

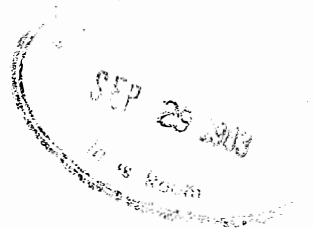


EMPLOYER ACCREDITATION: A RETROSPECTIVE*

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Employer Accreditation: A Retrospective*

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The purpose of this paper is to provide a retrospective of accreditation legislation. Since 1968 all provinces, save Manitoba, have passed legislation enabling multi-employer associations to acquire exclusive bargaining rights. In British Columbia, accreditation applies to all industries; elsewhere, it is confined to the construction industry. In reviewing the accreditation experience, my remarks will focus on the following areas:

- I. An overview of the purpose and the types of accreditation.
- II. A brief assessment of the impact of accreditation on bargaining structures.
- III. A lengthy discussion concerning the impact of accreditation on representational issues notably employer cohesion.

I. Overview of Accreditation

Accreditation legislation was introduced to redress an imbalance of power between employers and unions in the construction industry by conferring exclusive bargaining rights on employers' associations and encouraging broader-based bargaining. While contractors traditionally bargained through associations, these organizations were no stronger than their weakest link. Voluntary cooperation frequently dissipated during negotiations, particularly in the face of union pressure tactics. Because collective bargaining was highly fragmented - by trade, area and sector - unions were able to whipsaw weak employer organizations and leapfrog wages within and across labour markets. These fragmented bargaining

structures contributed to the escalation of construction wages and the volume of strike activity during the 1960's.¹

In many respects, the accreditation process is similar to trade union certification. The acquisition of exclusive bargaining rights is normally based on majority support, the appropriateness of the bargaining unit and the employers' association being a properly constituted organization. There are, broadly speaking, three accreditation models.² They may be distinguished by the authority granted to employer associations over unionized contractors. The "realistic" model exists in seven provinces. It allows an accredited association to bargain on behalf of all unionized contractors (and all contractors who subsequently become unionized) in a bargaining unit, regardless of whether they are members of the association. This approach requires evidence of majority support. British Columbia adopted the "conservative" model which is based on voluntarism and includes only those unionized contractors who have joined the association and designated it to act as their accredited bargaining agent. Quebec, on the other hand, adopted what might be called the "compulsory" model. It requires all contractors to join and bargain through a single provincial association designated by law.

In the late 1960's and early 1970's, provincial legislatures enacted accreditation legislation in an attempt to stabilize labour-management relations. The principle objective of accreditation was to promote unity within employer associations.

Although accreditation schemes vary in scope and impact, they have provided legal cohesion for employer associations by: (a) bringing nonassociation firms within the bargaining unit; (b) prohibiting firms in the unit from bargaining individually and reaching an agreement or

understanding with a union; (c) outlawing national "free-ride" agreements in several provinces; and (d) in some cases banning selective strikes. By strengthening an association's control over members, accreditation sought to remove an internal source of instability.³

A second objective was to encourage centralized bargaining structures "since contractor associations would be in a better position to insist on it."⁴ The degree of centralization ultimately depended on how employer bargaining units were to be determined.

The first is known as trade accreditation and is based on existing bargaining rights. Under this scheme the bargaining unit normally corresponds to the sector and geographic area specified in an existing collective agreement between an employer association and a trade union. Alternatively, the sector approach permits an association to seek accreditation in any sector and area for which it claims support.⁵

The potential for broader-based bargaining was greater under the latter scheme. A third approach, adopted in Quebec, involves no choice at all: by law, there is one industry-wide collective agreement.

II. Accreditation and Bargaining Structures

If accreditation is to be judged in terms of employer usage, then it has been a tremendous success. Virtually all collective bargaining in construction is conducted under the aegis of accredited employers' associations.⁶ As well, public policy facilitated the creation of provincial, multi-trade employer bargaining agents, known as CLRA organizations. Since 1970, the structure of bargaining has moved from the local level to

provincial tables. In most jurisdictions, negotiations are conducted on a trade-by-trade basis, but in Quebec and British Columbia industry-wide negotiations are a reality. Thus in the span of little more than a decade we have witnessed both a significant expansion of the scope of bargaining and the centralization of decision-making authority by employers and unions.⁷

As noted above, accreditation is available to all employer associations in British Columbia. Given the history and relative stability of multi-employer bargaining in the province, the motivation to accredit probably differs from contractors in the construction industry. It more likely reflects a desire to formalize existing bargaining relationships rather than to stabilize or expand fragmented bargaining patterns.

In any event, ~~accreditation appears to have~~ considerable appeal among non-construction employers. Since 1970, 25 accreditation orders have been issued (22 are outside construction). Employer associations have been accredited in some of the provinces' major industries including forest products and pulp and paper. In the public sector, accreditation has been extended to the municipal, educational and health care sectors. In total, accreditation covers 21 employers' associations and more than 2,500 employers (see Appendix A).

III. Employer Cohesion

The need for accreditation legislation in construction was based on the lack of employer cohesion in contract negotiations. Most of the problems were intraorganizational. The major difficulty was that contractors put their individual interests above the collective interests

of their association. The associations were frequently unable to resolve intraorganizational conflicts. Internal strains often reflected the diverse interests of small and large contractors, financially sound and marginal firms and regional interests. These divisions were particularly apparent in making decisions on bargaining policies, strategies and tactics. Added to this was the fact that the associations did not always bargain for all union contractors in an area. Thus there were not only difficulties controlling their members, but they lacked control over independent contractors capable of undermining their bargaining position.

Most accreditation schemes resolved this issue by giving employer associations direction and control over all unionized firms regardless of membership in the association. Whether accreditation involves compulsion or voluntarism (e.g., British Columbia), it remains to be determined whether cohesion has been achieved in practice. In the remainder of this paper, we will explore this issue. The analysis is based largely on published decisions of labour relations boards in British Columbia and Ontario between 1974 and 1982. The cases involve representational issues following the accreditation of an employers' association. The issues selected for review include: (1) the behaviour of individual contractors during work stoppages; (2) the duty of fair representation; (3) contract enforcement; and (4) the British Columbia experience with de-accreditation. Under the B.C. Labour Code, individual employers may apply to opt out of accredited associations (i.e., de-accredit), provided their requests are timely (i.e., applications are made four to five months following the execution of a collective agreement).⁸

We can draw two broad conclusions about the impact of

accreditation on employer unity. First, there is clear evidence accreditation provides legal cohesion. Contractor associations are not only less vulnerable in contract negotiations, but they have pursued aggressive negotiating and lockout policies, which fifteen years ago were either unthinkable or unsuccessful. Second, regardless of whether accreditation is voluntary or compulsory, there are still signs of intraorganizational conflict, some of which are reminiscent of the pre-accreditation era. Nevertheless, the internal strains described in the cases which follow must be put in perspective. The number of reported cases is relatively small considering the number of accredited associations engaged in collective bargaining over the past ten to fifteen years. The absence of more extensive litigation suggests that employers, particularly non-association firms, have accepted the statutory framework regulating multi-employer bargaining. In those instances where voluntary compliance was not forthcoming, labour relations boards provided the legal cohesion.

(1) Work Stoppages

Historically, contractors have been vulnerable to union pressure tactics during critical stages of negotiations. Selective strikes, picketing, staggered expiration dates, and interim agreements with specified contractors were devices to pressure associations into a settlement on the unions' terms. Accreditation and accompanying legal reforms were introduced to stabilize association bargaining. As these cases demonstrate, accredited employers' associations now enjoy greater protection against individual bargaining and selective strikes, and are in a better position to secure compliance with lockout decisions.

Several recent Ontario cases deal with employer cohesiveness during a legal work stoppage. The Ontario Labour Relations Act (OLRA) requires province-wide bargaining by trade in major building construction. Consequently, only provincial collective agreements negotiated by the designated employer and employee bargaining agencies (employer associations and union councils) are valid collective agreements. According to section 146 of the OLRA:

146. - (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with sub-section (1) is null and void.

In Jen-Mar Construction Limited and United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency, (1978) 2 Can LRBR 483, the Ontario Labour Relations Board (OLRB) ruled a local collective agreement reached during the 1978 provincial carpenters' strike was null and void. The decision also noted that selective strikes by local affiliates (i.e., local unions) of the provincial employee bargaining agency are prohibited under section 148 of the OLRA.

148. - (1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or

authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117 (e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

The 1982 strike of the United Association of Journeymen and Apprentices of Plumbers and Pipefitters brought several cases before the OLRB. In Mechanical Contractors Association Ontario, et.al. and Kamtar Construction Limited, (1982) 3 Can LRBR 248, a firm affected by the provincial strike subcontracted construction work to a contractor who had a maintenance agreement with the same local union. Kamtar argued this was permissible because maintenance work falls outside the definition of the construction industry and is not covered by the province-wide bargaining system. While this is true, the Board concluded the work in question was construction not maintenance, and that the maintenance agreement was "an arrangement contrary to the terms of section 146(2) of the Act". Accordingly, it directed the subcontractor to cease employing workers and the union to cease supplying members to work sites.

A similar issue was raised in Mechanical Contractors Association Ontario, et. al. and Sikora Mechanical Ltd., (1982) 3 Can LRBR 251. The Board found several mechanical contractors continued operations and certain local unions continued to supply them with tradesmen during a provincial strike. The Board ruled that no written or oral arrangement is permissible between individual contractors and local unions in the context of provincial bargaining unless the provincial bargaining agencies approved an interim or extension agreement. Since this was not done, there was a breach of section

146(2) of the Act. The Board also rejected the argument "that once an affiliated bargaining agent calls or authorizes a strike pursuant to section 148(1) there is no continuing obligation to administer that strike by reasonable efforts to ensure that affected employees participate in it." It reasoned that unions have an ongoing responsibility in the same manner that they are obligated to make reasonable efforts to bring an end to strikes during the life of a collective agreement.

It is our view that an affiliated bargaining agent has an analogous ongoing responsibility to engage in reasonable efforts to ensure that the strike called or authorized continues to be called or authorized and on a uniform basis. It is not enough to call or authorize a strike initially and then to sit back and encourage through inaction, the return to work of striking employees. An affiliated bargaining agent is obligated to call or authorize the strike in respect of all employees it represents in the ICI and this obligation must be held to be a continuing obligation. Province-wide bargaining takes away responsibility for negotiations from individual employers and unions and places that responsibility in the hands of central bodies. Such multi-party negotiations on a lesser scale were common in the construction industry but the structures were vulnerable to the whipsaw tactics of unions who would seek to break employer coalitions by permitting some employees to work during a strike to the disadvantage of others. . . . An affiliated bargaining agent must supervise affected work sites effectively and make reasonable efforts to convey to its members that a strike has been called and that they are not to work. The affiliated bargaining agent clearly cannot, on a selective basis, sanction the working of its members on particular projects by inaction and comply with its obligations under section 148(1). Moreover, where its members refuse to comply with the calling or authorizing of a strike notwithstanding the reasonable efforts of the affiliated bargaining agent, at the very least, the affected affiliated bargaining agents and employee bargaining agency are required to advise the employer bargaining agency that they are unable to control the situation so that the employer bargaining agency is able to exercise its rights vis-a-vis the employers it represents and to call a lock-out if it wishes to impose the uniformity that the affiliated bargaining agents of the employee bargaining agency are unable to

achieve having exercised reasonable efforts. Whether an affiliated bargaining agent has taken reasonable steps to call or authorize a strike on a continuing basis must be decided having regard to all of the circumstances.⁹

The interrelationship of agreements or arrangements and selective strikes was also discussed in Mechanical Contractors Association Ontario, et. al. and All-Pro Contractors (1982) 3 Can LRBR 264. This case involved the establishment of a "non-union" firm by an employee who had worked for the unionized contractor being struck. The issue was whether the supply of union tradesmen to the "non-union" firm violated section 146(2) of the Act. The Board concluded an arrangement existed amongst the local union, its business manager, the respondent employer (carrying on business as a "non-union" firm) and his employees in violation of section 146(2).

What this means under section 146(2), however, is that an arrangement with any person or employer, whereby employee-members perform, or are permitted by their bargaining agent to perform, work which, but for the strike, would have been performed by the employer who has been struck, is unlawful. The effect of section 146(2) on a striking Union and its members, in other words, is clear and straightforward. If the Union and its members opt for strike action, the members do not thereafter continue to perform the struck work, even for a non-union employer.¹⁰

The decisions reached in this case and in the Sikora case, supra., mean unions engaged in a provincial strike are not only prohibited from supplying labour to perform struck work, but have an ongoing responsibility to ensure that employees participate uniformly in the strike.

Not all jurisdictions impose the same restrictions on selective strikes. In Metal Industries Association and International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 712, (1979)

1 Can LRBR 191, the B.C. Labour Relations Board (BCLRB) considered whether a union could conduct a strike vote covering one of the twelve members of the accredited employers' association. The union had conducted such a vote and struck the company. The employers' association contended the "unit affected" by a strike vote must include all employees of the employers covered by an accreditation order. While the union held separate certifications for each firm, negotiations had proceeded toward a master agreement covering all employers. The Board noted the "unit affected" normally corresponds to the unit certified or voluntarily recognized by the employer. In most cases, this would involve a single company or plant.

In the context of association or multi-employer bargaining, the phrase is capable of another meaning and could well mean a unit consisting of the employees of all of the employers. But that will depend on the fluid bargaining process. More specifically, it will have to be demonstrated through powerfully persuasive evidence that an understanding exists, whether express or implied by past practice or the like, that the strike vote constituency will be broader or different than its prima facie meaning would indicate. If such an agreement exists, the trade-union must - not may - conduct the vote accordingly.¹¹

This decision recognizes that accreditation does not automatically result in an industry-wide agreement, but is a matter for negotiations. In the absence of such an agreement or understanding between the parties, it appears selective strikes are permissible. While an accredited association may not have legal recourse to the Board for relief, self-help responses, e.g., a lockout, are not precluded. This was the response of CLRA to selective strikes in the construction industry.

When an accredited employers' association imposes an industry-

wide lockout, individual members are bound by that decision. In Acme Commercial Painting Ltd. et. al., (1977) 2 Can LRBR 273, a contractor devised a scheme to circumvent accreditation. The facts in this case are reminiscent of the Kamtar case, supra. Two firms represented by the accredited employers' association (CLRA) subcontracted work to a third company during a CLRA-sanctioned lockout. The CLRA asked the BCLRB to designate the three firms as a single employer and to declare null and void the collective agreement negotiated between the subcontractor and the union. The Board decided that: (1) because the associated companies were under common direction and control, they should be treated as a single employer within the meaning of the B.E. Labour Code; (2) the two member firms were seeking to avoid the economic ramifications of the lockout; and (3) since accreditation prohibits individual bargaining, the collective agreement was null and void.

In this case, the Board went on to describe some of the underlying problems which existed between painting contractors and CLRA.

[The] dispute centres on the fact that repaint work can only be done during a comparatively short period of time, principally the summer months. It is during this time that the climate conditions allow this type of painting to be done, and also, in cases of institutions such as schools, when it becomes most convenient to do such work. However, this is also the period when the collective agreements in the construction industry come up for renewal. With the possible exception of this year (1977), collective bargaining in the construction industry in recent years has been accompanied by strikes and lockouts. Since the painting contractors engaged in maintenance work are covered under the same collective agreement as are painters on new construction, they find their principal work period seriously eroded.

During the hearing of this case, various allegations were made as to commitments by CLRA to negotiate a separate agreement with a different termination date

for repainting and maintenance contractors. We need not concern ourselves with this dispute except to observe that CLRA has been less than successful in responding to the special needs of this section. We make no judgment as to whether a separate collective agreement should be negotiated for repaint work. However, this dispute is of several years duration and it is to be hoped that CLRA may be able to bring about a consensus, on this issue rather than continuing to offer what has been characterized as false encouragement. This would then allow the parties to pursue whatever course that decision may entail. In this regard we commend to their attention the decision of this Board in Alberni Engineering and Shipyard and Duncan Ironworks and Metal Industries Assoc., (1977) 1 Canadian LRBR 190. 12

This case illustrates the inherent difficulties industry-wide associations may have in reconciling or accomodating the diverse interests of its constituents. As we shall discover below, dissatisfaction among member firms has led to complaints involving the duty of fair representation and applications for de-accreditation.

(2) The Duty of Fair Representation

The acquisition of exclusive bargaining rights carries with it a statutory obligation to fairly represent members of the bargaining unit in a manner which is not arbitrary, discriminatory or in bad faith. Duty of fair representation cases most frequently involve the manner in which unions process individual grievances. The scope of fair representation cases is expanding. It now extends to the relationship between an employers' organization and individual employers and to disputes involving contract negotiations.¹³ There have been four published cases on the handling of contract negotiations by employers' associations. The two British Columbia cases involved the Metal Industries Association (MIA) and included

applications for de-accreditation. The Ontario cases involved the construction industry.

In Alberni Engineering and Shipyard and Duncan Ironworks and Metal Industries Association (1977) 1 Can LRBR 194, the employers' association attempted to negotiate a standard province-wide wage rate. Negotiations reached an impasse and the association imposed a lockout. Two member firms refused to participate in the lockout citing their disagreement with the association's wage policy. The companies felt their economic survival depended on paying higher wages than those proposed by the association. The association asked the BCLRB to secure the dissident's compliance with the lockout. The BCLRB determined that associations frequently and justifiably pressure members during a lockout to maintain a united front and, in this instance, these actions did not constitute a denial of fair representation. However, the de-accreditation application was granted (see section on de-accreditation).

In a subsequent case involving MIA (Kockums Industries Limited and Metal Industries Association, (1979) 2 Can LRBR 345), an employer alleged a breach of the duty of fair representation is automatic grounds for de-accreditation. The complaint was summarized as follows:

that MIA has grouped and re-grouped its members in bargaining units without permitting the members any input, thus acting in an arbitrary manner; that MIA has failed to collectively bargain in good faith by refusing to put a monetary offer on the table during the 1977 Steelworkers group negotiations and by failing to pursue all available remedies prior to calling a lockout; that it has acted in a fashion contrary to its constitution and by-laws; and finally that MIA has pitted its members one against another. 14

The BCLRB determined there was no evidence to show the MIA acted in an "arbitrary, discriminatory or bad faith manner" toward Kockums. This conclusion obviated the need to decide whether a breach of the duty of fair representation entitles an employer to automatic deletion from an accreditation order. However, the Board indicated that a proven breach involving bad faith would constitute a prima facie case for de-accreditation.

Arbitrary and discriminatory conduct where the latter does not involve an element of bad faith, do not embrace acts of turpitude, while bad faith does. This is a fundamental difference with profound consequences for both the employers' association and the employer. Where an association has acted in a bad faith manner towards one or more of its members it has lost the license to represent those members; it has properly lost the trust essential to a successful employer/association relationship. We have no hesitation in finding that an employer against whom an association is found to have acted with bad faith such as to lead to a violation of Section 7(2) will have a prima facie case for de-accreditation. To oblige such an employer to remain within the confines of such an association would be perverse and genuinely destructive of the concept of accreditation. We are satisfied that the Legislature never intended this result.¹⁵

The OLRB considered the duty of fair representation in Dominion Maintenance Limited, et. al. (1980) 1 Can LRBR 1. A group of Sarnia contractors argued that the provincial employer bargaining agency agreed with their position not to grant a wage increase in the second year of a collective agreement. Subsequently, a 55 cent an hour increase was negotiated. The outraged contractors asked the Board to declare the provincial agreement void or, alternatively, to require the employer bargaining agency to pay the wage increase. In rejecting the application, the Board noted the duty of fair representation protects individual contractors from arbitrary, discriminatory or bad faith treatment at the hands of their

employer bargaining agency. There was no evidence the employer bargaining agency either misled or deceived the contractors. It appears their bargaining position was considered fairly by a sub-committee along with those of other contractor groups. These positions were used to formulate an opening position in negotiations, a point which the contractors apparently failed to appreciate. The Board observed that there was no obligation to table the "no wage increase" proposal.

The sub-committee had come to the not altogether surprising decision that the negotiation of a provincial agreement would be expedited if it were to offer a wage increase on a uniform basis. The proposed first offer was put to the directors, including the representatives from Sarnia, and approved by vote. There was no attempt to deceive or mislead. With the casting of votes the function of the assembled directors had changed from one of setting out initial bargaining positions to one of approving offers to be tabled with the trade union.¹⁶

In Mechanical Contractors Association of Ontario (1982)

OLRB Rep. Mar. 417, the Board ruled the duty of fair representation was breached when the employer bargaining agency failed to notify a former local employer affiliate of bargaining meetings. The local affiliate, dissatisfied with the activities of its parent organization, decided it no longer wished to be a full member and began withholding a portion of its dues. The employer bargaining agency responded by terminating the local affiliates membership and by refusing to apprise the latter of future bargaining meetings. The Board concluded the employer bargaining agency acted in an arbitrary manner when it failed to properly consult with the former zone affiliate regarding the preparation, conduct and status of negotiations. The remedy entitled the former affiliate to notice of and attendance at all future meetings and

negotiating sessions of the employer bargaining agency, but did include the right to vote in the decisions of that organization. As a non-member it was entitled only to the protection of fair representation specified in the OLRA.

While there are important differences between the relationship of a union and its members and an employers' association and its members, the BCLRB and the OLRB believe the same standard of representation should be applied.¹⁷ In the Kockums case, supra., it was emphasized the duty does not entail positive obligations, but is met when "arbitrariness, discrimination and bad faith in the representation of members has been avoided."¹⁸ In cases involving contract negotiations, labour relations boards have been reluctant to regulate internal negotiations and substitute outcomes they believe are more congruent with effective bargaining.¹⁹

Perhaps this accounts for the small number of complaints of unfair representation. One might have expected a greater caseload given the diversity within these bargaining units and the fact that most accreditation schemes are not voluntary. This, however, was not the case and two of the cases involved an association covered by voluntary accreditation. To the extent that internal conflicts exist, they appear to manifest themselves in other ways.

(3) Contract Enforcement

Contract enforcement of multi-employer collective agreements involves some issues not commonly found in the administration of single employer agreements. For example, fractional bargaining may involve unwritten agreements which vary or ignore the terms of a master collective

agreement. While accreditation prohibits individual bargaining, the practice has a long history in the construction industry, and may go undetected. A second potential source of conflict is the failure of an employer to comply with the provisions of the collective agreement. In the context of single employer bargaining, the dispute is subject to the grievance and arbitration procedure. This is the standard practice for resolving rights disputes between parties of interest. Under multi-employer bargaining, we find twists to common practice. For example, how are disputes between an accredited employers' association and an individual employer to be resolved? What if the employer refuses to remit industry funds to the association as required by the collective agreement? Put another way, can there be a grievance between parties of like interest and, if so, is it arbitrable? This issue arose in Ontario and British Columbia and the remainder of my remarks will concentrate on this unique aspect of contract enforcement.

In J. G. Rivard et. al. and Mechanical Contractors Association Ontario (1981) 3 Can LBRB 256, a contractor's refusal to remit industry fund dues to a provincial bargaining agency was referred to the OLRB. The respondent firm, while not a member of the association, was represented by it for the purpose of collective bargaining. The seven-year dispute included a previous complaint to the Board seeking enforcement of the collective agreement and a claim before the Supreme Court of Ontario. Both cases were dismissed. The new complaint was based on a revision to section 112 a(1) of the OLRA which now reads:

112a.(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, a party to a collective agreement between an employer or

employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement including any question as to whether a matter is arbitrable, to the Board for final and binding determination.²⁰

The only change in language was the substitution of "a party" for "either party". In addition, there was the addition of section 132(3) of the OLRA which reads: "Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 112a."²¹

In rejecting the applicant's earlier request for relief, the Board concluded "a collective agreement is between parties of opposing interests and that only grievances between parties in either column might be referred to the Board" ²² The decision was affirmed in the Divisional Court. The OLRB concluded the amendments to the OLRA did not represent a change in legislative intent and therefore its previous decision (i.e., only grievances between opposing parties to a collective agreement were arbitrable) was still correct. ²³ However, taking its cue from the High Court to "construe liberally the substantive and remedial bases" in the OLRA, the Board decided the issue in favour of the employers' association. ²⁴

The Board noted that under the OLRA, an employer is bound by the collective agreement negotiated by the employer bargaining agency. Accordingly, the non-payment of industry fund dues by an employer is a deviation from the terms of the collective agreement and a violation of the OLRA. Moreover, the industry fund dues provision is a common feature of construction agreements and serves an important labour relations

function analogous to the checkoff and payment of union dues.

The provision for the payment of industry fund dues is analogous to a provision in a collective agreement for the check off and payment of dues to a trade union. There is a labour relations interest in ensuring the viability of employers' organization and employer bargaining agencies. The payment of industry fund dues to such organizations and agencies provides a basis for their viability in the process of collective bargaining and in the administration and policing of collective agreements.²⁵

Since the employer bargaining agency has a duty of fair representation to all members of the bargaining unit, regardless of whether they are members of the designated or accredited organization, the OLRB concluded it would "exercise a general supervisory role with respect to such representation". In conclusion, the industry fund dues clause serves a valid labour relations function and is enforceable under the OLRA.

The BCLRB reached a similar conclusion in a non-construction case involving industry funds (American Cartage Agencies Ltd. and Transport Labour Relations (1981) 2 Can LRBR 104). The respondent employer argued that: (1) the industry fund provision was not binding on it because it was not a proper subject for inclusion in a collective agreement, i.e., it did not relate to wages, hours and other conditions of employment and (2) the provision was unenforceable because it regulates the internal affairs of the accredited association rather than relations between parties of different interests.

The BCLRB reviewed both the American and Ontario jurisprudence and, in particular, the "mandatory/permissive" approach to bargainable issues. In rejecting this approach, it argued that in a free collective bargaining system the parties should be given wide latitude to define the

areas of mutual agreement. The industry fund clause is similar to a union checkoff clause in that it attempts to preserve the structure of collective bargaining. The BCLRB tied the issue to accreditation and maintaining employer cohesion.

The Board's practice of closely scrutinizing applications for de-accreditation under Section 59(6) reflects the labour relations importance which is placed on maintaining that cohesion. A provision in a collective agreement aimed at maintaining the financial integrity of an accredited employers' organization has a similar purpose. . . .

In conclusion, both the employers' organization and the Union may legitimately regard themselves as having a real and continuing collective bargaining interest in preserving and improving the structure in which their bargaining takes place.²⁶

Accordingly, the industry fund clause serves "a valid and sensible labour relations purpose deserving of recognition under the Labour Code."²⁷

The BCLRB, citing potential difficulties with other means of resolving the dispute, e.g., the courts and arbitration, resolved the dispute under section 65(1) of the Labour Code.

65(1) A person bound by a collective agreement, whether entered into before or after the coming into force of this Act, shall do everything he is required to do, and shall refrain from doing anything he is required to refrain from doing, by the provisions of the collective agreement, and failure to do so is a contravention of this Act.²⁸

Given the uniqueness of the complaint and its relationship to the bargaining structure provisions in the Labour Code, the BCLRB concluded the industry fund was a valid and enforceable provision of the collective agreement.

(4) De-Accreditation

There have been no reported cases of de-accreditation outside of British Columbia. This undoubtedly reflects the stiff requirements to do so, e.g., majority support, and the general satisfaction with accreditation. In British Columbia individual employers are permitted to de-accredit provided their requests are timely. A number of critics, myself included, feared this "escape hatch" undermined the central purpose of accreditation, i.e., to promote employer unity. In actual practice, however, the BCLRB has stringently guarded the back door. Once an employer consents to join an accredited body, it relinquishes the right to unilaterally decide whether it wishes to remain or not.

In the first de-accreditation case (Ocean Construction Supplies Northern Ltd. and Transport Labour Relations et. al., (1976), 1 Can LRBR 175), the BCLRB explained its general approach to deletions from an accreditation order. It made it clear applications must be timely and deletion requires "much more than simply the individual employer's expression of genuine feelings that it prefers to bargain with the union alone . . . [requiring instead] a strongly persuasive case that its interests can no longer be adequately served by what has been an ongoing bargaining structure."²⁹ In assessing the requests of individual employers, the Board examined the "community of interest" in much the same manner it does in certification cases and applications to vary a certification order. There was a clear recognition of the need to balance competing interests.

If the withdrawal of a key member of the association would cause the employer group to become unravelled, the Board would be loath to permit de-accreditation, even while recognizing that the individual employer would suffer some discomfort from continued membership.³⁰

Noting there were unique historical factors which led to the employers' inclusion in the accredited association and the fact that de-accreditation posed fewer risks to the association's bargaining position than continued inclusion posed for the employer, the Board granted the request for deletion.

As noted above, the Board in Alberni Engineering, supra., acceded to the request of two employers to opt out of the MIA. The decision once again involved an analysis of "the current viability of the bargaining unit and the legitimate business concerns (as opposed to 'dissatisfaction') of the applicants."³¹ In this instance, the competing interests had destroyed the community of interest.

Where as here, the Board is satisfied that the implementation of a policy (here, higher wage rates to retain specialized marine personnel) is essential to the continuing operation of the dissident member, then it cannot overlook that fact in order to maintain the integrity of a unit designed in the first instance to advance the interests of its members.³²

As in Ocean Construction, supra., the Board recognized an inflexible approach to de-accreditation might jeopardize legislative support for multi-employer bargaining.

There were two other de-accreditation cases involving the MIA.³³ In Davis Wire Industries Ltd. and Metal Industries Association (1979) 1 Can LRBR 470, the employer argued that: (1) as the only manufacturer of welded wire products it lacked a community of interest with other members of the association; (2) there was a climate of hostility making the continued relationship untenable; and (3) its exclusion posed no threat to the accredited association. The Board, relying on the criteria discussed earlier, emphatically rejected the application on the ground the employer failed to establish a community of interest no longer existed. Until that has been established,

the effect of de-accreditation on an association will not be considered.

The Board, however, expressed concern about the internal affairs of the MIA.

. . . the seeming insensitivity of MIA to complaints from its membership cannot be allowed to continue unchecked. In the last year the Board has received five more applications for de-accreditation from MIA. These are certainly symptomatic of problems in that organization. The character of Hearings before the Board is remarkably consistent in one aspect: they are permeated by antipathy which has arisen between MIA and certain of its members. It is apparent that the source of this antipathy is the stance taken by officers of MIA towards certain of its members.

It may well be that the problem is whether the current structure of MIA is viable in the long run. Before we presume to offer any judgment in that regard however, we urge the parties to reassess their attitudes, perhaps with the aid of the Employers Council of B.C. in order to stop this airing of complaints in public.³⁴

In Kockums, supra., de-accreditation was granted after the employer persuaded the Board that its interests could no longer be served by the association and the deletion would not undermine the association's bargaining position.

The Panel is satisfied that the transformation of Kockums from a company largely concerned with the domestic market to one serving an international market has had significant repercussions for its labour relations and has to some degree dislocated it from the community of interest which it previously shared with the other members of MIA.³⁵

The Board distinguished this case from Davis Wire, supra., observing there was objective evidence the firms economic situation had changed and this affected the community of interest.

The lone de-accreditation case in construction (G.W. Ledingham,

et. al. and Construction Labour Relations Association (1979) 2 Can LRBR 35) also turned on the nature of the employer's business. Three contractors sought deletion on the grounds that: (1) utility construction constitutes a highly specialized segment of the construction industry; (2) there was no community of interest between themselves and other CLRA members; and (3) they identify more closely with the Utility Contractors' Association of British Columbia (established in 1976). The BCLRB rejected the request of two firms because they were engaged in a broad range of construction work and share a community of interest with other CLRA members. Ledingham, however, joined CLRA in 1971 because it intended to expand into other sectors of construction. This never materialized and the company remains a "pure" utility contractor which deals with only three unions (some of CLRA's larger members deal with as many as nineteen). Until 1976, it unsuccessfully tried to persuade other utility contractors to join CLRA. Based on Ledingham's unique position (as the only "pure" utility contractor among CLRA's 900 members), the Board relied on the reasoning in Alberni Engineering, supra. and de-accredited the firm.

Two other de-accreditation applications were rejected. One case was dismissed as untimely (Tideline Construction Ltd., (1978) 1 Can LRBR 171) and the other lacked merit (Board of School Trustees No. 68, et. al. and Mid-Island Public Employers' Association (1980) 3 Can LRBR 340). In the latter case, the BCLRB considered whether different factors should be applied in cases involving a public sector employer. The Board saw no reason to depart from its previous decisions since the applicant shared a community of interest with other employers represented by the accredited association.

To date there have been only a handful of de-accreditation cases and the BCLRB has carefully scrutinized these applications. In balancing the competing interests of individual employers and associations, the Board has adopted a flexible approach. Mere dissatisfaction with association policies or a preference for individual bargaining do not constitute grounds for deletion. De-accreditation will only be granted where an application is timely, a community of interest no longer exists and the association's bargaining position will not be seriously eroded. The Board's approach appears sensible; it recognizes the dynamics of labour relations and is consistent with the goal of promoting multi-employer bargaining. With the possible exception of the MIA, which is clearly a unique case, there has not been a stampede to de-accredit.

Conclusion

This paper has reviewed published labour relations boards cases dealing with the impact of accreditation legislation on employer unity. The analysis focused on four areas of potential association-employer conflict. The results can be summarized as follows.

- (1) Although accredited employers' associations still encounter individual bargaining and selective strikes, there have been only a few reported cases of employer disunity during work stoppages. It would appear that accreditation and other legal reforms have been accepted by the construction community. Employers' associations have more diverse constituencies today than

in the past and have displayed greater cohesion in negotiations under accreditation.

- (2) The four reported complaints dealing with fair representation involved contract negotiations and, in two cases, were linked to other issues. Based on the cases reviewed and the absence of extensive litigation in this area, it appears employers' associations are effectively discharging this responsibility.
- (3) One problem unique to multi-employer bargaining is the matter of resolving rights disputes between parties of like interest. The OLRB and the BCLRB concluded these matters were not arbitrable, but could be remedied under provisions in their respective labour relations statutes.
- (4) Although British Columbia has a voluntary accreditation system, voluntary withdrawal has not been equated with voluntary entry. Employer cohesion has not been weakened by the few cases in which de-accreditation was permitted.

This paper demonstrates that accreditation enhances employer cohesion. The direct evidence is reflected in the published cases. Labour relations boards have scrutinized the behaviour of association members and unions, thereby ensuring the stability of accredited associations. There may also be an indirect effect reflected in the absence of more extensive litigation. Considering accreditation covers virtually the entire construction industry and more than 2,500 non-construction firms, the number of reported cases of internal conflict appears relatively small. Moreover, a majority of the 17 cases reviewed involved the Mechanical Contractors Association

of Ontario (5 cases) and the Metal Industries Association (4 cases). No doubt disharmony extends beyond the cases reported here. The extent and intensity of such conflict and the manner in which it is managed is largely unknown. Nevertheless, in the construction community there is a consensus that accreditation provides legal cohesion.

One might put the issue another way: would employer associations be any worse off without accreditation? The answer is yes. This is apparent from two published decisions involving unaccredited employers' organizations. In Greater Vancouver Regional District, et. al. (1979) 2 Can LRBR 273, the BCLRB distinguished an employers' association from an accredited employers' association. In this case, the City of Delta gave notice of its intention to withdraw from the unaccredited association in order to commence negotiations with the union. Notwithstanding the fact that the employer had previously assigned its bargaining rights to the association, the Board concluded the B.C. Labour Code does not protect unaccredited associations from withdrawals and individual bargaining. In contrast, "an accredited employers' organization has the exclusive authority, for such time as the employer is named in the accreditation order, to bargain collectively on behalf of the employer and to bind the employer by the collective agreement."³⁶

A similar conclusion was reached in CNR et. al. and Railway Association (1982), 1 Can LRBR 254 by the Canada Labour Relations Board. It ruled CNR could withdraw from industry-wide bargaining by revoking the authority it had given to an employers' association. The decision distinguished associations with voluntary underpinnings (as was the case here) from those with legal underpinnings. Accreditation provides legal cohesion for multi-employer bargaining. Unaccredited associations are

governed by a different standard: an association created by voluntary agreement can be easily destroyed by disagreement.

Footnotes

1. Joseph B. Rose, Public Policy, Bargaining Structure and the Construction Industry (Toronto: Butterworths, 1980), pp. 3-6.
2. H.W. Arthurs and John H.G. Crispo, "Countervailing Employer Power: Accreditation of Contractor Associations", in H. Carl Goldenberg and John H.G. Crispo (eds.), Construction Labour Relations (Ottawa: Canadian Construction Association, 1968), pp. 376-415.
3. Joseph B. Rose, "Construction Labour Relations" in John Anderson and Morley Gunderson (eds.), Union-Management Relations in Canada (Toronto: Addison-Wesley, 1982), p. 407.
4. Arthurs and Crispo, op. cit., p. 410.
5. Rose, Public Policy, Bargaining Structure and the Construction Industry, op. cit., p. 69.
6. Ibid., pp. 81-84.
7. The creation of CLRA organizations and the push for centralized negotiations forced unions to adopt structures, e.g., councils, to coordinate negotiations on a provincial or multi-trade basis.
8. Accreditation can be terminated in other jurisdictions where a majority of the employers in the bargaining unit support it.
9. Sikora case, supra., p. 262.
10. All-Pro Contractors case, supra., p. 273.
11. Metal Industries Association and Ironworkers case, supra., p. 196. The Board also distinguished this case from that of a multi-employer certification and a case involving a council of trade unions imposed under the B.C. Labour Code. In these circumstances, there is a "significant effect on the manner in which strike votes must be taken".
12. Acme case, supra., p. 281.
13. For a discussion of latter issue see, Paul Weiler, Reconcilable Differences (Toronto: The Carswell Company Limited, 1980), pp. 128-132.

14. Kockums case, supra., p. 367.
15. Ibid., p. 370.
16. Dominion Maintenance case, supra., p. 12.
17. The panel of the BCLRB deciding the Kockums case, supra., disagreed with the conclusion of their colleagues in Alberni Engineering, supra. The earlier decision maintained there should be a less rigorous duty of fair representation applied to employers' associations.
18. Kockums case, supra., p. 366.
19. Dominion Maintenance case, supra., p. 11.
20. Ontario Labour Relations Act, section 112a(1).
21. Ibid., section 134(3).
22. J.G. Rivard case, supra., pp. 267-268.
23. In another case (MacGregor Crane Service Ltd., (1979) OLRB Rep. Aug. 777), the Board stated it would enforce such a clause against an employer where the complaint was brought by a union, even though the union had no pecuniary interest in the industry fund.
24. J.G. Rivard case, supra., p. 269.
25. Ibid., p. 270.
26. American Cartage case, supra., p. 117.
27. Ibid.
28. British Columbia Labour Code, section 65(1).
29. Ocean Construction case, supra., p. 181.
30. Ibid., p. 183.
31. Alberni Engineering case, supra., p. 201.
32. Ibid., p. 202.
33. The internal strife in MIA is a study in itself. Suffice it to say, MIA's problems have been centered in its secondary metals manufacturing group. This group is heterogeneous, has more than doubled in size since becoming accredited and bargains with several unions. Members have been upset with the performance of MIA's directors. Once they allowed a member to resign from the association; in two other cases, employers received permission

to bargain individually in contravention of the accreditation certificate. The MIA conceded it did not fully understand its responsibilities as an accredited employers' association.

34. Davis Wire case, supra., pp. 476-477.
35. Kockums case, supra., p. 363.
36. Greater Vancouver Regional District case, supra., p. 278.

APPENDIX A

ACCREDITATIONS GRANTED BY THE B.C. LABOUR RELATIONS BOARD
IN EFFECT AS OF MARCH 15, 1983

DATE OF ACCREDITATION	NAME	NO. OF EMPLOYERS* SHOWN ON ACCREDITATION
June 7, 1970	Pulp & Paper Industrial Relations Bureau 880-505 Burrard Street Vancouver, B.C. V7X 1M4	17
June 16, 1970	Forest Industrial Relations Limited 880-505 Burrard Street Vancouver, B.C. V7X 1M4	184
June 23, 1970	B.C. Road Builders Association 400-698 Seymour Street Vancouver, B.C.	43
July 14, 1970	Construction Labour Relations Association of B.C. 97-6th Street New Westminster, B.C. V3L 2Z4	1439
October 14, 1970	Transport Labour Relations 302-3680 East Hastings Street Vancouver, B.C. V5K 2A9	149
March 16, 1971	British Columbia School Trustees Assoc. (Okanagan Labour Relations Council) 1-369 Queensway Avenue Kelowna, B.C. V1Y 8E6	10
March 24, 1971	British Columbia School Trustees Assoc. (East Kootenay Labour Relations Council) 703 Cranbrook Street North Cranbrook, B.C. V1C 3S1	6
May 26, 1971	British Columbia Hotels' Association 1st Floor-900 West Georgia Street Vancouver, B.C. V6C 1P9	250
June 29, 1971	British Columbia School Trustees Assoc. (West Kootenay Labour Relations Council) P.O. Box 640 Grand Forks, B.C. V0N 1N0	4
May 3, 1972	Okanagan Mainline Municipal Labour Relations Association 220-1460 Pandosy Street Kelowna, B.C.	13

DATE OF ACCREDITATION	NAME	NO. OF EMPLOYERS* SHOWN ON ACCREDITATION
October 25, 1972	Interior Logging Association 460 Hartman Road Rutland, B.C.	130
March 20, 1973	Metal Industries Association (re: employers engaged in some phase of secondary metal manufacturing) 204-410 Seymour Street Vancouver, B.C.	88
June 26, 1973	Assoc. of Canadian Security Services 340-885 Dunsmair Street Vancouver, B.C.	5
September 18, 1973	Metal Industries Association (re: employers engaged in sales and service) 204-410 Seymour Street Vancouver, B.C.	17
August 3, 1975	British Columbia School Trustees Assoc. (North West Labour Relations Council) P.O. Box 758 Smithers, B.C. V0J 2N0	4
August 21, 1975	Health Labour Relations Assoc. of B.C. 500-1212 West Broadway Vancouver, B.C. V6H 3V1	166
October 30, 1975	Mid-Island Public Employees Association c/o Regional Dist. of Nanaimo 6300 Hammond Bay Road Lantzville, B.C. V0R 2H0	5
November 13, 1975	Pacific Drywall Dealers Labour Relations Association 26th Floor-700 West Georgia Street Vancouver, B.C.	5
January 26, 1976	Automotive Employers' Association of Victoria 305-1020 Government Street Victoria, B.C.	7
November 8, 1976	Greater Victoria Labour Relations Assoc. 210 Burnes House, 26 Bastion Square Victoria, B.C.	13

DATE OF ACCREDITATION	NAME	NO. OF EMPLOYERS* SHOWN ON ACCREDITATION
April 19, 1978	Pipe Line Contractors Assoc. of B.C. 203-698 Seymour Street Vancouver, B.C. V6B 3K6	28
March 21, 1979	Brewery Employers Labour Relations Assoc. c/o Campney & Murphy Barristers & Solicitors P.O. Box 49190, 595 Burrard Street Vancouver, B.C. V7X 1K9	3
May 30, 1979	Aluminum Window Employers Labour Relations Association c/o Campney & Murphy Barristers & Solicitors P.O. Box 49190, 595 Burrard Street Vancouver, B.C. V7X 1K9	6
June 19, 1980	Western Commercial Dental Laboratories Labour Relations Association c/o Campney & Murphy Barristers & Solicitors 16th Floor, 595 Burrard Street Vancouver, B.C. V7X 1K9	6
May 4, 1981	Okanagan Federated Shippers Labour Relations Association c/o Campney & Murphy Barristers & Solicitors 16th Floor, 595 Burrard Street Vancouver, B.C. V7X 1K9	13

(Source: British Columbia Labour Relations Board)

* "Employers" refers to names shown currently on the accreditation. Our records do not indicate whether or not these employers are still active. Also some of the names may be divisions, subsidiaries or related corporate entities.

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