frozen and that tellers would continue to assume responsibility for their cash deficits, despite the fact that a different directive was in effect in the other branches, what could be described as an unhealthy work atmosphere developed at the branch. Some employees blamed the union for their predicament; others disagreed. As a result, working relations which had previously been good, began to deteriorate and reached the point where some employees stopped speaking to each other and it was no longer pleasant to work together. Toward the end of May, the secretary to the branch manager, who was included in the unit certified on April 21, 1978, called a meeting of the employees in the basement of the branch, after customer hours. According to Mrs. Gladu, this meeting was called to openly discuss the situation in order to clear the air and allow employees to express themselves openly. This meeting was held in the basement and was not attended by the manager and the accountant, who at this time were both upstairs on the main floor of the branch. Following discussion of the transfers and cash deficits, it was proposed that the employees resign from the union. Some favoured the idea; others were opposed. Since the majority were in favour of resigning, the other employees eventually supported them. Mrs. Gladu was then asked to type the letters of resignation, which she did on June 2. The evidence revealed that the employees paid for the stamps affixed to their letters of resignation. During this meeting, it was also decided to consult a lawyer in order to find out how to sever ties with the union and revoke the certification. Mrs. Gladu and Mrs. Morelli were authorized to meet with the lawyer. In order to do so, the two women sought permission from the manager to absent themselves from work, without telling him however, the reason for their absence. The manager agreed. Mrs. Gladu and Mrs. Morelli met with the lawyer. They then returned to the branch, which was closed to customers, and asked the other employees to come to see them. This second, informal meeting, lasted only a few minutes and was held in the middle of the floor, while the manager was in his office and the accountant, according to the preponderance of the evidence, was in the vault. Mrs. Gladu or Mrs. Morelli informed the employees that it was not recommended that they get rid of the union because of the legal costs involved. The cost of the visit to the lawyer was paid by the employees.

6 The evidence also revealed that on January 1, 1978, the Bank instituted a new job evaluation system which entailed the introduction of a new wage bracket. After this new policy was implemented, the personnel office was swamped with questions and answers from many employees who did not understand how the system worked. As a result of these calls and an idea which had been suggested the previous year, it was decided, during the spring, to meet with all the Bank's employees and explain the operation of the new system. It was also decided to discuss other matters with them. To this end, a group composed of

what were known as communications advisers was formed. The members of this group were recruited from among the branch accountants and assistants and the district superintendents. These persons, 24 in all, were brought to head office where they underwent six days of training in preparation for the meetings with employees. Once their training was completed, meetings were held from the beginning of June until mid-October with all the employees of the Bank's branches and those at head office. In the case of the branches, these meetings were organized by the branch accountants, and the communications adviser merely served as a resource person. The branch accountant was responsible for informing the employees of this meeting, which he did by posting the following memorandum:

> **MEETING — DISCUSSION**
>
> In order to answer several questions raised earlier by the staff and in particular any questions which you may have, a meeting has been planned to discuss the following subjects:
>
> — job evaluation,
>
> — salary review (mechanism),
>
> — fringe benefits,
>
> — evaluation of employees,
>
> — career development at the B.C.N.,
>
> — the B.C.N. and trade unionism,
>
> — other subjects.
>
> I invite you to prepare any questions which you may wish to discuss.
>
> Your accountant _____
>
> Date of meeting _____
>
> (Translation ours)

The role of the communications advisers was to answer questions which they were asked on these subjects and, in the event that they did not know the answer, they were to note the question and ensure that the personnel department answered it. With regard to the subject of the B.C.N. and trade unionism, the communications advisers were instructed to inform the employees that if they chose to join a union, they had every right to do so, that the Bank would respect this choice and that no employee would be dismissed because he belonged to a union. The members of the personnel department had received several questions from employees concerning the matter of dismissal.

III

7 When the complainant amended its pleadings on October 12, 1978, and in particular, when it added paragraph 4(a), the respondent objected on the grounds that this amendment constituted a new cause of action and that, as such, it could not be accepted. We took the objection under advisement and allowed the presentation of evidence relating to allegation 4(a) concerning the communications advisers referred to earlier. Certainly the Board would not allow any amendment which would change the nature of a case completely. If the Board condoned such a practice, a person could bring a complaint and add to it other complaints which would otherwise be inadmissible. If, for example, in the case before us the amendment had covered a violation of the Code which would have been inadmissible because it was not filed within the prescribed time period, clearly the Board would not have accepted it. Nor, it should be pointed out, would we entertain any amendment which would have the effect of taking the opposing party by surprise on the eve of a hearing, for example. In the instant case, since the amendment was presented late, we asked the complainant to present its evidence first, even though it was not required to do so under section

188(3), so that the respondent would not be taken by surprise. Since, at the time the amendment was presented, it was clear that it would be at east a week before the employer presented its evidence, we accepted this amendment. Moreover, with regard to the objection taken under advisement, we decided that it must be overruled because the evidence revealed that the communications advisers' meetings with the Bank's employees, which are the basis for the new cause of action, did not end until mid-October. The respondent could not therefore conclude that the new complaint — if indeed the complaint was new — was prescribed. Moreover, the respondent did not see fit to argue this point during the presentation of arguments.

8 Two other preliminary questions must be decided before we deal with the merits of the dispute, namely the burden of proof and anti-union animus. On June 1, 1978, the *Canada Labour Code* and, in particular, section 188(3) was amended. The old and new texts read as follows:

> 188.(3) A complaint in writing made pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with paragraph 184(3)(a) is evidence that the employer or person has failed to comply with that paragraph.
>
> 188.(3) Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 184(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

Although only two complaints were filed, there are actually four separate complaints. Two of them — the first relating to the cash deficits and the second to Michel Théberge's transfer — concern events which occurred prior to June 1, 1978. The third, involving the employees' resignations, is based on incidents which occurred both before and after June 1. Finally, the fourth, relating to the communications advisers, is based on events which occurred after the new amendments came into effect.

9 On the first point raised, namely the applicability of the new section 188(3) to the complaints before us, we made a determination at the start of the hearing to the effect that the change contemplated in section 188(3) was a procedural one which applied to all cases coming before the Board for a hearing after June 1, 1978. In reaching our decision, we relied on the decision rendered by the Ontario Labour Relations Board in *Barrie Typographical Union Number 873 and the Barrie Examiner*, [1976] 1 Can LRBR 291, in which the Ontario Board had considered a similar situation. That Board had the following to say at pages 295 and 296 of that decision:

> Rules relating to the location of the onus of proof are unquestionably rules of procedure. The onus of proof only comes into play after the trier-of-fact has found the evidence to be so evenly balanced that no clear conclusion can be drawn. See *Robins v. National Trust Co. Ltd.*, [1927] 2 D.L.R. 98 (J.C.P.C.). In this situation, the trier-of-fact must then fall back upon the rule relating to the location of the onus of proof, and make an evidential finding against the party upon whom the burden rests. Rules as to onus, therefore, are rules of evidence, establishing a procedure to be followed where the evidence of two opposing parties is evenly balanced. Support for this conclusion can be found in *R. v. Krumps*, [1931] 3 D.L.R. 767 (Man. C.A.); dicta to the same effect can be found in *Attorney General v. Halliday*, [1866-67] U.C.Q.B. 397 and *Sanders v. Malsbury* (1882), 1 O.R. 178. In view of this authority, there is no doubt in our minds that the amendment to s. 79 of the Labour Relations Act, reversing the onus of proof, is a rule of procedure.
>
> The reverse onus, because it is a matter of procedure, can be construed as applying to all hearings held subsequent to its enactment. This construction does not give retroactive effect to the rule. Since the rule is one directed to the assessment of evidence at the hearing, the critical point of time is the hearing, and not when the events which are the subject of the evidence occurred. So long as the hearing is held after the rule comes into force, the rule cannot be said to operate retroactively. At this point, a distinction should be made between the commencement of proceedings and the holding of the hearing. Because the reverse onus does not come into play until after the evidence has been heard at the hearing, the mere fact that the proceedings in this case were commenced prior to when the amendment came into force does not add an element of retrospectivity. As was pointed out in *Wicks v. Armstrong* (1928), 61 O.L.R. 667, at p. 669, amendments to rules of evidence apply immediately, regardless of when proceedings are commenced.

We therefore conclude that the provisions of the new section 188(3) apply to the four complaints of unfair labour practices in the instant case. We also wish to add that we agree with the position taken by the Ontario Labour Relations Board to the effect that the burden of proof, which is at issue here, is a burden reversible by a preponderance of evidence.

10 The second point consists in determining whether anti-union animus is an essential element of the alleged infractions. This question arises because, in a recent decision dated January 4, 1979, *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills* Branches, 34 di 651, [1979] 1 Can LRBR 266, the Board ruled that in the case of complaints of unfair labour practices presented under certain sections of the Code, the intention or anti-union animus was no longer an essential element in finding that these sections had been violated. Prior to the amendments of June 1, 1978 to the *Canada Labour Code*, the Board had consistently indicated that in cases of unfair labour practices, it was essential that there be an anti-union animus (cf. *Central Broadcasting Company Limited*, 10 di 8, 75 CLLC ¶ 16,169, and [1975] 2 Can LRBR 65; *The Royal Bank of Canada, Kamloops & Gibsons*, 27 di 701, 78 CLLC ¶ 16,132, and [1978] 2 Can LRBR 159; and *Bank of Nova Scotia*, 28 di 901, and [1978] 2 Can LRBR 181). In this decision of January 4, 1979, the Board based its new interpretation on the changes made on June 1, 1978. At pages 279 and 280, the Board stated the following:

> In Canada where the remedy for an unfair labour practice has in the past most often been by prosecution before the courts, motive, characterized as anti-union animus, has usually been considered an essential element of many unfair labour practices. The majority of the Board held so in relation to section 184(1)(a) in *The Royal Bank of Canada, Kamloops & Gibsons Branch, supra*. The minority held anti-union animus had no relevance in that case.
>
> This approach consistently applied by this and some other labour relations board requires some reexamination under the Code as amended in June of this year. Recent amendments to the Code have decriminalized the labour relations process to the extent that the Board is now the single agency with remedial authority. It has wide, discretionary, remedial authority under section 189 of the Code with the clear legislative directive that the Board's remedial authority is to be used to further Code objectives and not primarily to punish (sections 189 and 121). Prosecution under the Code is subject to Board consent (section 194). This new role for the Board was recognized recently by the Federal Court of Appeal in *McKinlay Transport Limited v. Goodman et al*, [1979] 1 F.C. 760, 78 CLLC ¶ 14,161:
>
> > Parliament has recently enacted extensive amendments to the Canada Labour Code which, in my view, demonstrate that the purpose was to vest in the Canada Labour Relations Board extensive and far reaching powers to deal with labour relations in the works and undertakings to which the statute applies including the granting of injunctions enjoining employees from participating in strikes, and the making of orders requiring employees to perform the duties of their employment — a power not exercised by a Court of equity. Not only has the Board been vested with powers more extensive and particular than those of the courts in such situations but the area in which the Board's decisions are open to attack and review has been narrowed by the amendments. The power previously reserved to the Minister of authorizing prosecution for violation of the Act has also been vested in the Board. In the face of these provisions, even though the legislation does not specifically purport to withdraw from the superior courts jurisdiction to issue injunctions in respect of conduct arising out of labour disputes, it seems to me that the Court can and ought to take into account in exercising its discretion that Parliament has shown its disposition that such matters be dealt with by the Board on the principles which it applies in the search for achievement of the objects of the legislation rather than by the courts.

The Board has therefore recognized that the amendments to the Code decriminalized the scope of certain sections. The Board has also recognized that, in the case of certain other sections, such as sections 184(3)(a) and 184(3)(e), anti-union animus remained an essential element of a violation of these sections. Let us examine further this decision of the Board. We must add that this process of decriminalization of certain sections of the Code, particularly sections 121, 189 and 194, has followed a trend already confirmed in the sections dealing with unfair labour practices (sections 184, 187 and subsequent sections). In short, the amendments made to sections 189 and 194 by Bill C-8 merely served to clarify within the legislation, the intended scope of the Code, which is already set forth in a declaratory and explanatory manner in the preamble and in other sections of the Code.

11 If we examine the origin of these provisions, we will see that, as far back as 1968, the Woods Report, *Canadian Industrial Relations* (1968), paved the way; it enunciated the principle of decriminalization which sanctioned the transition from civil law to labour law. Paragraphs 468 and 476 of the Report read as follows:

> 468. The term unfair labour practice as used in the statutes bears a different technical meaning in different statutes. We find it useful to give it the meaning of conduct, usually otherwise lawful, which is prohibited by statute because it is calculated to interfere with the free course of action considered fundamental to the functioning of collective bargaining. We single out for special treatment elsewhere the questions of employer free speech and good faith bargaining and the subject of picketing and boycotting and enforcement of the law.
>
> 476. In respect of procedural matters, we recommend the elimination of the consent to prosecute provision and the transfer of jurisdiction over unfair labour practices from the Magistrates' Court to the Canada Labour Relations Board, as reconstituted according to later recommendations, with power in the Board to investigate and to seek accommodation through the use of field staff, to hear and determine unsettled issues, and to prescribe remedies including an order to do or cease doing some act, as well as an order of employee reinstatement and an order for compensatory damages. We recommend that Board orders be enforceable on the initiative of a party for whose benefit the order was made as an order of a superior court. We recommend further that the Board have exclusive jurisdiction in this field and that nothing made an unfair labour practice by legislation be the subject of a civil suit unless the conduct is unlawful irrespective of the fact that it is prohibited by statute.

It is essentially paragraph 476 of this Report which deals with procedure and which was intended to confirm the non-punitive nature of the Board's powers with respect to unfair labour practices by removing from the courts of civil law or criminal jurisdiction all exclusive jurisdiction in this matter and entrusting it to the Canada Labour Relations Board.

12 This means, for example, that the Board's action of applying remedies by ordering the reinstatement of an employee, with compensation for lost wages, following a complaint of unfair labour practices brought against an employer, does not in itself constitute a punitive and negative action directed against the employer but rather a positive action designed to re-establish a balance which has been upset, by returning to the status quo ante, so that the industrial relations system, the recognition of the right to join a trade union and the process of free collective bargaining can have their full and beneficial effect.

13 It is in this sense that the search for the employer's motivation in cases of unfair labour practices takes on a completely different connotation. The search for anti-union animus on the part of an employer approximates, as nearly as possible, by analogy, and all things being equal, the search for criminal intent in proceedings within criminal jurisdiction. This is not the objective of a labour tribunal. All that the labour tribunal must seek to determine is whether, in a specific case, the freedom of association enacted in section 110 has been safeguarded, whether the freedom of an employee to join the union of his choice has been respected, whether the freedom of a union or an employee to exercise the rights provided for in the Code has been preserved — in other words, whether there has been a departure from the natural purpose of the objectives and intentions set forth in the Code owing to the employer's course of action. It is the course of action and its consequences, far more than the motivation behind it, which should be examined.

14 On this point, the precedents set by labour tribunals are clear.

15 In *NLRB v. Great Dane Trailers Inc.* U.S. Sup. Ct. (1967) 65 LRRM 2465, the learned judges deal with the question of interference and consider whether the refusal by an employer to grant vacation benefits to strikers in the case where there is an absence of proof of anti-union motivation (anti-union animus) constitutes an unfair labour practice.

> NLRB v. GREAT DANE TRAILERS, INC.
>
> Supreme Court of the United States
>
> NATIONAL LABOR RELATIONS BOARD v. GREAT DANE TRAILERS, INC. No. 781,

June 12, 1967

LABOR MANAGEMENT RELATIONS ACT

— Interference — Discrimination — Denial of vacation benefits to strikers 52.365

NLRB held warranted in finding that employer violated Sections 8(a)(1) and (3) of LMRA when it refused to pay strikers vacation benefits accrued under a terminated collective bargaining contract while announcing an intention to pay such benefits to nonstrikers, even though there was an absence of proof of anti-union motivation on the part of employer, since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation on the part of employer appeared in the record.

— Interference — Discrimination — Motivation of employer-Burden of proof 52.16, 36.606

*If it reasonably can be concluded that employer's discriminatory conduct was*0 '*inherently destructive*' *of important employee rights, no proof of anti-union motivation is needed* and NLRB can find a violation of LMRA *even if employer introduces evidence that the conduct was motivated by business consideration*; if, however, the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight', an anti-union motivation must be proved to sustain the charge 'if' the employer has come forward with evidence of legitimate and substantial business justifications for the conduct; in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to 'some' extent, the burden is upon employer to establish that it was *motivated by legitimate objectives since proof of motivation is most accessible to him*. (pp. 2465-6) (Emphasis added)

16 With regard to complaints of unfair labour practices relating to allegations or accusations of discrimination on the part of an employer, one of the most important decisions in the United States is *Radio Officers' Union v. NLRB*, 33 LRRM 2417, in which the United States Supreme Court has the following to say:

> The language of s. 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished *by discrimination* is prohibited. Nor does this section outlaw discrimination in employment as such; *only such discrimination as encourages or discourages membership in a labor organization is proscribed*.
>
> . . . . .
>
> But it is also clear that specific evidence of *intent* to encourage or discourage is not an indispensable element of *proof* of violation of 8(a)(3)... [An] employer's protestation that he did not *intend* to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. (pp. 2427-8) (Emphasis added)

Moreover, in Canada, the decisions of human rights commissions with regard to discrimination confirm this trend. It is the discriminatory effect which is prohibited rather than the discriminatory intent, as was held in *The Board of the Yorkton Regional High School and the Saskatchewan Human Rights Commission*, dated July 6, 1970 (Bence C.J., Q.B.). This decision was based on another very detailed decision rendered by Macdonald J. of the Alberta Supreme Court, 1st Division in *Re: Attorney-General for Alberta and Gares et al* (1976) 67 D.L.R. (3d) 635, in which it is clearly stipulated that in cases of discrimination, there is no question at all of intent or absence of intent.

17 This approach appears logical to us; otherwise, the Board would find itself involved in an extremely difficult — indeed, almost impossible — exercise, because in trying to discover the underlying motivation, it would have to become involved in interminable proceedings relating to intent, which lead nowhere. Our experience in labour relations clearly indicates that an action or attitude itself has its own positive or negative effect insofar as the freedom to exercise the right to join a union is concerned. If an employer's action or attitude per se clearly has the effect of interfering with or destroying the rights of an

employee recognized by the Code, the case of the union and the employee is heard and this is all that the Board requires in order to reach a conclusion, unless the preponderance of the evidence presented by the defence provides new or contradictory facts.

18 Moreover, the Board itself, in *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches, supra*, had the following to say:

> Effect as *a more important factor* than motive is not unknown to the Code. Section 184(3)(b) is directed to effect:
>
> > 184(3) No employer and no person acting on behalf of an employer shall
> >
> > (b) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred upon him by this Part;
>
> The distinction between sections focusing on effect only and those requiring anti-union animus is not novel in Canadian jurisprudence. In *A.A.S. Tele-Communications Ltd.* [1977] 1 Can LRBR 73, the Ontario Board stated:
>
> > The prohibition contained in s. 56 is of a different legal character than the prohibition in s. 58, the legality of employer conduct depending upon the consequences flowing from that conduct rather than upon the underlying motive. Interference with the 'formation, selection, or administration' of a trade union is prohibited, such prohibition being qualified only where employer conduct falls within the accepted boundaries of freedom of expression. In contrast with s. 58, it is not necessary under s. 56 to establish an anti-union animus on the part of an employer before making a finding of illegality. Conversely, the presence of anti-union animus, in the absence of any evidence of interference, would not be sufficient to found a complaint under s. 56.
> >
> > The essential element in any complaint under s. 56 is employer interference with a trade union. A distinction must be made, however, between employer conduct that actually interferes with a trade union, and employer conduct that only incidentally affects a trade union. The distinction, although only one of degree, is important because it takes into account the adversarial nature of collective bargaining. Given that the union and the employer are economic adversaries, the Board should not characterize the normal wear and tear of collective bargaining as constituting illegal interference. Conduct that threatens the formation or existence of the collective bargaining relationship, however, is quite a different matter, and would clearly amount to a contravention of s. 56. (p. 280-1) (Emphasis added)

IV

19 As we mentioned briefly earlier, we have before us four separate complaints of unfair labour practices. However, two of these complaints, namely those relating to the cash deficits and Michel Théberge's transfer, can be combined since the reasons given by the employer to justify its actions in each case are essentially the same. We will examine first the complaint relating to the cash deficits and second the complaint involving Michel Théberge's transfer. Then we will consider the complaint relating to the resignations of the employees of the Ontario Street branch separately and, finally, the complaint involving the communications advisers.

(A) Complaint relating to the cash deficits

20 If we apply the principles and considerations which we have just discussed to the part of the union's complaint relating to the cash deficits, what is the exact nature of this complaint?

21 The evidence reveals that at the beginning of April 1978, the B.C.N. decided to assume full responsibility for cash deficits, which prior to this date had been borne in part by the tellers. Moreover, it decided to apply this policy to employees of all its branches, with the exception of the branches which were certified or involved in certification procedures. This meant that the employees of the Ontario Street branch did not benefit from this new policy.

22 At the end of May 1978, as a result of the dissatisfaction caused by the employer's refusal to apply its general policy regarding cash deficits to employees of the Ontario Street branch, these same employees decided to submit their resignations

to the union, primarily because of the B.C.N.'s refusal to apply the said policy to them. In the wording of its complaint, the union claims that the employer's action in applying this new policy to the non-unionized branches and refusing to apply it to employees of the branches which were certified or involved in certification procedures constitutes a violation of sections 184(1)(a), 184(3)(a) and 184(3)(e) of the Code, which read as follows:

> 184.(1) No employer and no person acting on behalf of an employer shall
>
> (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union, or
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> •
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> . . . . .
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> (3) No employer and no person acting on behalf of an employer shall
>
> (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
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> . . . . .
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> (e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from...

What we must first determine then, is whether this action taken by the employer can be interpreted as an action by which it sought to "*discriminate against any person in regard to employment, pay or any other term or condition of employment...*" *because* "'*this employee*' *is or proposes to become ... a member ... of a trade union or participates in the promotion, formation or administration of a trade union*" (section 184(3)(a)).

23 The evidence reveals that it was after a long investigation based on a comparative study of the policies of other banks with respect to cash deficits that the B.C.N. reached this decision. Mr. Rémi Bourdages, Labour Relations Manager at the B.C.N., revealed that the B.C.N. was practically the only bank to maintain this policy of making the employees assume the burden of and responsibility for cash deficits. In refusing to apply the policy to employees of the branches which were certified or involved in certification procedures, it becomes clear that this action means that employees are treated differently *because* of their membership in a union.

24 In the dictionary, *Le Petit Robert*, the word "*discrimination*" is defined as follows:

> USU.: The act of separating one group from others by treating them in an inferior manner. (Translation ours)

and the word "*discriminatory*" (to follow the wording of section 184(3)(a) more closely) as "*that which tends to distinguish one group of persons from another to their detriment; discriminatory measures*" (translation ours).

25 It is clear, therefore, that the application of a general policy to all B.C.N. branches, with the exception of employees of branches which were certified or involved in certification procedures, constitutes, on the face of it, discrimination because this action is in fact tantamount to making a distinction between the tellers who were unionized or involved in certification procedures and the tellers of the other non-unionized branches, to the detriment, of course, of the unionized tellers, *because* they were members of the union or were involved in procedures relating to applications for certification.

26 In this regard, then, section 184(3)(a) was violated.

27 If we now seek to determine the effects of the employer's decision on the union members by submitting the employer's action to the test of whether it was "*inherently destructive of important employee rights*", which test was cited earlier in *NLRB v. Great Dane Trailers Inc.*, it appears from the evidence that this decision not to apply the general policy regarding cash deficits to all branches, the exceptions being the branches which were certified or involved in certification procedures, created strong dissatisfaction among the employees. The employer was well aware of this fact, as was confirmed by Messrs. Lemay and Bourdages in their testimony. This dissatisfaction was particularly evident among employees of the Ontario Street branch. All the employees who testified before the board stated that the main reason for their resignation from the union was the fact that they could not benefit from the general policy regarding cash deficits *because* they were unionized. In this respect, as we stated earlier, the test of whether an action is "*inherently destructive of important employee rights*" certainly applies in this instance and, as is stated in *Radio Officers Union v. NLRB*, which was cited earlier:

> The unfair labour practice is for an employer to encourage or discourage membership by means of discrimination. (p. 2427)

The judgment goes on to specify as follows:

> An employer's protestation that it did not *intend* to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. (p. 2428)

However, a very recent decision of the Ontario Labour Relations Board, *Spar Aerospace Products Limited* [1978] OLRB Rep. 859, provides further clarification regarding this question. The majority decision, signed by Mr. D.D. Carter, Chairman, contains the following comments with respect to the freeze imposed by section 70 of the Ontario Labour Relations Act:

> The approach appears to be one of simply requiring the employer to conduct 'business as before'.
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> . . . . .
>
> The Board clearly took the approach that the freeze simply required the employer to conduct its employment relations in the same manner as obtained prior to the giving of notice to bargain.
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> . . . . .
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> It should be emphasized that the 'business as before' approach dictates that the totality of the employment relationship be the subject of the freeze.
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> . . . . .
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> ...in the Board's view, section 70 read as a whole manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety.
>
> . . . . .
>
> The 'business as before' approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before.
>
> . . . . .
>
> This interim legal regime, in our view, should not place an employer in a legal straitjacket yet it should not at the same time lead to employees perceiving themselves as being penalized for engaging in collective bargaining. These two ends, in this Board's view, are best achieved by interpreting section 70 as requiring the parties to simply conduct 'business as before'. (pp. 867-8)

What we must determine is whether the so-called "*business as before*" test can be applied to the case before us. We believe that it can. As soon as a union begins certification procedures or, a *fortiori*, holds a bargaining certificate, the employer must act as before and in an impartial manner, and must continue to apply the same policies and the same terms and conditions of employment to everyone without making a distinction and discriminating between those who are unionized and those who are not unionized or who are taking steps to become so. The whole problem is to determine whether the employees have the impression or are convinced that they are at a disadvantage or are being penalized because they exercised a right conferred on

them by the Code. In the case before us, it is clear that the employer's action in applying its cash deficit policy in a different and a discriminatory manner to the unionized and non-unionized employees constitutes a violation of the principle of "*business as before*". It is clear to us that the employer applied such policies in a comprehensive, uniform and identical manner to all its branches. It was only when employees at a number of branches took steps to join the union that the employer changed its policy.

28 We must now ask ourselves whether these discriminatory attitudes on the part of the employer and this violation of section 184(3)(a) also constitute a violation of section 184(1)(a), which specifically concerns interference by the employer in the formation and administration of a trade union and the representation of employees by such a union. It is clearly apparent to us that it does, particularly when one considers the harmful effect of this decision by the employer on the union's credibility and the series of resignations which ensued. In this respect, then, the employer's action constitutes interference on its part in the formation of the union since this action contributed to the onset of the disintegration of the union and the dissatisfaction with it. Moreover, the union's right of representation was also jeopardized since the series of resignations compromised its representative character.

29 Finally, we conclude that section 184(3)(e) was also violated since this incident involving the cash deficit policy and the discriminatory manner in which it was applied clearly constitute an attempt on the part of the employer, by the imposition of a pecuniary or other penalty, to compel the employee to cease to be a member of the union. This conclusion was supported by the testimony given by the employees during the hearing to the effect that they had resigned from the union because of the B.C.N.'s cash deficit policy. This reaction, moreover, was confirmed by the evidence with respect to the union meetings held in the basement of the Ontario Street branch.

(B) Michel Théberge's transfer

30 In this case, the respondent was entitled, as we saw earlier, under the provisions of the Code in effect at the time, to unilaterally alter the terms and conditions of employment so long as it had not received the notice to bargain and did not violate the provisions of section 148(b). However, the respondent applied the policy of freezing the terms and conditions of employment as soon as the application for certification was made. We must therefore ask ourselves whether the decision not to transfer Michel Théberge was consistent with the practice which it had applied voluntarily. The facts show, beyond a shadow of a doubt, that Michel Théberge was notified of his transfer before the application for certification was filed. On this point, all the labour relations boards and tribunals agree that the refusal to introduce or grant an advantage or benefit which the respondent had agreed to introduce or grant before the freeze took effect constitutes a prohibited alteration of the terms and conditions of employment (see *Kiddies Togs Mfg. Co. Ltd. v. R. ex rel. Deuitch*, 65 CLLC ¶ 14,040 (Quebec Court of Queen's Bench); *Hospital Employees' Union, Local No. 180 v. Cranbrook and District Hospital Society*, 68 CLLC ¶ 14,145 (British Columbia Supreme Court); *Abbott Laboratories Ltd.* [1975] TT 136; *Hostess Food Products Ltd.* [1975] OLRB Rep. 210; *Parr's Print and Litho Ltd.* [1973] OLRB Rep. 597; and *Carleton University* [1978] OLRB Rep. 184. In the case before us, in view of the fact that the respondent had already promised before the application for certification was filed that Michel Théberge would be transferred, its refusal to implement the decision it took earlier constitutes an unlawful alteration of Michel Théberge's terms and conditions of employment. However, we must ask ourselves whether the opinions expressed by our investigator to the effect that the transfer should not be allowed because such an action could constitute an unfair labour practice are sufficient, in the circumstances, to excuse the otherwise unlawful action of the respondent. We are faced here with a situation somewhat similar to that described in *NLRB v. Dothan Eagle Inc.*, 75 LRRM 2531, in which the respondent argued that whether or not he altered the terms and conditions of employment, he was likely to be found guilty of an unfair labour practice. In the above-mentioned decision, the United States Court of Appeal states as follows:

> Conversely, it may be an unfair labour practice for an employer to refuse to grant benefits during the campaign or the collective bargaining period. Threats by an employer during the campaign period to reduce existing benefits clearly constitute a violation of S 8(a)(1)... Similarly, a unilateral refusal by an employer during the collective bargaining period to maintain existing wage and benefit policies is tantamount to a refusal to bargain in good faith and violates S 8(a)(5)... Finally, on some occasions it may even be an unfair labor practice for an employer to deny an increase in wages or other benefits during the bargaining period. (Page 2533)

. . . . .

At first glance it might appear that the employer is caught between the proverbial 'devil and the deep blue sea'. It is an unfair labour practice to grant a wage increase during the campaign and bargaining periods, but at the same time it may be an unfair labor practice to refuse to grant an increase during this same period. Indeed, the employer in this case had made just this sort of an argument, claiming that it could not grant the pressroom employees their normal progression raises since to do so would have been an unfair labor practice. We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge. In Armstrong Cork Co., supra, we explained:

> We regard as fundamentally unsound petitioner's argument that it was, in effect, required to cancel the wage increase to its mechanical employees, and continue its previous practice of granting them merit increases in order to comply with the union's insistence that it make no change in 'conditions of employment'. In view of petitioner's prior announcement of a general wage increase, even though it was subject to W.S.B. approval, we think its unilateral action in withdrawing the increase insofar as applicable to its union employees after the union's certification was equivalent to changing 'conditions of employment', for the definition of the quoted phrase includes not only 'what the employer has already granted', but also what he 'proposes to grant'. 211 F.2d at 847, 33 LRRM 2792-2793.

In other words, whenever the employer by promises or by a course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during the union campaign or during the period of collective bargaining. Both unprecedented parsimony and deviational largess are viewed with a skeptic's eye during the tensions of organization, recognition and bargaining. In those cases where the employer was found guilty of an unfair labor practice for withholding benefits during the campaign period or during the process of collective bargaining, the basis of the charge was a finding that the employer had changed the established structure of compensation. United Steelworkers of America, AFL-CIO v. NLRB, supra; NLRB v. Zelrich Co., supra; NLRB v. Longhorn Transfer Service, Inc., supra; Armstrong Cork Co. v. NLRB, supra. These unilateral blandishing acts of the employer tend to interfere with the exercise of free choice by the employees which is an important raison d'être of contemporary labor policy. In NLRB v. Dorn's Transportation Co., 2 Cir. 1969, 405 F. 2d 706, 70 LRRM 2295, the court distinguished between the situation in which a unilateral raise must be given and the situation where such a raise would be an unfair practice, saying:

> The broad purpose of Section 8(a)(1) is to establish 'the right of employees to organize for mutual aid without employer interference'. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S. Ct. 982, 985, 89 L. Ed. 1372, 16 LRRM 620 (1945). The issue under the Act is therefore whether in form and in purpose the withholding or conferring of economic benefits was to discourage and frustrate the statutory right of employees freely to organize and bargain collectively.
>
> The present case presents no such interference with protected rights. The evidence relied upon by the Board consists of two conversations initiated by employees at a time when granting a wage increase would invite the charge that the Company was seeking to weaken the position of the union. This is not a situation where the employer has by public announcement specifically advised the employees that the union is causing them to lose a wage increase they would otherwise have received. Compare NLRB v. Agawam Food Mart, Inc., 386 F. 2d 192, 66 LRRM 2768 (1 Cir. 1967). Nor did the Company fail to give a pay raise which it had previously announced would be effective on a specific date. Compare NLRB v. Longhorn Transfer Service, Inc., 346 F. 2d 1003, 59 LRRM 2498 (5 Cir. 1965). 405 F.2d at 715, 70 LRRM 2301.

. . . . .

In the instant case it is clear that the wage increases should have been given during the campaign and the collective bargaining periods. It had been established policy for the employer to give the apprentices in the pressroom and the copyroom periodic increases every six months. This policy was widely known and had been in effect for a considerable period of time. It had thus become part of the established scheme of compensation and could not be deviated from for purposes of influencing the vote during the union election. Nor could this policy be changed without union consultation during the collective bargaining period. In other words, the periodic increases were such an integral part of the structure of

> compensation that the refusal to continue these increases was in effect a denial of benefits which the employees had every reason to expect. In such circumstances there is no doubt that the employer had coerced the employees in violation of S 8(a)(1) and refused to bargain in good faith as required by S 8(a)(5).
>
> Moreover, in the instant case the evil of the employer's actions was compounded by the fact that while the periodic and automatic wage increases were denied to those in the pressroom, these regular increases were given to the non-unionized copyroom personnel. Such discrimination between union and non-union personnel cannot be tolerated. Russell-Newman Manufacturing Co. v. NLRB, supra; Armstrong Cork Co. v. NLRB, supra. In these circumstances the employees in the pressroom could not have missed the fact that but for the union they would have been receiving the increases given to their brothers in the copyroom. Such interference with employees' right to choose their representative without interference from the company was an unfair labor practice. (pp. 2534-5)

In that decision, the fact that there was a change in the company's policies served as the basis for the Court's finding that an unfair labour practice had been committed. Any change constitutes an unfair labour practice. If we apply the situation of Michel Théberge to the above-cited *Dothan Eagle* case, there is no doubt that the American Court would have found the employer guilty of an unfair labour practice for altering a practice which it had announced before the application for certification was filed. However, as the Board pointed out in *Royal Bank of Canada, supra*, the complaint of an unfair labour practice before us does not involve the violation of the provisions of section 148(b) or the present section 124(4) if they applied. We can also consider — although we are under no obligation to do so — section 184 in the light of anti-union animus. With regard to the opinion expressed by our investigator, the evidence is clear. Two bank employees testified to this effect under oath. Although, as counsel for the union pointed out, she was unable to contradict this evidence because, in accordance with the provisions of section 208, we did not allow our investigator to testify, we cannot for this reason disregard the sworn testimony of the two bank employees who were in agreement on this point. Testimony must not be rejected simply because one party cannot contradict by means of another witness the contents of the said testimony.

31 Moreover, we found it very peculiar and highly unusual for a company the size of the B.C.N. to place so much emphasis in its defence on the opinions expressed by the Board's investigator, because the Board was in no way bound by these opinions. It is very surprising that the B.C.N., in view of its very impressive legal services and its experienced senior officers (its vice-president, labour relations manager and the countless experts which it can consult), should base its defence on the simple opinions expressed by a Board officer. Such a defence is, to say the least, weak and pusillanimous.

32 We must also consider another element, namely the letter of April 4, 1978, in which the union informed the respondent that it had no objection to the bank transferring Michel Théberge as planned. At first glance, the respondent's attitude in not acting on this letter appears to be consistent with its decision to follow the advice of our investigator and negotiate nothing. In fact, in the context of bargaining, such a letter is a trap. If the respondent acts on the letter, it weakens its position by conceding an advantage without obtaining anything in return, and it disregards the warning of our investigator. If it does not act, it follows the advice which it received from the Board's officer but disregards the recognized practice of freezing the terms and conditions of employment as soon as an application for certification is filed. In the final analysis, however, we must conclude that the respondent should have proceeded with Michel Théberge's promotion. In view of the union's clearly expressed intention not to oppose such a transfer, the respondent had no reason to fear that it might be prosecuted for an unfair labour practice. The only other possible explanation, then, for the refusal to proceed with the transfer is the fact that it was a term or condition of employment which the respondent would have to negotiate. This explanation does not withstand scrutiny because the respondent was obliged to proceed with the transfer since it had announced the said transfer before the application was filed. It should have proceeded with the transfer even though it already had voluntarily applied the policy of freezing the terms and conditions of employment. We therefore conclude that by not proceeding with Michel Théberge's transfer, the respondent acted for anti-union reasons and violated the provisions of section 184.

(C) The resignation of employees of the Ontario Street branch

33 As we stated at the very beginning of this decision in relating the facts, the complainant claimed that the respondent interfered with the representation of the employees by encouraging the holding of meetings and discussions at the branch which

culminated in an attempt by the employees to get rid of the union. However, the evidence presented to the Board did not support these allegations, but provided proof to the contrary. The meeting held in the basement of the branch was organized by two employees who were members of the certified unit and only members attended. Similarly, the letters of resignation were typed by an employee who was a member of the certified unit, and the stamps and lawyer's fees were paid for by the employees. Moreover, as we stated earlier, the informal and very brief meeting held in the branch after customer hours was not attended by the manager and the accountant. This does not mean that the respondent did not know what was happening; it would be surprising if it did not. The branch in question is small and it is clear that the manager and accountant knew that on June 2 a meeting was held in the basement. The evidence, however, shows that they did not intervene in any way in the affairs of the employees. Even though the respondent knew what was happening, it cannot be criticized for not interfering in the affairs of its employees. Moreover, there was no other possible place to hold the meeting but in the basement, where it was much more practical for the employees to meet.

34 Although it should be made clear that the evidence revealed a cause and effect relationship between the employer's unlawful action with respect to the cash deficits and the case of Michel Théberge on the one hand, and the resignations from the union on the other (in that the resignations from the union are the direct result of the employer's unlawful actions), we cannot infer that the very fact that these resignations occurred makes the employer guilty of actually committing an unlawful act. The evidence revealed that the employer did not interfere and was not the direct instigator of the resignation process.

35 We conclude that the preponderance of evidence clearly reveals that the respondent did not interfere and we decide that it did not violate the provisions of section 184.

(D) The case of the communications advisers

36 As we stated earlier, the evidence reveals that the principal reason for organizing these meeting was to inform the employees of the new pay scales. In *ATV New Brunswick Limited*, 29 di 23; and [1979] 3 Can LRBR 342, the Board held that the respondent was entitled to meet and talk with its employees even after certification had been granted. The evidence presented in each particular case must therefore be examined in order to determine if what was said during these meetings constitutes or approximates an unfair labour practice. In the instant case, the evidence reveals that all the branches were visited by the communications advisers, who had very strict instructions to answer questions. If they did not know the answers, they had instructions to make note of the question and submit it to head office, which would ensure that an answer was provided. The evidence reveals that during these meetings, discussions were limited to facts relating to the various items on the agenda. With respect to the item entitled the B.C.N. and trade unionism, the evidence revealed that the respondent confined itself to informing the employees that they had the right to join a union, and that if they exercised this right, the bank would recognize it and no one would be dismissed. These meetings may have had the indirect effect of complicating the recruitment campaigns conducted by the complainant and other unions. However, the employees of the bank sector are not children who need to be coddled, especially not when they are informed of facts only. We conclude that the respondent had the right to meet with its employees and that the evidence which was presented before us concerning what was said during these meetings cannot sustain the allegation that there was a violation of section 184. The Board reached the same conclusion on the basis of almost identical facts in *Bank of Nova Scotia, Selkirk, Manitoba*, 27 di 690; and [1978] 1 Can LRBR 544.

V

37 In the light of the conclusions which we have reached in the case of the cash deficits and Michel Théberge's transfer, and pursuant to powers vested in it under section 189 of the Code, the Board orders the employer:

(1) To apply its cash deficit policy to the Ontario Street branch in Montreal and to its other unionized branches in Matagami and Rouyn-Noranda, the whole being retroactive to April 3, 1978;

(2) To compensate the employees of these branches for the losses incurred and actually sustained since April 3, 1978 as a result of the failure to apply this cash deficit policy;

(3) To reimburse Mr. Michel Théberge the amounts which he lost between April 10, 1978, the scheduled date of his transfer to the position of general clerk, and the date on which he was actually promoted to this position;

(4) In accordance with the provisions of Section 121(1) of the Code, the Board does not make a final order in these cases, but orders the parties to try to reach agreement on the sums to be paid to the tellers affected by the application of the cash deficit policy and to Mr. Michel Théberge, within twenty (20) days of receipt of this judgment. Should the parties fail to agree on these quanta, the Board will settle the dispute;

(5) The Board further orders the B.C.N. to distribute this decision to each employee of its Ontario Street (Montreal), Matagami and Rouyn-Noranda branches within fifteen (15) days of receipt of these reasons.

***The Vice-Chairman, Mr. Claude H. Foisy*:**

I

38 I have had the opportunity to read my colleagues' reasons for decision and to collaborate in writing a part of the said reasons. Like them, I am of the opinion that there is reason to dismiss the complaints relating to the communications advisers and the resignations of employees of the Ontario branch, and I subscribe to their reasons with respect to these complaints.

39 In the case of the complaint relating to the transfer of Michel Théberge, I subscribe to their reasons and decision with the following reservations; I am of the opinion that section 184 *must* be considered in the light of anti-union animus for reasons on which I will elaborate later when I comment on the case of the cash deficits. I also agree with the order rendered to remedy the violation of section 184 in the case of Michel Théberge.

40 With respect to the case of the cash deficits, I do not share my colleagues' points of view. This gives rise to the following dissenting opinion. In order to facilitate greater understanding, I will repeat, as an introduction, part of the text already cited by the majority.

II

41 The second point consists in determining whether anti-union animus is an essential element of the alleged infractions. This question arises because, in a recent decision dated January 4, 1979, *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches*, 34 di 651, [1979] 1 Can LRBR 266, the Board ruled that in the case of complaints of unfair practices presented under certain sections of the Code, the intention or anti-union animus was no longer an essential element in finding that these sections had been violated. Prior to the amendments of June 1, 1978 to the *Canada Labour Code*, the Board had consistently indicated that in cases of unfair labour practices it was essential that there be an anti-union animus (cf *Central Broadcasting Company Limited*, 10 di 8, 75 CLLC ¶16,169, [1975] 2 Can LRBR 65; *The Royal Bank of Canada, Kamloops & Gibsons*, 27 di 701, 78 CLLC ¶16,132, and [1978] 2 Can LRBR 159; and *Bank of Nova Scotia*, 28 di 901 and [1978] 2 Can LRBR 181). In this decision of January 4, 1979, the Board based its new interpretation on the changes made on June 1, 1978. At pages 279 and 280, the Board stated the following:

In Canada where the remedy for an unfair labour practice has in the past most often been by prosecution before the courts, motive, characterized as anti-union animus, has usually been considered an essential element of many unfair labour practices. The majority of the Board held so in relation to section 184(1)(a) in *The Royal Bank of Canada, Kamloops & Gibsons Branch, supra*. The minority held anti-union animus had no relevance in that case.

This approach consistently applied by this and some other labour relations boards requires some reexamination under the Code as amended in June of this year. Recent amendments to the Code have decriminalized the labour relations process to the extent that the Board is now the single agency with remedial authority. It has wide, discretionary, remedial authority under section 189 of the Code with the clear legislative directive that the Board's remedial authority is to be used to further Code objectives and not primarily to punish (sections 189 and 121). Prosecution under the Code is subject to Board consent

(section 194). This new role for the Board was recognized recently by the Federal Court of Appeal in *McKinlay Transport Limited v. Goodman et al*, 78 CLLC ¶ 14,161:

> Parliament has recently enacted extensive amendments to the *Canada Labour Code* which, in my view, demonstrate that the purpose was to vest in the Canada Labour Relations Board extensive and far reaching powers to deal with labour relations in the works and undertakings to which the statute applies including the granting of injunctions enjoining employees from participating in strikes, and the making of orders requiring employees to perform the duties of their employment — a power not exercised by a Court of equity. Not only has the Board been vested with powers more extensive and particular than those of the courts in such situations but the area in which the Board's decisions are open to attack and review has been narrowed by the amendments. The power previously reserved to the Minister of authorizing prosecution for violation of the Act has also been vested in the Board. In the face of these provisions, even though the legislation does not specifically purport to withdraw from the superior courts jurisdiction to issue injunctions in respect of conduct arising out of labour disputes, it seems to me that the Court can and ought to take into account in exercising its discretion that Parliament has shown its disposition that such matters be dealt with by the Board on the principles which it applies in the search for achievement of the objects of the legislation rather than by the courts.

The Board has therefore recognized that the amendments to the Code decriminalized the scope of certain sections. The Board has also recognized that, in the case of certain other sections such as sections 184(3)(a) and 184(3)(e), anti-union animus remained an essential element of a violation. However, with respect to the complaints before us and, more particularly, the first three complaints mentioned above, namely those relating to the cash deficits, Michel Théberge's transfer and the resignations, the actions relating thereto were taken while the old Code was in force. In these circumstances it would not be equitable, in my opinion, to apply the new approach that the Board adopted in the above-mentioned decision, *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches*. I feel, in fact, that if seeking the intention is an essential part of determining whether an infraction has taken place, we cannot in retrospect apply amendments to the Code which would have the effect of eliminating this essential element. This is a question of merits and not one of procedure. In *Maxwell on The Interpretation of Statutes* (1969) P. St. J. Langan states the following at pages 215 and 216:

> Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases *or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended*. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.
>
> The statement of the law contained in the preceding paragraph has been 'so frequently quoted with approval that it now itself enjoys almost judicial authority'.
>
> One of the most well-known statements of the rule regarding retrospectivity is contained in this passage from the judgment of R.S. Wright J. in Re Athlumney: 'Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.' (Emphasis added)

To the same effect, see *S.G.G. Edgar, Craies on Statute Law*, (1971) at pages 387 to 402. It seems unfair to me, vis-à-vis the respondent, to apply the Board's new interpretation, which is based on the new statutory provisions, to facts arising before these new provisions came into effect. We must assess the employer's actions in the context of the interpretation that we gave to the Code before it was amended.

III

42 The union alleges that the employer violated sections 184(1)(a), 184(3)(a)(i), 184(3)(a)(v), 184(3)(b), 184(3)(e). Essentially, it alleges that the employer's actions in these two cases constitute discrimination against and punishment of union members because they joined a union and because they filed an application for certification. The union also alleges that this constitutes interference with its representation of the employees. In this regard, the union argues that the employer's activities interfered not only with the representation of the employees directly concerned but also with the representation of other employees of the Bank as a whole because the said activities had the effect of discouraging employees from becoming unionized and, consequently, from joining this union.

43 The employer argues, basically, that it did not act with the intention of punishing its employees because they joined a union or filed an application for certification. It claims that it acted in accordance with its rights in the particular context of the filing of applications for certification and subsequent collective bargaining. It claims that as soon as the first application for certification affecting one of its establishments was filed, it adopted the policy that all the terms and conditions of employment existing at the time that an application for certification was filed would be frozen. The employer argues that it was not required to apply its new cash deficit policy to the branches which were certified or involved in certification procedures because if it did so it would be acting contrary to its policy of not changing the terms and conditions of employment and the cash deficits policy constitutes a "term or condition of employment". It claims that if the union wants to have this benefit, it only has to negotiate it. The employer's argument is basically the same as that advocated by the *Bank of Nova Scotia, supra*:

> The employer's position can be simply stated. There is no doubt that employees in the certified branches were treated differently from employees in branches not certified — and perhaps this had a disheartening effect on some individuals within the certified branches and an inhibiting effect on employees not certified. But, these effects flow from the choice freely made by the employees to have their terms and conditions of employment established by collective bargaining rather than by unilateral employer action. These employees are free to bargain collectively for improvements in salary and vacation programs with the possibility of gaining more than the employer has granted. Furthermore, these benefits can be negotiated to have retroactive effect. The employees have opted out of the realm of unilateral employer action and into the collective bargaining regime. Counsel for the employer invokes a modified version of a colloquial adage by suggesting the union is expecting to be fed by the hand it has bitten. Further, any trade union worth its salt would not want the benefits of employer unilateral action but would prefer to negotiate all benefits. After certification the employer does not have to extend to employees in certified branches the improvements extended to other branches since such improvements are a matter for negotiation. Because the employer acted upon this understanding of the collective bargaining world in which it found itself, it did not act with a prohibited motive and thus committed no unfair labour practice. (pp. 906-7; and pp. 185-6)

The sections that the union alleges the respondent violated read as follows:

> 184.(1) No employer and no person acting on behalf of an employer shall
>
> > (a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or
>
> (3) No employer and no person acting on behalf of an employer shall
>
> > (a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person
> >
> > > (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
> >
> > •

. . . . .

(v) has made an application or filed a complaint under this Part, or

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

•

. . . . .

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that he may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part;

I wish to point out at once that section 184(3)(b) does not apply in the instant case. This case concerns a so-called "*yellow dog*" clause according to which an employer agrees with an employee, either verbally or in writing, that the latter cannot join a union in the future as long as he is in its employ. This situation does not apply to the facts before us.

44 With respect to the other alleged violations of section 184, let us first examine, since anti-union animus is an essential element of the infraction, whether the measures taken by the employer stem from prohibited motives.

45 Although the complaints of unfair labour practices allege that section 184 has been violated, the main point of the discussion in this case consists in determining whether, in view of the provisions of the Code and the context of labour relations, the employer could change the terms and conditions of employment of its staff.

46 An application for certification to represent a group of employees working for an employer which has not previously had to deal with a union has an effect by the very fact that it is filed. We can state, without any danger of being wrong, that there are not many employers who are pleased about such an application. It would be abnormal, on the contrary, for it to be otherwise. Until such an application is filed, the employer can administer as it pleases, acting as absolute master of its business. The application for certification disrupts its peace and security. Although no employer is thrilled when a union establishes itself in its business, all employers do not react the same way. Some will do everything in their power to break the union and the employees who have supported it. We then witness the dismissals of employees — preferably those whom the employer believes initiated this revolt — contestations of the applications for certification that are intended merely to gain time, transfers of employees, etc. Others, however, even if they are not pleased with the situation and even if it is not with a light heart, will respect the right of their employees to unionize.

47 It is also important to remember that from the time an application for certification is filed, the employer is clearly on the defensive. In all the provincial jurisdictions in this country, it cannot change the terms and conditions of employment after the application has been filed and, in most cases, the employer is not too sure as to what constitutes a change in the terms and conditions of employment. Once the employer has gotten over its initial shock of learning of the application for certification, it can consult its legal counsel in order to obtain information on the scope and the effects of such an application and thus assess the situation on its true perspective. Once this has occurred — as it generally does during the first week after the application has been filed — the employer cannot ignore the fact that, should its employees be certified, its relation with them will be changed. It will go from the system of individual bargaining to the system of collective bargaining. This change in systems, which was discussed by the Supreme Court in *Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée*, [1959] S.C.R. 206, was raised again by Estey J. in *International Longshoremen's Association, Local 273 et al v. Maritime Employers' Association et al*, [1979] 1 S.C.R. 120, at pages 127 and 128:

This issue was settled in principle by this Court in McGavin Toastmaster Ltd. v. Ainscough where Chief Justice Laskin stated at pp. 724-5:

> I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. The majority of this Court, speaking through Judson, J., in Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée (1959), 18 D.L.R. (2d) 346 at pp 353-4, [1959] S.C.R. 206 at p. 212, said this in a situation where a union was certified for collective bargaining under Quebec labour relations legislation:
>
> > There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.
>
> The situation is the same in British Columbia where the legislation in force at the material time stated explicitly that a collective agreement entered into between a union and an employer is binding on the union, the employer and the employees covered thereby: see Mediation Services Act, 1968 (B.C.), c. 26, s. 6.
>
> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

These observations, made with reference to British Columbia labour relations legislation, apply equally to the Code and the Collective Agreements here before us.

The employee who joins a union should also be aware that by deciding to become a union member, he has opted for the collective bargaining system. The Board has recognized this reality on several occasions, among others, in *The Bank of Nova Scotia, supra*.

48 *Before the amendments to the Canada Labour Code* came into effect on June 1, 1978, only section 148(b) dealt with the freezing of terms and conditions of employment. This section reads as follows:

> 148. Where notice to bargain collectively has been given under this Part.
>
> •
>
> . . . . .
>
> (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

This section, among others, was interpreted in *Air Canada*, 24 di 203, in which the Board stated the following at pages 213, 214 and 215:

> As a second method of attempting to creating an environment conducive to the settlement of collective bargaining differences and 'cooperative efforts to develop good relations and constructive collective bargaining practices' and 'constructive settlement of disputes' and 'effective industrial relations for the determination of good working conditions

> and sound labour-management relations' (Preamble), Parliament has enacted section 148(b) of the Code. This section prohibits an *employer* from altering 'the rates of pay, any term or condition of employment or any right or privilege of the employees in the bargaining unit' or 'any right or privilege of the bargaining agent' until the time of a lawful work stoppage, unless 'the bargaining agent consents to the alteration of such a term or condition or such a right or privilege'. The prohibition is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyst avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code, Part V. The scope of the prohibition in section 148(b) is deliberately more expansive than the scope of past collective agreements. Current or prospective negotiations between a trade union and employer are not restricted to the subjects addressed in previous collective agreements. In circumstances where the negotiation is for a first collective agreement there is no such point of reference. A bargaining agent seeking to negotiate a first collective agreement or a renewal of an existing collective agreement is not restricted in the matters that it may seek to include in a collective agreement 'unless they are clearly illegal, contrary to public policy, or an indicia, among other things of bad faith' (CKLW Radio Broadcasting Limited, supra, p. 12). Under the collective bargaining regime, the bargaining agent has the exclusive authority to bargain collectively on behalf of the employees in the bargaining unit and 'there is no room left for private negotiation between employer and employee' (Le Syndicat catholique des Employés de Magasins de Québec, Inc. v. La Compagnie Paquet Ltée (1959), 18 DLR (2d) 346 (S.C.C.) per Judson J. at p. 353). The trade union may seek to negotiate with respect to any matter that is a term and condition of employment, expressed in either individual contracts of employment or a previous collective agreement, and any other matter, characterized by Parliament as 'any right or privilege of the employees in the bargaining unit'. It may also seek to negotiate with respect to 'any right or privilege of the bargaining agent' whether acquired in a previous collective agreement or otherwise enjoyed by the trade union. (For a discussion of the scope of collective bargaining with respect to the duty to bargain in good faith see Pulp and Paper Industrial Relations Bureau, as yet unreported B.C.L.R.B. decision No. 62/77). Our interpretation of the purposes of section 148(b), namely protecting the exclusive authority of the bargaining agent from being undermined by unilateral employer action, encouraging cooperative collective bargaining practices and the constructive settlements of disputes, is consistent with the requirement in section 148(b) that an employer alteration is permissible with the consent of the bargaining agent. The requirement for that consent requires the employer to recognize the authority and role of the bargaining agent and necessitates communication between the employer and bargaining agent, thereby fostering joint resolution of interests of either party.

This interpretation was repeated in, among others, *The Royal Bank of Canada, Kamloops & Gibsons, supra*, and in the *Bank of Nova Scotia, supra*. This provision prevents the employer from changing the terms and conditions of employment from the time that the union's notice to bargain has been sent to it. As we saw in the above quotation, the purpose of this section is to protect the union's bargaining rights by preventing the employer from unilaterally changing the existing terms and conditions of employment so as to undermine the union's authority in the actual bargaining process. In the above mentioned two decisions concerning the *Royal Bank of Canada, Kamloops & Gibsons and the Bank of Nova Scotia*, a minority decision, on the other hand, was of the opinion that the terms and conditions of employment could not be changed from the moment certification has been granted. In the context of this discussion, it is important to note that before June 1, 1978, the *Canada Labour Code* did not contain any provisions having the effect of freezing the terms and conditions of employment at the time an application for certification was filed. This situation was unique in the field of labour relations in Canada since all the provincial jurisdictions had provisions which had the effect of freezing the terms and conditions of employment of the employees concerned at the time an application for certification was filed. Depending on characteristics specific to the various provincial legislations, the terms and conditions of employment cannot be changed except with the consent of the Board or union. Section 124(4) of the Code, which has been in effect since June 1, 1978, remedied this deficiency; it reads as follows:

> 124.(4) Where an application by a trade union for certification as a bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay or any other term or condition of employment or any right or privilege of such employees until

> (a) the application has been withdrawn by the trade union or dismissed by the Board, or
>
> (b) thirty days have elapsed after the day on which the Board certifies the trade union as bargaining agent for the unit, except pursuant to a collective agreement or with the consent of the Board.

As we have just seen, such a clause already existed in all the other jurisdictions and, more particularly, in Quebec where the respondent's head office and the majority of its branches are located. Section 47 of the Quebec Labour Code reads as follows:

> 47. From the filing of a petition for certification and until the right to lock-out is acquired or an arbitration award is handed down, no employer may change the conditions of employment of his employees without the written consent of each petitioning association and, where such is the case, certified association.
>
> The same rule applies on the expiration of the collective agreement until the right to lock-out is acquired or an arbitration award is handed down.
>
> The parties may stipulate in a collective agreement that the conditions of employment contained therein shall continue to apply until a new agreement is signed.

The freezing of the terms and conditions of employment when the application for certification is filed, as stipulated in labour legislations in Canada, has a dual purpose. First and foremost, it seeks to prevent the employer from influencing its employees' decision whether or not to continue to support the union and possibly from causing them, in the context of a representation vote, to vote against the said union. In order to do so, the employer could change the terms and conditions of employment plus or minus for an immediate purpose, namely that of changing its employees' minds. The second purpose consists in protecting the bargaining power of union members with respect to the collective bargaining which will be undertaken once the organization is certified. In this context, it is highly unlikely that the employer would change the terms and conditions of employment to the employees' advantage. It would be more inclined to deprive them of rights and privileges in order to gain a tactical advantage in the bargaining to come.

49 I am also aware that a decision made by the employer to apply or not to apply some of these measures may have the effect of contravening the provisions of section 184. However, before we can conclude that there was a violation under section 184, we must, since we have to consider the Code as it existed before June 1, 1978, take the anti-union animus into account.

50 In addition, as we saw in the foregoing, the employer must, under section 188(3), which was amended on June 1, 1978 and which applies in the present case, show by a preponderance of evidence that the measures that it did or did not take did not stem from a prohibited motive.

IV

51 In the case of the cash deficit policy, which was not applied to the employees in branches that were certified or involved in procedures for certification, the employer submitted, as we saw in the foregoing, that it had not applied the said policy because it had decided in December 1977 not to change the terms and conditions of employment of employees involved in an application for certification, and this, as of the time of filing of the said application. In the context of collective bargaining, the employees had, in order to enjoy these benefits, to negotiate them.

52 In the above-cited *Bank of Nova Scotia* decision, the problem was similar to the one before us here. The Board stated the following:

> This bring us to the substance of the complaints. As indicated above, there is no complaint before the Board of a violation of section 148(b). Instead we have the three allegations of violations of section 184 outlined above. The key difference between a section 148(b) violation and a violation of section 184 is the requirement of anti-union animus for a section 184 violation. The discrimination, the intimidation or the imposition of a penalty must be for a purpose or a reason prohibited by the Code. These, in turn, are enacted to support the freedom granted in section 110(1). A violation of section 148(b) does

> not require an anti-union animus. Thus, if an alteration of the status quo at the appropriate time amounted to a violation of section 148(b) that same action at another time would not constitute a contravention of section 184 unless a prohibited motive is established." (p. 906; and 185)

In that decision, the Board agreed with the respondent's argument according to which, in a context of collective bargaining, the respondent did not have to grant the employees the improvements given to employees working in other branches, considering that these improvements were a matter for negotiation; moreover, the Board recognized that in such circumstances, the respondent had not acted out of anti-union animus.

53 In the present case, the respondent did not grant its new cash deficit policy to employees who were certified or involved in certification procedures. It was not obliged to do so under section 148(b), which did not apply at the time. It did not, in addition, act against its policy of freezing the terms and conditions of employment as of the time of filing of an application for certification; the evidence indicated that this cash deficit policy was not in force at the time the applications for certification were filed and had not been announced to the employees before the dates of filing of the said applications. The evidence also showed that the respondent had not announced this new policy in the branches that were certified or involved in certification procedures. The employees learned of this policy from employees working in other branches. The respondent testified that, following the first application for certification which was presented by a union and which covered its regional centre of Quebec City, it adopted the policy of freezing the terms and conditions of employment of its employees who were covered by such an application for certification. After making this decision, the respondent met with two of the Board's labour relations officers on three occasions. According to the evidence, they advised the said respondent not to change the terms and conditions of employment of the employees concerned as of the filing of the application for certification and, more particularly, with respect to the transfer of employees, not to do as other chartered banks had done. In those other banks, as soon as an application for certification was filed, there occurred, as if by chance, a series of transfers which changed the composition of the personnel covered by an application for certification. The respondent also stated that although it had made the decision before its first conversation with one of the Board's investigators, the said investigators confirmed, as it were, that its initial decision was right.

54 As we saw in the foregoing, the respondent, if it had wanted to do so, without contravening the provisions of section 148(b) of the Code, could have changed the terms and conditions of employment unilaterally until the time at which it received the notice to bargain. However, it decided not to change the terms and conditions of employment as of the filing of the application for certification.

55 In this context, by not changing the terms and conditions of employment of its employees, the respondent is acting in keeping with the role that it will be required to play in the collective bargaining system. In such a system, one does not concede anything for nothing.

56 Considering the particular atmosphere surrounding the filing of an application for certification and the remarks that the Board's officers made to the respondent, I find that the preponderance of the evidence indicates that the respondent did not act out of a prohibited motive and is not guilty of an unfair labour practice by not applying its new cash deficit policy to its employees who were certified or involved in certification procedures. For these reasons, I dismiss the complaint relating thereto, which alleges that section 184 was violated.

End of Document

Appendix 2

KeyCite treatment
Most Negative Treatment: Distinguished
Most Recent Distinguished: A.T.U., Local 1374 v. Canada Coachways (Alberta) Ltd. | 1980 CarswellAlta 276, 5 A.C.W.S. (2d) 155, [1981] 1 W.W.R. 266, 32 A.R. 474 | (Alta. Q.B., Aug 29, 1980)

1979 CarswellNat 725
Canada Labour Relations Board

Union of Bank Employees, Locals 2104 & 2100 v. Canadian Imperial Bank of Commerce

1979 CarswellNat 725, 1979 CarswellNat 726, [1980] 1 Can. L.R.B.R. 307, 35 di 105, 80 C.L.L.C. 16,002

Union of Bank Employees, Locals 2104 and 2100, Canadian Labour Congress, complainant, and Canadian Imperial Bank of Commerce, operating at the following branches; Niagara and Scott Street, St. Catharines, Ontario, St. Paul and McDonald Street, St. Catharines, Ontario, Creston, British Columbia, respondent

Mr. Marc Lapointe, Q.C., Chairman and Messrs Lorne E. Shaffer and Hugh R. Jamieson, Members

Judgment: November 30, 1979
Docket: 745-422, 745-426, 745-427, Decision No. 202

Counsel: *Mr. Jeffrey Sack* representing the union.
Mr. F.G. Hamilton, Q.C. representing the employer.

Subject: Labour
Related Abridgment Classifications
Labour and employment law
I Labour law
I.3 Unfair labour practices
I.3.b Employer practices
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***Mr. Hugh Jamieson* in cooperation with the *Chairman, Mr. Marc Lapointe, Q.C.*:**

I

1 These matters were heard by the Board in Ottawa on April 9, 10 and 11, 1979. Originally, complaints had been lodged against the Canadian Imperial Bank of Commerce, the Bank of Montreal and the Royal Bank of Canada. For no reason other than the order of filing, the Board decided to proceed first with the case involving the Canadian Imperial Bank of Commerce.

2 The other two banks and the union agreed to abide by any decision arrived at by the Board in the Canadian Imperial Bank of Commerce case. Signed declarations of agreement were filed with the Board, the wording of which were identical other than the names of the banks and local numbers of the union,

> It is understood and agreed between ... that the complaints against the respondent ... will be adjourned sine die on the following understanding:
>
> > (a) The ... agrees to abide by any decision that the Board shall make in the matter provided that there are no material facts particularly relating to or allegedly relating to the complaints against the ... that would distinguish the actions of this respondent from those of the other corporate respondents.
> >
> > (b) This agreement shall not be construed as any admission by the ... of any violation of any provision of the Canada Labour Code regardless of the outcome of the complaints against other respondents.

The matter was thereafter dealt with as if it related only to one bank.

3 The complaints arose from a decision of the employer to implement a nine percent (9%) general increase in salary to all its employees except to those employed in branches where certification of a bargaining agent had been applied for or where certification had been granted.

4 The complaints were filed on December 20, 1978, by the Union of Bank Employees, locals 2104 and 2100, Canadian Labour Congress (the union), alleging that the Canadian Imperial Bank of Commerce (the employer), had contravened, by the above described partial implementation, sections 124(4), 148(b), 184(1)(a), 184(3)(a) and 184(3)(e) of the Canada Labour Code (Part V — Industrial Relations). The union filed an amendment to its complaints on January 19, 1979, alleging that the employer's actions also contravened section 148(a) of the Code.

5 On February 1, 1979, the employer responded to the complaints, raising some preliminary objections, which we will deal with later, and generally submitting that its actions were consistent with the provisions of both section 124(4) and 148(b) of the Code and ancillarily that it did not violate section 184.

6 As to the complaints based on a violation of section 148(a) and (b), on February 7, 1979, the Minister of Labour granted consent pursuant to section 187(5) of the Code. It read:

> Pursuant to subsection 187(5) of the Canada Labour Code, I consent to a complaint being made to the Canada Labour Relations Board by the Complainant against the Respondents for an alleged violation of paragraphs (a) and (b) of section 148 of the Canada Labour Code, in that in or about the month of December 1978 the Respondents refused to make every reasonable effort to enter into a collective agreement and did alter the rates of pay for certain employees effective January 1, 1979 without the requirements of paragraphs 180(1)(a) to (d) having been met.

II

7 At the hearing, counsel for the employer raised the following preliminary objections:

> The complaint and the amendment have not been signed on behalf of the various local unions in conformity with Board Regulation 9.

and

> The complaint alleges a violation of section 148 in which case the Minister's Consent in writing is required under section 187(5) at the time the complaint is made. (As further confirmed by Board Regulation 35(2). It is clear that the Minister's written consent was not issued at the time the complaint was filed and therefore the entire complaint is defective and must be dismissed.

and

> The wording of the consent granted by the Minister of Labour does not correspond with the nature of the complaint in as much that it inferred that there had been an alteration of rates of pay when in fact, the complaint was to the contrary.

Dealing immediately with these preliminary objections, we are satisfied by documents filed with the Board that the person who signed the application was authorized to do so as required by section 9 of the Regulations. One of the primary objectives of that Regulation is to ensure that persons, corporations or organizations implicated in applications are aware of their contents. It ensures the "bona fide" of the application. In the instant application where counsel and a qualified representative are responsible for the filing, the purpose of the Regulation has been served and its requirements met.

8 Ministerial consent is contemplated prior to the filing of a complaint under section 148 by the provisions of section 187(5) of the Code:

> 187(5) Except with the consent in writing of the Minister, no complaint shall be made to the Board under subsection (1) in respect of an alleged failure to comply with section 148 or paragraph 184(3)(g) or 185(a) or (b).

Upon receipt of complaints such as in the instant case where some allegations require ministerial consent which does not accompany the complaint and other allegations contained in the complaint do not require ministerial consent, it is the practice of the Board to transmit the complaint to the respondent and draw to the attention of both parties the fact that ministerial consent is necessary but has not been obtained. If ministerial consent is provided subsequently, it is then transmitted to the respondent. If not, the Board will not deal with that portion of the complaint unless and until consent is provided.

9 Of course, the complainant could have provided the respondent with a new copy of the complaint bearing a date subsequent to the ministerial consent but that would have served no useful purpose. The respondent was in no way prejudiced by receiving a copy of the complaint in advance of the ministerial consent. The absence of consent is unquestionably fatal to an application which requires it. However, the existence of consent when the Board is dealing with the matter of an application which bears a date prior to the granting of the consent makes of that fact a defect in form or technical irregularity which is curable under section 203 of the Code.

10 The wording of the consent which is obviously taken from the wording of the Code is sufficient to indicate the existence of ministerial consent. It is not necessary for the Minister to restate the complaint particularly in a case such as this where some aspects of the complaint do not require ministerial consent.

11 The Board is satisfied that the matter is properly before it.

III

12 A measure of the considerable importance of the present case can be appreciated when one considers the amplitude of the resources invested by the parties in attempting to obtain a favourable resolve by the Board: three of the major chartered banks of Canada and a union directly supported by the Canadian Labour Congress in a series of cases encompassing the extreme geographical confines of this country, from the Maritimes to the Pacific. The Board, having to deal with new provisions in the Code and past decisions, has to navigate carefully in these unknown waters and this explains, in part at least, the time elapsed since the filing of these complaints.

IV

13 What was the evidence in this case?

14 Some evidence was adduced on behalf of the employer, through Mr. P.J. Cotton, Vice-President, Personnel, relating to the policies and practice, the composition and implementation of the employees' compensation package and in particular the salary structure. There are three considerations of salary increases: merit, promotional and general. Merit increases are dependent

on an annual assessment of each employee's performance. Promotional increases are self-explanatory. General increases are granted periodically and are dependent upon the outcome of ongoing studies related to regional or local economic conditions, competitors' salary structures and other similar considerations.

15 While we can assume that general salary increases were granted prior, the evidence was limited to a resume of the practice since 1974, as follows:

> April 1, 1974 — 6-8% (vary by Region)
>
> December 1, 1974 — 8%
>
> March-September, 1975 — 4-5% (vary by Region)
>
> February 1976 — 6-8% (vary by Region)
>
> June 1976 — 2 $^{3}/_{4}$-3 $^{1}/_{4}$% (vary by Region)
>
> October 1976 — 0-1 $^{1}/_{2}$% (vary by Region)
>
> March 1, 1977 — 6%
>
> February 1, 1978 — 5 $^{1}/_{2}$%
>
> January 1, 1979 — 9%

General salary increases are announced by way of a "head office circular" to all branches. The general increase of February 1, 1978, was not extended to certified branches. That circular read:

> We are pleased to announce effective February 1, 1978, a general salary increase of 5 $^{1}/_{2}$% with a maximum of $2,000 applicable to all full-time members of the personnel in Canada. Rates currently being paid to part-time employees should be reviewed and adjusted where warranted, but no such adjustment should exceed 5 $^{1}/_{2}$%. Revised salary schedules will be brought into use February 1.
>
> The foregoing salary adjustments will not apply to members of the personnel included in the bargaining units at our 5 branches which have applied for and received trade union certification in Ganges, Gibsons, Langley, Mission and Port McNeill, B.C., since this is a matter for negotiation some time in the future.

We have no evidence as to how that particular circular was distributed to certified branches.

16 The January 1, 1979 increase was announced by circular dated December 8, 1978:

> We are pleased to announce that effective January 1, 1979, a general salary increase of 9% rounded to the nearest $50 has been approved for all full-time and part-day members of the personnel in Canada. Rates currently being paid to part-time employees should be reviewed and adjusted where warranted, but no such adjustment should exceed 9%. Revised salary schedules will be brought into use January 1.
>
> The foregoing salary adjustments will not apply to members of the personnel included in the bargaining units at branches which have applied for and/or received trade union certification since this is a matter for negotiation some time in the future.

On this occasion employees in certified branches or in branches affected by an application for certification were required to initial a copy of the circular.

17 Normal merit and promotional increases continued to apply to all employees without exception.

18 During cross-examination, Mr. Cotton explained memos and other documents which had been required to be produced by the union, relating to the formulation of specific salary increases including the January 1, 1979 increase.

19 Counsel also had Mr. Cotton identify and comment on certain documents, including a document "Trade Union Activity — The Most Frequently Asked Questions" and a memorandum dated January 4, 1978 from Mr. R. Donald Fullerton, President and Chief Operating Officer to all Department Managers, all of which had been produced and considered at previous Board proceedings. (See *Canadian Imperial Bank of Commerce, Sioux Lookout Branch*, 33 di 432; [1979] 1 Can LRBR 18 and *Canadian Imperial Bank of Commerce, Yonge Street Branch*, 34 di 677, [1979] 1 Can LRBR 391).

20 The union, on the other hand, adduced evidence to illustrate the effect of the non-implementation of the latest salary increase on certified branches. Employees spoke of frustration, confusion, doubts as to their commitment to the union, bitter accusations between staff members and of being punished because they had exercised or were exercising their rights under the Code.

21 It is a matter of record that the union had filed an application for certification affecting the employees of the Niagara and Scott Street Branch, which was still pending as of January 1, 1979. The union was certified on January 10, 1979. At the St. Paul and McDonald Street Branch, the union had been certified on September 8, 1978 and had served notice to commence collective bargaining on September 27, 1978. At the Creston Branch in British Columbia, the union had been certified on November 24, 1978 and had served notice on December 22, 1978. In this latter case, these dates acquire special importance.

V

22 The union, takes the position that by a past practice of many years, the employer had established an annual salary review process leading to a general increase which had become part of the salary structure of the bank and was therefore a term or condition of employment and a justified expectation of the employees. Consequently, failure to implement the salary increase of January 1, 1979 to the employees of the certified branches and the branches affected by an application for certification constituted an alteration of the terms and conditions of employment. Insofar as the Niagara and Scott Street Branch, the alteration was contrary to section 124(4) of the Code and contrary to section 148(b) in respect of the other two branches in the instant case where notice to bargain had been served, prior to January 1, 1979, being the implementation date.

23 The union further contends that such a substantive alteration in the terms and conditions of employment constitutes a failure to bargain in good faith as contemplated by section 148(a) of the Code.

24 The union finally claims that since organization of the employer's branches commenced, the employer had adopted a very high anti-union profile and the factual aspect of this case displays the continuing desire and attempts to interfere with the employees' rights, contrary to section 184 of the Code; specifically, section 184(3)(a), by discriminating against those employees who had or who were exercising their rights; section 184(3)(e) by the imposition of a pecuniary penalty; and interference as contemplated by section 184(1)(a) by the devastating effect of the employer's action on employee rights and the implicit message portrayed by the action to other employees who may be considering exercising their rights in other branches.

25 In support of the union's position, counsel cited the following cases:

NLRB v. Dothan Eagle, Inc. 434 F.2d 93; 75 LRRM 2531 (1970)

NLRB v. McCann Steel Company 448 F.2d 277; 78 LRRM 2237 (1971)

NLRB v. United Aircraft Corp. 490 F.2d 1105; 85 LRRM 2263 (1973)

NLRB v. Otis Hospital 545 F.3d 252; 93 LRRM 2778 (1976)

NLRB v. Lucy Ellen Candy Division of F & F Laboratories Inc. 517 F.2d 551; 89 LRRM 2549 (1975)

Plasticrafts Inc. v. NLRB 586 F.2d 185; 99 LRRM 3204 (1978)

Spar Aerospace Products Limited [1978] OLRB Rep. 859

Scarborough Centenary Hospital [1978] OLRB Rep. 949 also [1978] OLRB Rep. 679

Hostess Food Products Ltd. [1975] OLRB Rep. 210

Public Service Alliance of Canada v. Alliance Employees Union OLRB unreported decision, file no. 0731-78-U, September 8, 1978

Kiddies Togs Mfg. Co. Ltd., 65 CLLC ¶ 14,040

Webster & Horsfall (Canada) Ltd. 69 CLLC ¶ 16,050

Johnson Controls Ltd. 71 CLLC ¶ 16,041 (O.L.R.B.)

26 Counsel for the union also reviewed this Board's decision in *Royal Bank of Canada, Kamloops & Gibsons*, 27 di 701; [1978] 2 Can LRBR 159; 78 CLLC ¶ 16,132 and the *Bank of Nova Scotia*, 28 di 901; [1978] 2 Can LRBR 181 wherein the Board set out its interpretation of the effect of section 148(b). In this connection, the main thrust of counsel's submission was that the conclusions reached in those decisions were in conflict with the preponderance of jurisprudence cited. Also, he argued that as section 148(b) was not before the Board in either of these cases, the remarks relative to that section were obviously "*obiter dictum*" and are not binding on this panel of the Board. Furthermore, counsel for the union submits that since those decisions, amendments to the Code, including the shifting of the onus (section 188(3)) on the respondent as regards alleged violations of section 184(3) and the incorporation of section 124(4) bring new dimensions and perspective of the legislation: the whole area bears serious re-examination.

27 On the other hand, the employer's position is that it has not contravened the Code, in fact it has taken guidance from the Board in its decisions in *Royal Bank of Canada, supra* and *Bank of Nova Scotia, supra*, in taking its position that salaries of persons in certified bargaining units are a matter for negotiations. It extended that policy to persons in bargaining units which were the subject of applications for certification after the proclamation of section 124(4) of the Code on June 1, 1978. The provisions of section 124(4) were viewed in the same light as section 148(b) resulting in a freeze of conditions upon the filing of an application for certification in anticipation of future collective bargaining.

28 Counsel for the employer subscribed to the reasoning and decisions of the Board in the decisions in *Royal Bank of Canada, supra* and *Bank of Nova Scotia, supra*. He also pointed out apparent differences in the jurisprudence cited, inasmuch as the American cases were dealing with bargaining in good faith, there being no similar freeze provisions in the U.S. legislation, and the other cases dealt with merit increases or committed conditions which were not implemented, or involved antiunion motivation.

29 The employer concedes that merit or promotional increases are terms or conditions of employment and they have not been altered. In the employer's view, general increases are at the best, periodical, based solely on business or entrepreneurial pressures and are not part of the total compensation package of the bank, therefore, not a term or condition of employment. The employer also maintains that the underlying motive for the decision not to implement salary increases to unionized employees was twofold: to comply with the freeze provisions of the Code and to maintain maximum flexibility at the bargaining table. Counsel for the employer cited excerpts of several National Labour Relations Board decisions to display the inconsistency in this area. All of the cases cited are referred to in the cases already mentioned.

VI

30 The applicable sections of the Code read:

124. (4) Where an application by a trade union for certification as a bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay or any other term or condition of employment or any right or privilege of such employees until

(a) the application has been withdrawn by the trade union or dismissed by the Board, or

(b) thirty days have elapsed after the day on which the Board certifies the trade union as bargaining agent for the unit,

except pursuant to a collective agreement or with the consent of the Board.

. . . . .

148. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; and

(b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 180(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

. . . . .

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

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

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. . . . .

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

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

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

(ii) has been expelled or suspended from membership in a trade union for a reason other than a failure to pay the periodic dues, assessments and intiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union,

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

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

(v) has made an application or filed a complaint under this Part, or

(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;

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. . . . .

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

(ii) making a disclosure that he may be required to make in a proceeding under this Part, or

(iii) making an application or filing a complaint under this Part:

. . . . .

188(3) Where a complaint is made in writing pursuant to section 187 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 184(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

. . . . .

189 Where, under section 188, the Board determines that a party to a complaint has failed to comply with subsection 124(4) or section 136.1, 148, 161.1, 184, 185 or 186, the Board may, by order, require the party to comply with that subsection or section and may

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. . . . .

(a.1) in respect of a failure to comply with subsection 124(4) or paragraph 148(b), by order, require an employer to pay to any employee compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to the employee;

(b) in respect of a failure to comply with paragraph 184(3)(a), (c) or (f), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ or has suspended or discharged for a reason that is prohibited by one of those paragraphs,

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

(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any pecuniary or other penalty imposed on the employee by the employer;

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

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. . . . .

and, for the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any failure to comply with any provision to which this section applies and in addition to or in lieu of any other order that the Board is authorized to make under this section, by order, require an employer or a trade union to do or refrain from doing any thing

that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply that is adverse to the fulfilment of those objectives.

VII

31 The essential facts in this case are not in dispute. The employer circulated a head office circular dated December 8, 1978, to all its branches, and in the unionized branches at least, employees were required to initial that circular which announced a general salary increase of 9%, effective the following month (January 1, 1979) for all employees except those employees in certified bargaining units and those whom the employer *considered* to be in bargaining units where applications for certification were pending. It is not denied that the employer followed the course of action set out in that circular.

32 As pointed out before (see page 110), on September 8, 1978, certification had been granted and notice to bargain served upon the employer at the St. Paul and McDonald Street Branch. Certification had been granted (November 24, 1978) but notice to bargain had not been served at the Creston Branch in British Columbia (it was eventually served on December 22, 1978). These dates as applying to the Creston Branch acquire special significance, as will be determined below.

33 Finally, the application for certification at the Niagara and Scott Street Branch (filed on November 29, 1978) was still pending on December 8, 1978 and also on January 1, 1979. Eventually, the union was certified for this branch, on January 10, 1979.

34 It is against this background that the announcement of a 9% general salary increase must be appreciated. Indeed, it is trite to comment that the decision to serve notice to bargain at the Creston Branch a few days prior to the implementation of the increase must have been a hard one to take, just as much as the decision to file the application for certification at the Niagara and Scott Street Branch, prior to the implementation of the general increase. These comments stem from the knowledge which the unions had of some decisions of this Board concerning the interpretation to be given to section 148(b) of the Code and of the absence of interpretation of specific applications of the new section 124(4) or of the absence of a substantial overall interpretation of the interplay and interrelation between section 124(4), section 148 and section 184 of the Code.

35 The instant case relates to a series of situations where the applicant union alleges violations of sections 124(4), 148 and 184 in circumstances where an amendment to section 188(3) has reestablished the reverse onus of proof on the employer in situations contemplated by section 184(3) of the Code.

36 The Board shall first deal with the allegations of violations to section 184 of the Code.

37 It is important to stress that the singling out by Parliament of a subparagraph of section 184, namely sub-paragraph 3, to apply the severe and significant exception to the general rule that who complains has the onus of proof, by determining that the respondent has that onus, is a clear indication of the importance attached to prohibitions against unfair labour practices by employers. A scrutiny of the elements contained in the various divisions of section 184(3) underlines the fact that it is paramount in the legislator's concern to protect the fundamental right and freedom of employees to join the trade union of their choice and participate in its lawful activities as enshrined in section 110(1) of the Code. Sections 184, 185 and 186 ensure that the exercise of these rights will not be tampered with by improper or undue pressure generated by employers or unions or anybody. But it is only in section 184(3) that the onus of proof is reversed.

38 Employees in the process of making up their minds as to the advisability of electing collective bargaining as opposed to individually arranging their working conditions with an employer, may be the subject of various unlawful attempts at dissuasion. These are dealt with in the Code by resorting to the various provisions of section 184. However, once they have opted for the collective bargaining regime and once they have selected a bargaining agent and the whole matter is "out in the open" via an application for certification of which the employer has been notified, the employees are still exposed to various forms of pressure. Even more so in some cases. In no way do the prohibitions against unfair labour practices by employers lose any of their rigorousness during that period of time which extends beyond the filing of the application for certification.

39 In dealing with the allegations under the various subsections of section 184 of the Code, we must look for antiunion motivation in some circumstances. (See *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hill Branches*, 34 di 651; [1979] 1 Can LRBR 266, for a detailed statement on whether motive is an essential ingredient).

40 It has become apparent throughout the organizational attempts at various branches of the employer across the country, by several unions, that this employer has embarked on a campaign designed to discourage its employees from exercising their rights under the Code. Some attempts were blatant and blundering, others more sophisticated and subtle. For example, see *Canadian Imperial Bank of Commerce, Sioux Lookout Branch, supra* and *Canadian Imperial Bank of Commerce, Yonge Street Branch, supra and Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hill Branches, supra*.

41 Throughout the organization campaign, in this hitherto unorganized industry, the Board has been mindful that in a vast corporation such as the employer's, individuals at varying levels of management can be over-zealous or impulsive and their actions can reflect on the overall corporate policy and the Board has taken this into consideration in previous cases involving the Canadian Imperial Bank of Commerce. In the instant case however, there can be little doubt that the question of a system-wide general salary increase, the amount thereof and its implementation is one which is decided at the highest level.

42 There can also be little doubt about the corporate policy as expressed on page 2 of the previously mentioned confidential memorandum from the President, R. Donald Fullerton, to all department managers, dated January 4, 1978. It read as follows:

> In any dealings with trade unions the Bank will pursue a course towards stability in personnel matters, and will seek to gain acceptance of its personnel policies and practices in the belief that they are fair and equitable, taking into account its differing responsibilities to its employees, shareholders, customers, and the public at large. *To the fullest extent possible, the Bank will preserve its right to deal with, and communicate with, its employees directly and not through a third party*. The Bank, as always, will live up to its contractual agreements and will expect others to do the same. *The Bank will not be coerced and will resist inefficient fragmentation of the branch network which has grown and developed through the dedicated efforts of many personnel over a number of years*.
>
> As a responsible employer, the Bank has an obligation to keep our employees informed of their rights and options so that any decisions will be made with full knowledge of all the implications. It is important that our personnel carefully consider the serious long-term ramifications of signing a union application card. (Emphasis added)

Under the guise of defending individual rights, the employer's practice of unilaterally establishing conditions of employment and preference for depriving its employees of access to an effective dispute resolution mechanism, is persisted in. It is against this background that we view the employer's actions.

43 The question before the Board in relation to section 184(1)(a) is the effect of the content of the circular of December 8, 1978, on the employees to whom it was circulated and the consequences in terms of the effect on the formation or administration of a trade union or the representation of employees by a trade union. More specifically it is in the manner and method of communicating the implementation of the salary increase that we find the subtlety of the employer's actions.

44 The Board has had the experience in the last two years of a sufficient number of applications in the banking industry to acquire an accurate appreciation of the mentality of the standard bank employee. The degree of his or her sophistication in matters of unionism is patently low and volatile.

45 Let us have another look at that head office circular of December 8, 1978:

> We are pleased to announce that effective January 1, 1979, a general salary increase of 9% rounded to the nearest $50.00 has been approved for all full-time and part-day members of the personnel in Canada. Rates currently being paid to part-time employees should be reviewed and adjusted where warranted, but no such adjustment should exceed 9%. Revised salary schedules will be brought into use January 1.

> The foregoing salary adjustments will not apply to members of the personnel included in the bargaining units at branches which have applied for and/or received trade union certification since this is a matter for negotiation some time in the future.

The vague reference in the last two lines quoted above, coupled with the following extract from the text of material widely circulated by this employer after January 1978 (Exhibit A-6) and entitled "Trade Union Activity — The Most Frequently Asked Questions":

> 11.Q. — How long will negotiations take?
>
> A. — This is very difficult to predict. The negotiation procedure is normally a lengthy series of meetings between the representatives of the employer and the trade union. During these meetings every word of the Collective Agreement has to be agreed to by both parties. As an example of the task involved, you might look at a Collective Agreement if you have access to one. A couple of agreements we reviewed had 134 pages and in one case 24 detailed sections, 10 schedules and 24 letters of agreement. Our five unionized branches were certified commencing last summer and no agreement in any branch is yet in sight.

could not but have a most serious effect on employees. Why would an employer circulate such a message as that contained in the second paragraph of the December 8, 1978 circular, to the vast number of employees across Canada, when only a molecule are unionized or attempting to become unionized, if it was not intended to intimidate those thousands of employees with the threat of a long term freeze on their salaries if they opted for the collective bargaining regime? The majority of them would never ever have had any contact with a union organizer. By the dissemination of that circular to all employees however, the employer was achieving the goal of countering the cropping up of organizations at various locations in its system and by the same token it was discriminating against those who had opted for collective bargaining. It was not to inform them, as Mr. Fullerton stated. The message for employees in those branches where no certification had been granted or was pending was very clear. The exercise of the right to join a union and seek certification would result in their being denied the immediate 9% increase that was otherwise forthcoming. Was it a reasonable thing for the employer to send such a circular containing the absolutely useless last paragraph vis-à-vis them, to all employees' attention as a matter of information? We do not think so. It would be no more reasonable than doing the same thing if the circumstances were the opposite. A multi-location employer having both non-unionized and unionized employees in different locations performing the same duties would obviously not send out circulars to all employees announcing that the increase negotiated for unionized employees would not be granted to non-unionized ones doing the same job. Obviously, such a course of action would create a sense of being penalized among the non-union employees and provide stimulus to any union organizing drive among them.

46 The motive was undoubtedly aimed at having a chilling effect on potential organizing. The Board can come to no other conclusion than that the employer issued the circular of December 8, 1978, and circulated it for the purpose of persuading these employees not implicated by any unionism, to refrain from exercising their rights under the Code and this in the very midst of a burgeoning and massive organizing campaign by the labour movement right across Canada.

47 The Board therefore finds that the respondent has not provided it with any other reasonable and logical reason for having addressed said circular containing the second paragraph to its thousands of employees in branches unaffected by any specific and actual union organizing. Having found that the motive was improper, we conclude that the employer contravened section 184(1)(a) by an interference, prohibited in that section, in the organizational efforts of the applicant union, in relation to the formation of a trade union and the representation of employees by a trade union.

48 Moreover, the fact that the employees at the certified branches and at the branch affected by an application for certification were required to specifically record their receipt and knowledge of the contents of the circular, indicates to us the employer's desire to also intimidate those employees who had exercised their rights. The confusion and second-guessing which it fostered among the employees, members or not of the union in those branches, as shown in evidence in the instant case, is proof of the effect on these employees, an effect which was so clearly and patently foreseeable that the employer could not but have known it, yet did nothing to alleviate it, but on the contrary, generated it by its actions, thereby demonstrating its motive.

49 Section 188(3), as amended June 1, 1978, imposes upon the employer the onus of proving that there were only legitimate reasons for these actions and that they were not tainted with any anti-union animus in order to avoid a finding of violation of section 184(3)(a) of the Code. No such demonstration was made by the employer, except to allege the automatic implementation of a freeze under the new section 124(4) which it equate to that under section 148(b). The Board finds that the respondent did not convince the Board that it has not violated section 184(3)(a).

50 In relation to all of the employees of the respondent to whom the circular of December 8, 1978, was directed, the Board finds that the respondent violated the provisions of section 184(3)(e) of the Code.

51 The Board has already stated its interpretation of section 184 as being quite autonomous and paramount. It said in *Royal Bank of Canada, Kamloops & Gibsons, supra*, at pages 716, 171 and 16,986:

> ...We wish to state that it is our interpretation of the Code that an employer act may constitute a violation of both section 148 and 184 of the Code. A good introduction to the reason for our conclusion and an eloquent statement of the union's position in this case is the decision of the U.S. Court of Appeals, Fifth Circuit, in *NLRB v. Dothan Eagle, Inc.* (1970), 75 LRRM 2531: ...

and at pages 718, 173 and 16,987:

> We agree with the U.S. Court of Appeal approach that an employer's actions may be both a refusal to bargain and a prohibited act under section 184.

In this case the Board adds that it is its interpretation that an employer act may constitute a violation of both sections 124(4) and 184 of the Code. In that case, the Board was not confronted with the situation prevailing in the instant case where we find an act of an employer which allegedly contravened section 148(b) and the union filed a complaint, and at the same time, that same act allegedly contravened various subparagraphs of section 184, and the union filed a series of complaints (section 184(1)(a), 184(3)(a) and 184(3)(e)), and that same act finally allegedly contravened section 148(a) and section 124(4), and the union filed complaints in those regards.

52 The Board states that in some circumstances, as exemplified in this particular instance, there could be the existence of a violation of section 184 and concommitantly, a violation of the provisions in the Code of either or both of the "freeze" mechanisms. Conversely and further, the correct application and respect of the freeze provisions does not automatically absolve employers from scrupulously avoiding, in the implementation and application of the freeze periods, any action which could be viewed as a prohibited act, under section 184. This is even more pertinent and applicable in the banking industry because of the skittishness of the employees, their present lack of basic labour relations knowledge and their isolation in small pockets of employees because of the essential and unavoidable deployment of the operations through small branches. If there is one area where employers should remain neutral, this is it. As was stated by this Board:

> Neutrality is a characteristic we urge on employers when it involves matters of employee exercise of rights under the Code.

53 Significantly, this statement was written in reasons for decision in a case involving precisely the same employer as in the instant case. (See *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches, supra*, p. 674.

54 The Board now turns to the allegation of a violation of section 124(4).

55 Let us look again at the rather simple facts in this case. For a number of years, this employer, in addition to merit increases and promotional increases in the salary structure, had granted general salary increases at least once a year, sometimes twice and even three times (in 1976). On February 1, 1978, it granted a $5\ ^{1}/_{2}\%$ such general increase. It denied this increase to members of the personnel in the bargaining units at five branches where a union had been certified, alleging that salary adjustments were a matter for negotiations some time in the future.

56 On March 9, 1978, this Board, in *Royal Bank of Canada, Kamloops & Gibsons, supra*, (pages 722, 176 and 16,989) stated:

> ...We would therefore find that the failure to introduce annual increments given to employees represented by the union not contrary to section 148(b), had notice to bargain and ministerial consent been given.

Because of the information services provided by this Board and the keen interest of the banking community in this Board's reasons for decision since the original decision to find the employees of a bank branch to constitute an appropriate bargaining unit, there is no doubt this employer was aware of that decision.

57 On June 1, 1978, Bill C-8 was promulgated, adding to its provisions, section 124(4). For the same reason mentioned above, there is no doubt that this employer was aware of the text of this amendment, together with accompanying amendments such as that referred to above concerning section 188(3).

58 On September 8, 1978, the union was certified at the St. Paul and McDonald Street Branch in St. Catherines, Ontario. Notice to bargain was served upon the employer.

59 On November 24, 1978, the union was certified for the Creston Branch, at Creston, B.C. On November 29, 1978, the Union filed an application for certification at the Niagara and Scott St. Branch in St. Catherines, Ontario. The employer was notified of this application, according to the record, on December 8, 1978. The same day the employer announces by circular distributed to all its branches, coast to coast, a general salary increase of 9% to be implemented on January 1, 1979. It states to all and sundry that the increase will not apply to members of the personnel who not only are represented by a certified bargaining agent, but also to those members of the personnel in branches where certification is sought as evidenced by an application for certification.

60 On December 20, 1978, the union files complaints of violation of sections 124(4), 148(b), 184(1)(a), 184(3)(a) and 184(3)(e) of the Code, on behalf of the locals holding certifications or having applied therefor, in the instant case. On December 22, 1978, the union gives notice to bargain upon the employer in the Creston Branch. On January 1, 1979, the employer implements the wage increase as announced. On January 10, 1979, the union is certified at the Niagara and Scott St. Branch. On January 19, 1979, the union adds a complaint of violation of section 148(a) of the Code.

61 A certain number of facts emerge.

> 1. The employer did not attempt prior to December 8, 1978, to obtain any consent or to discuss the 9% increase with the union under section 148(b) of the Code as regards the St. Paul and McDonald Street Branch.
>
> 2. The employer did not seek to obtain any consent or to discuss the 9% increase with the union prior to December 8, on December 8 and until December 22, concerning the Creston Branch.
>
> 3. The employer did not apply to this Board in any fashion prior to and after November 29, 1978, and more precisely after December 8, 1978 (when it was notified that the union had applied for certification at the Niagara and Scott St. Branch) in order to obtain the consent of the Board to "*alter the rates of pay or any other term or condition of employment or any right or privilege of* [*its*] *employees*."

62 As pointed out before, counsel for the employer argued that salaries of persons in certified bargaining units are a matter for negotiations and that they are not, as opposed to merit or promotional increase, terms and conditions of employment. After the proclamation of section 124(4) of the Code on June 1, 1978, it extended the same policy to persons in bargaining units which were the subject of applications for certification. Section 124(4) was viewed in the same light as section 148(b) resulting in a freeze of conditions upon the filing of an application in anticipation of future collective bargaining.

63 In *Royal Bank of Canada, Kamloops & Gibsons, supra*, the Board had stated at pages 719, 174 and 16,987-8:

> There are circumstances where parties dispute whether an alteration occurs. The status quo is not always easy to ascertain. There is as yet no provision in the Code imposing a similar freeze after an application for certification is made although such provisions have existed in provincial legislation for years.

There is no doubt that the addition of section 124(4) filled an obvious void in the Code and gave new dimensions to the question of maintaining the status quo during, firstly, the critical period when employees have opted, sometimes very hesitantly for collective bargaining and have selected a bargaining agent but have not yet seen juridical consecration of that bargaining agent nor had time to really get acquainted with their new collective bargaining regime and the ways and traits of the new agent and secondly, during the period which follows certification, the notice to bargain and collective bargaining.

64 Parliament, recognizing that the period post application for certification was critical if the fundamental right inscribed in section 110(1) of the Code was to have any practical meaning, enacted section 124(4). This section inserts in the Code a new prohibition directed at the employer. What is the nature of that prohibition? It is a prohibition which has nothing to do with the motive of the employer in doing what he is prohibited from doing.

65 As we stated in *Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches, supra*, page 669.

> In this context, it must be considered that the prohibitions in section 124(4) and 148(b) have as their primary focus the objective they seek to achieve rather than the employer's motive.

66 The objective is to ensure that no action by the employer as regards rates of pay or any other term or condition of employment or any right or privilege of employees is going to deny the employees full freedom in the exercise of their right to seek collective bargaining and to opt for a specific bargaining agent. This is paramount.

67 To suggest as did the respondent in the instant case that salaries and other terms and conditions of employment of employees apparently affected by an application for certification is somewhat presumptuous.

68 To whom would such a "freeze" apply?

69 The bargaining unit described in the application may be altered significantly during the certification process. Employees who have exercised their rights by opting for a collective bargaining relationship with their employer should not see a change in their world at this early stage. Nor should their conditions of employment be subject to unilateral change before their selected bargaining agent has obtained the necessary status to represent them effectively. Section 124(4) removes from the employers the right to make unilateral decisions affecting the employees' working conditions during the certification process, thus averting the possibility of pressures of all types on the employees during that critical stage, where, according to the Code and Board policy, there may even be a representation vote ordered, a vote which could become meaningless because of some employer manipulation of the rates of pay, other term or condition of employment or of any right or privilege.

70 Section 124(4) establishes the status quo. In other words, it is "business as before", for the employees.

71 That status quo is preserved pending that period and until prospective collective bargaining.

> 124(4). Where an application by a trade union for certification as a bargaining agent for a unit is made in accordance with this section, no employer of employees in the unit shall, after notification that the application has been made, alter the rates of pay or any other term or condition of employment or any right or privilege of such employees until
>
> (a) the application has been withdrawn by the trade union or dismissed by the Board, or
>
> (b) thirty days have elapsed after the day on which the Board certifies the trade union as bargaining agent for the unit,
>
> *except pursuant to a collective agreement or with the consent of the Board*. (Emphasis added)

72 The allegations of contravention of section 124(4) affecting the Niagara and Scott Street Branch, St. Catherines, Ontario, illustrate typical circumstances intended to be covered by that section. The employer had decided to implement a system-wide general salary increase. It took that decision, according to evidence, far prior to November 29, 1978, date upon which the union filed an application for certification. Despite having been notified on December 8, of this application, the employer decided to deny the increase to employees in that branch, because of anticipated future collective bargaining and pleaded as a motive that this action was to comply with the freeze provisions of the Code and to maintain maximum flexibility at the bargaining table. The employer argues that to deny the increase to employees merely because they are affected by an application for certification could result in accusations of violation of section 184 of the Code. On the other hand, to grant it unilaterally would probably result in similar accusations. This is the syndrome of "damned if you do and damned if you don't" which has been commented upon in precedents cited by both parties.

73 There is no question in the mind of this Board that by past practice, this employer had established general salary increases as an integral part of its compensation package for employees. The employment officers of the employer would definitely point out, as a matter of course, to any applicant for a position with the bank, that, salary wise, the candidate would benefit from promotional and merit increases and furthermore, general increases. Once the announcement was made on December 8, the 9% increase became an integral part of the salary structure and every employee was quite correct in perceiving that this increase was owed to him or her.

74 Section 124(4) of the Code makes it mandatory for the employer to not *alter* the salary structure except pursuant to the provisions of the section. The employer failed to do so. Section 124(4) extracts the employer from the "damned if you do, damned if you don't" position during this delicate period where the hypersensitivity of employees and unions creates an atmosphere which is fraught with potential for conflict, fear and apprehension.

75 A new role is created for the Board. Except in the circumstances where there is an existing collective agreement where terms and conditions of employment are clearly delineated, it becomes the responsibility of the Board to ensure that nothing is done which may affect the employees' right of selection. The Board must administer the application of the status quo in a manner which also ensures that the ability or flexibility of the eventual proposed bargaining agent to represent the employees in the bargaining unit and bargain with an acceptable degree of effectiveness on their behalf, is preserved.

76 Basically, it is "business as before". Here, business as before was the granting of the 9% general salary increase. If there are reasons and justifications for altering that situation, the employer can and must obtain the consent of the Board. The need for consent applies, in our view, to the normal day to day working conditions, including existing wage rates as well as the wage structure, hours of work, classifications, duties and functions, transfers, layoffs, promotions, etc.

77 This would only constitute a brief fettering of the employer's rights and there is no intention that the Board manage the company. It is for this reason that, in the future, the Board will act on this type of application as expeditiously as possible to avoid unnecessary disruption of the employer's day to day operations. On receipt of an application for consent, the Board, through its normal investigatory processes, will be in a position to confirm the authenticity and motive for the alteration. It will also have the necessary information and insight to assess the effect, if any, on the wishes of the employees and the consideration of maintaining a balance of rights. Therefore, while the expectation of bargaining may be advanced as the basis for section 148(b) the same certainly does not hold true for the provisions of section 124(4). Unlike section 148 and the provisions of other legislation [1], it is the consent of the Board and not of a bargaining agent which is required for an alteration pursuant to section 124(4). Prior to the enactment of section 124(4) employers were frequently in a dilemma as to whether or not they should implement contemplated changes while an application for certification was pending. Employers were reluctant to seek consent from a union which did not yet possess certification and which might not eventually get it. The Board, with section 124(4), may deal with anticipatory applications and avoid the conflict which is generated where the employer has to choose a course of action in which either alternative could result in formal charges with damaging effects on the industrial relations milieu. A prompt determination on an application to the Board as to whether or not a certain course of action would constitute a prohibited change clarifies the matter and relieves the employer of pressures to deal with an uncertified union or risk charges under the Code. Employers will not be prejudiced if they apply pursuant to section 124(4) in cases of doubt. They can apply to the Board

to make a determination as to whether a certain course of action would constitute a prohibited change and argue that the course contemplated is not a prohibited change. They can convince the Board that "business as usual" must be departed from.

78 However, the provisions of section 124(4) were not intended, in our view, to lessen the protection afforded by section 184. It provides a mechanism to minimize the tension and uncertainty that exists while an application for certification is pending and to enable parties to obtain a determination in advance as to the permissibility of a proposed course of action.

79 There are situations in which changed economic circumstances impel an employer to adopt courses of action which could be perceived by the union as an effort to evade the possibility of having to bargain collectively. In general and especially in the circumstances of a first application for certification, employees and the proposed bargaining agent have no access to the required information that may justify the course of action proposed by the employer. The employer, as pointed out above does not feel that he should deal with a union which is not and may not become the certified bargaining agent of his employees. It is here that the investigatory powers of the Board will provide for an opportunity to verify the facts advanced by the employer and if the Board makes a determination that the contemplated change is necessary, justified and not in violation of the Code, then consent to alter the conditions will be granted. The Board may grant consent subject to specified conditions. This process is intended not only to ensure that justice is done but also that it will be perceived by the employees concerned as being done.

80 Once a general increase is announced, it becomes part of the conditions and terms of employment between an individual employee and the employer. Section 184 prohibits the utilization of these benefits by discriminatory treatment as a means to unduly constrain or influence an employee in the exercise of his or her rights under the Code.

81 Essentially then, the concept which is applied by Parliament in section 124(4) is that in the event that an application for certification is not successful, the relationship between the employer and the employees will be undisturbed and they can carry on with the status quo being the same as before the application was submitted.

82 We find therefore, that in the case of the employees affected at the Niagara and Scott Branch, the 9% general salary increase became a term and condition of employment once it was announced on December 8, 1978, and, when the employees were required to initial the circular indicating that they would not receive it because of the pending application for certification, the employer altered their conditions of employment without the consent of the Board and in violation of section 124(4) of the Code.

83 Having come thus far, we pause to reflect and consider the consequences of the employer's actions. The results are disastrous. Besides the chilling effect on the union's organizational campaign, the parties, including the employees, are living in an impossible labour relations atmosphere. Confusion, frustration and mistrust are rampant. Small wonder the union and the employer are stalled in protracted negotiations.

84 This being in the infancy of collective bargaining in the banking industry, the Board, being mindful of its mandate as expressed in the preamble of the Code, finds that it must take positive steps to remedy the situation. We must attempt, through our remedial powers under section 189 of the Code, to restore the balance and create a climate in which the parties can hopefully reconcile their differences through discussion and mutual agreement.

85 Firstly, we will deal with the monetary aspects of the remedies. Bearing in mind the overall unfair labour practice context in which the 9% salary increase was withheld from the employees in the three branches in question, the Board orders the employer to compensate all employees in all three branches in an amount equal to that which they would have received had they been granted the increase on January 1. 1979. This would include employees who have terminated or who have been transferred to other branches in the meantime.

86 Furthermore, the Board orders the employer to pay to all employees in branches where they did not receive the $5\ ^{1}/_{2}\%$ salary increase as of February 1, 1978, compensation in the amount they would have received had they received the increase on February 1, 1978. The adjustment of $5\ ^{1}/_{2}\%$ will only apply to persons still in the employ of the employer.

87 All these salary adjustments should achieve a uniformity throughout all branches.

88 As a further remedy to counteract the employer's interference with its employees' rights under the Code, the Board finds it necessary to order the employer to communicate with all of its employees in the following manner:

> The Canadian Imperial Bank of Commerce has been found by the Canada Labour Relations Board to have contravened certain provisions of the Canada Labour Code (Part V — Industrial Relations), by interfering with its employees' rights under the said Code to exercise their right to organize for the purposes of bargaining collectively with access to dispute resolution mechanisms.
>
> The Canadian Imperial Bank of Commerce hereby retracts any statement made in the past which so interfered and will hence-forth cease and desist from participating in any activities which may tend to interfere with our employees' rights under the Canada Labour Code.

Such communication will be in the official language normally used in any given area and signed by the President and Chief Operating Officer of the employer and circulated within fourteen days from the receipt of this decision, with copies to the Board.

89 Furthermore, the employer is directed to post in all of its branches in Canada, a copy of the present reasons for decision in a conspicuous place.

90 In order to give a continuing effect to the Board's remedies and to encourage the parties to meet assiduously and negotiate vigorously, the Board will not deal with the allegations under sections 148(a) and (b) for the time being.

91 We do this in anticipation of a further salary review by the employer in the near future, being hopeful that the parties can arrive at a solution to the dilemma caused by the protracted negotiations. Surely by now, these parties should be able to devise, in the course of normal and straightforward collective bargaining, the necessary imaginative measures to account for a general increase occurring in the meantime.

92 With this in mind, pursuant to section 120.1 of the Code, the Board reserves jurisdiction to deal with the matters under section 148(a) and (b) of the Code. Jurisdiction is also retained to settle any question arising from the implementation of these remedies.

93 Finally, as the Board has no evidence before it as to how the Bank of Montreal or the Royal Bank of Canada communicated the withholding of the wage raises to their employees, if indeed they did so communicate, the comments and findings as to contravening section 184 are not applicable to them. We are however, prepared to accept written submissions on these points, if the parties so desire.

Footnotes

1 Alberta Labour Act, 1973. S.A. 1973, c.33, s. 154 New Brunswick. Industrial Relations Act. R.S.N.B. 1973, c.l-4, s. 35(1), (2). Ontario Labour Relations Act. R.S.O. 1970, c.232, as amended by S.O. 1975, c.76, s.70(1), (2). Quebec. Labour Code. R.S.Q. 1964, c. 141 as amended by S.Q. 1977, c.41, s.47.

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