
No Right (to Organize) Without a Remedy: Evidence and Consequences of the Failure to Provide Compensatory Remedies for Unfair Labour Practices in British Columbia

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Employees and unions encounter significant risks during union organizing and often see their efforts thwarted by employers. Labour law regimes attempt to minimize these risks by rendering unlawful a number of unfair labour practices (ULPs) employers can use to prevent unionization. But labour relations boards (LRBs) in Canada often avoid awarding full compensation for the harm ULPs cause, leading employers to still view ULPs as advantageous courses of action with only moderate associated costs.

The author argues that this problem can be solved or greatly mitigated without the need for formal reforms; LRBs rather must come to embrace the full range of remedial powers they already hold. Through an empirical analysis of cases brought to the British Columbia Labour Relations Board, the author shows how LRBs systematically choose to avoid compensating particular categories of harm, whether to individual or collective employee interests, or to the interests of the union. This failure is due to a misapplication of the principle of voluntarism, which seeks to have labour relations systems assist the voluntary resolution of labour disputes between unions and employers. By not requiring full compensation, LRBs attempt to maintain employers' voluntary commitment to the labour relations system, but doing so inevitably causes the system to work against employees and unions. Voluntarism is not appropriate during the union-organizing period, when a union has yet to be established, and when it is thus vital that the rights of employees and unions be enforced and adequate remedies provided.

Les employés et les syndicats encourent des risques considérables lors du processus d'organisation d'un syndicat et leurs efforts sont souvent contrecarrés par les employeurs. Les régimes de droit du travail tentent de minimiser ces risques en rendant illégales un certain nombre de pratiques déloyales de travail (PDT) que les employeurs peuvent utiliser pour empêcher la syndicalisation. Les commissions des relations de travail (CRT) du Canada évitent pourtant souvent d'accorder la pleine compensation pour le tort causé par les PDT, ce qui amène les employeurs à percevoir les PDT comme des voies d'action avantageuses et à faibles coûts.

L'auteure argumente que ce problème peut être résolu ou du moins grandement atténué sans réformes formelles ; les CRT doivent par contre prendre la pleine mesure des pouvoirs de redressement dont ils disposent déjà. À travers une analyse empirique de cas entendus par la Commission des relations de travail de la Colombie-Britannique, l'auteure démontre comment les CRT choisissent systématiquement d'éviter de compenser certaines catégories particulières de préjudices, que ce soit dans le cas des intérêts d'employés individuels ou syndiqués ou dans le cas des intérêts de syndicats. Cet échec est dû à l'usage erroné du principe du volontarisme, qui insiste sur le fait que les systèmes de relations de travail cherchent d'abord à assister les syndicats et les employeurs dans la résolution volontaire de leurs conflits de travail. En n'exigeant pas la pleine compensation, les CRT tentent de maintenir l'engagement volontaire de l'employeur dans le système des relations de travail, mais le système se trouve alors inévitablement à travailler contre les employés et les syndicats. Le volontarisme n'est pas de mise pendant la période d'organisation d'un syndicat, alors que ce dernier n'est pas encore établi et qu'il est donc essentiel que les droits des employés et des syndicats soient respectés et protégés par les voies de droit adéquates.

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Introduction

A. The Problem

Consider a typical tale of union organizing. Employees who support unionization begin speaking with others, encouraging them to sign membership cards and participate in union organizing. The union being considered by these employees holds a meeting for employees outside the workplace, and organizers talk to employees in the company parking lot.

After a few days, the employer gets wind of this activity and is alarmed at the prospect of a union. It fires two employees it believes are involved in the union drive. The employer may give another explanation for the terminations, but it will have committed an unfair labour practice (ULP) if the labour relations board (LRB) finds the decisions were tainted with anti-union animus. The standard remedy awarded in such cases is the reinstatement of each employee with back pay. According to the LRB, the wrong is then remedied.

But other employees have seen what has happened to their co-workers. If the union fails to be certified, neither the union nor the LRB will be available to protect employees from the employer, who clearly disapproves of union sympathizers. Some employees may worry that the employer will figure out—or think it has figured out—who voted for the union when it gets the election results. Support for the union then withers. Employees cease to talk about organizing. They avoid co-workers they think are supporters for fear of being seen associating with them. Some decide not to show up to vote, and since the union needs a majority of ballots cast to be certified, the vote is lost.

One of the fired employees decides he does not want to return to his former position. He takes his two weeks of back pay and looks for work elsewhere. The other returns and is fired without cause a month later. This dismissal is not found to be a ULP and the termination stands. At the next workplace that the union tries to organize, the rumour quickly spreads: at the last previously targeted employer, the union failed and workers were fired for trying to unionize.

The result is that the employer has defeated union organizing at little cost or risk to itself. Its workers remain without representation, not having had a chance to freely express their true wishes. The union is left with the costs of the ULP complaint, lost resources from the failed organizing campaign, and potential harm to its reputation.

This story is a common one and illustrates the interdependence of rights and remedies. It reflects a major weakness in LRB responses to employer ULPs during organizing campaigns and illustrates the necessary interdependence of rights and remedies. Labour remedies are widely criticized as inadequate, in the sense that they

do not remedy harm caused by violations and therefore do not effectively deter employers' unfair labour practices, particularly during organizing.¹ As a result, they do not protect employees' fundamental freedom to choose whether to have union representation—free of employer interference. Organizing is especially important because its outcome determines whether workers will have access to the rest of the rights and protections of labour relations legislation.

¹ Criticisms of the inadequacies of LRB remedies appear not only in academic literature, but in the reports of expert committees charged with reviewing labour relations legislation and in the labour community's submissions to these committees, and are also made by lawyers representing unions. For academic criticism, see e.g. Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA" (1983) 96 Harv. L. Rev. 1769 [Weiler, "Promises to Keep"]; Bernard Adell, "Establishing a Collective Employee Voice in the Workplace: How Can the Obstacles Be Lowered?" in G. England, ed., *Essays in Labour Relations Law: Papers Presented at the Conference on Government and Labour Relations: The Death of Voluntarism, School of Management, University of Lethbridge, 6–8 September 1984* (Don Mills, Ont.: CCH Canadian, 1984) 3; Ron Lebi & Elizabeth Mitchell, "The Decline in Trade Union Certification in Ontario: The Case for Restoring Remedial Certification" (2003) 10 C.L.E.L.J. 473. For critical labour-review-committee reports, see e.g. Ontario, Labour Representatives to the Labour Law Reform Committee of the Ministry of Labour, *Partnership and Participation in the 1990s: Labour Law Reform in Ontario* (1991) at 28-32, 40-42 [unpublished, archived at the Newman Library, Centre for Industrial Relations, University of Toronto] [*Partnership & Participation*]; British Columbia, Labour Relations Review Code Committee, *Managing Change in Labour Relations: A Discussion Paper* (Victoria: Ministry of Skills Development and Labour, 1998), Part 3.2; British Columbia, Labour Relations Code Review Committee, *Managing Change in Labour Relations—Final Report* (Victoria: Ministry of Skills Development and Labour, 1998) [*Managing Change*] at 59. Submissions to labour-review committees are also of interest. See Telecommunications Workers Union, *Response Submission of the Telecommunication Workers Union to the British Columbia Labour Relations Code Review Committee* (2003) at 3; United Steelworkers of America, *Submission to the Labour Relations Code Review Committee* (Burnaby, B.C.: United Steelworkers of America, 2003), Appendix A at 11 [*USW Submission*]; British Columbia Federation of Labour, *Submission to the Labour Relations Review Section Three Committee* (Vancouver: British Columbia Federation of Labour, 2003) at 49-52; Ontario Federation of Labour, *Submission by the Ontario Federation of Labour to the Ministry of Labour on Modernizing the Ontario Labour Relations Act* (Toronto: Ontario Federation of Labour, 2004) at 14-18, online: Ontario Federation of Labour <http://www.ofl.ca/uploads/library/briefs_submissions/Submission_-_Modernizing_the_OLRA_2004.pdf> [*OFL Submission*]; United Steelworkers of America, District 6, *A Return to Fairness: Restoring the Right of Ontario's Employees to Unionize: Submission to the Ontario Minister of Labour* (Etobicoke, Ont.: United Steelworkers of America, 2004) [*Return to Fairness*] at 15-19, 24. For criticism from the labour law bar, see e.g. Patrick Dickie, *The Crisis in Union Organizing Under the B.C. Liberals* (Vancouver: Hastings Labour Law Office, 2005) at 9, 14-16, online: Hastings Labour Law Office <http://www.labourlawoffice.com/Publications/The_Crisis_in_Union_Organizing_under_the_B.C._Liberals.pdf>; David Tarasoff, *Union Organizing and B.C. Labour Law: An Update* (Vancouver: Hastings Labour Law Office, 2006) at 11-13, online: Hastings Labour Law Office <http://www.labourlawoffice.com/Publications/UnionOrganizingandBCLabourLaw_an_update.pdf>.

B. Old Solutions

Two approaches to this problem have been proposed. The first is to impose punitive remedies, including financial penalties, on employers found to have committed ULPs.² The lack of LRB authority to impose penal sanctions has been identified as a major gap in LRBs' remedial approach to ULPs. Proponents of a punitive approach contend that simply trying to restore the status quo using accommodative and conciliatory approaches is "doomed to failure" since determinedly anti-union employers are likely to respond only to direct penal sanctions.³

However, it is unlikely that LRB authority will be extended to allow punitive or penal awards—even for repeated, serious ULPs.⁴ In addition, Bernard Adell points out that LRBs may not be able to satisfy the requirement, under subsection 11(d) of the *Canadian Charter of Rights and Freedoms*, that tribunals imposing penal sanctions have a high level of independence from government.⁵

² See e.g. Adell, *ibid.* at 15; *Return to Fairness*, *ibid.* at 24. A Labour Relations Code Review Committee in British Columbia noted that several labour organizations such as the British Columbia Federation of Labour, College Institute Educators' Association of British Columbia, United Steelworkers of America, and the Telecommunication Workers Union, urged reform to LRB remedies that would deter employer retribution against individual workers and impose financial penalties against employers committing ULPs. The Committee noted, but did not address, these submissions (British Columbia, Labour Relations Code Review Committee, *Report to the Minister of Skills Development and Labour* (Victoria: Ministry of Skills Development and Labour, 2003), Appendix E at 79). In particular, a treble back pay penalty (equal to triple the wages and benefits lost by the employee) has been proposed for unlawful termination during organizing (*Return to Fairness*, *ibid.* at 24).

Punitive remedies have also been advocated in the United States. See Michael Weiner, "Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive–Remedial Distinction in Labor Law Enforcement" (2005) 52 UCLA L. Rev. 1579. A key feature of the *Employee Free Choice Act* was treble back pay as a penalty for illegal terminations during organizing (U.S., Bill H.R. 1696, *Employee Free Choice Act*, 109th Cong., 2005, s. 4; U.S., Bill H.R. 800, *Employee Free Choice Act of 2007*, 110th Cong., 2007, s. 4). A revised version of the bill passed in the House of Representatives on 1 March 2007, but was defeated in the Senate on 26 June 2007 (U.S., Bill S. 1041, *Employee Free Choice Act of 2007*, 110th Cong. 2007). The *Employee Free Choice Act of 2009* was introduced in both the House of Representatives and the Senate in March 2009 and has since been referred to committee (U.S., Bill H.R. 1409, *Employee Free Choice Act of 2009*, 111th Cong., 2009; U.S., Bill s. 560, *Employee Free Choice Act of 2009*, 111th Cong., 2009).

³ See e.g. Adell, *supra* note 1 at 15.

⁴ *Ibid.* The Supreme Court of Canada has recently confirmed that administrative tribunals are not entitled to the type of absolute independence that characterizes the judiciary, and the degree of independence for a particular tribunal is determined by the legislature (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 at paras. 22-23, 204 D.L.R. (4th) 33).

⁵ Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [Charter]. Adell also notes that the reverse onus of proof applying to many ULP prohibitions may also violate the presumption of innocence in s. 11(d) of the *Charter* (*supra* note 1 at 15).

An even greater obstacle to adopting punitive remedies stems from society's reluctance to regard coercion of employees in a criminal light akin to commercial fraud.⁶ Furthermore, punitive remedies are at odds with the role of voluntary action in the labour relations system, and such changes are likely politically infeasible.⁷

A second proposed approach is to reduce the opportunity for employers to engage in ULPs during organizing by accelerating the union-recognition process through card-based certification and expedited processing of applications.⁸ Proponents argue that these changes would allow certification to be achieved quickly—often before employers become aware of organizing activity. A related proposal is to prohibit employers from disciplining, terminating, or removing any employee in a proposed bargaining unit without leave from the LRB once the employer is aware of organizing efforts.⁹

However, this approach is unlikely to be followed in the current political climate. Legislative changes over the last decade and a half have moved away from card-check certification toward mandatory representation elections,¹⁰ and LRB resources

⁶ Adell, *ibid.* at 15-16.

⁷ The recent experience in the United States with the repeated defeat of the *Employee Free Choice Act*, which provided for a number of punitive remedies for employer ULPs, is an example of the strong political resistance to such remedial expansion (*supra* note 2).

⁸ Paul Weiler is a leading proponent of this approach. See “Promises to Keep”, *supra* note 1. In those jurisdictions employing mandatory vote-certification procedures, there is strong support within the labour community to maintain, adopt, or restore accelerated, card-based, certification procedures. For example, the report of a subcommittee of advisers to then Minister of Labour Moe Sihota concluded that “[t]he surface attraction of a secret ballot vote does not stand up to examination” and recommended a return to card-based certification (British Columbia, Ministry of Labour and Consumer Affairs, Subcommittee of Special Advisors, *Recommendations for Labour Law Reform* (Victoria: Ministry of Labour, 1992) at 26). After British Columbia had reinstated card-based certification (which has since been reversed) a subsequent labour-legislation review committee concluded from its consultations that it is not employees that want certification elections, but employers. This committee chose to respect the wishes of employees and recommended that card-based certification be retained (*Managing Change, supra* note 1 at 58). See also *USW Submission, supra* note 1 at 9-14; *OFL Submission, supra* note 1 at 6-14.

⁹ *Partnership & Participation, supra* note 1 at 29.

¹⁰ Initially, card-check certification procedures were used throughout Canada. Mandatory vote procedures have since been adopted in Nova Scotia in 1977 (though allowing card-based certification for the construction industry) (*An Act to Amend Chapter 19 of the Acts of 1972, the Trade Union Act*, S.N.S. 1977, c. 70, s. 24), Alberta in 1988 (*Labour Relations Code*, S.A. 1988, c. L-1.2, s. 31), British Columbia from 1984 to 1992 (*Labour Relations Code Amendment Act*, S.B.C. 1984, c. 24, s. 43) and in 2002 (*Skills Development and Labour Statutes Amendment Act*, S.B.C. 2001, c. 33, s. 24), Newfoundland and Labrador in 1994 (*An Act to Amend the Labour Relations Act*, S.N. 1993, c. 58, s. 47), Ontario in 1995 (though the legislation allows unions to opt for card-based certification in the construction industry beginning in 2005) (*Labour Relations Act, 1995*, S.O. 1995, c. 1, s. 10 [*Ontario Act*]), Manitoba between 1997 and 2000 (*Labour Relations Amendment Act*, S.M. 1996, c. 32, s. 40), and most recently Saskatchewan in 2008 (*Trade Union Amendment Act, 2007*, S.S. 2008, c. 26, ss. 3-5).

have also decreased dramatically.¹¹ As a result, there is little prospect that card-based certification, expedited hearings, or other means of reducing opportunities for employer interference and delay will be introduced in many jurisdictions.

Both of these proposals would require significant changes to LRB powers or procedures as well as a substantial commitment of political will that may prove, in the end, to have limited effect.¹²

C. An Alternative Approach

This article proposes an alternative approach that does not require the expansion of LRB authority or procedure. One reason for the lingering problem of employer ULPs during union organizing lies in the choice and scope of remedies awarded by LRBs. Current remedial awards generally do not fully compensate for harm caused by wrongdoing. As a result, ULPs may provide a net benefit to employers even when remedies are awarded, ultimately encouraging rather than deterring ULPs.

Both of the old solutions referred to above require reforms to the existing statutory regime: the first would expand the remedial jurisdiction of the LRB, and the second would change certification and complaints procedures. That is, both proposals are based on the proposition that the existing statutory scheme is deficient in some respect. In contrast, this article concludes that there is tremendous unrealized promise in the existing processes and powers for addressing employer ULPs committed during organizing. LRBs must come to realize the full potential of the compensatory or restorative approach to labour remedies. Implementing a fully compensatory remedial scheme would lessen or eliminate incentives for employer wrongdoing and reduce the disincentives for employees and unions to complain of misconduct. This approach

¹¹ For instance, at the British Columbia Labour Relations Board (BCLRB) the number of vice-chairs shrank by more than half between 2000 and 2006, from 12 full-time and 2 part-time vice-chairs in 2000 to 4 full-time and three contract vice-chairs by 31 December 2006. The number of staff lawyers also dropped, from six full-time staff lawyers in 2000 to three in 2006. Meanwhile the number of applications and complaints filed and disposed each year decreased only 39.2 per cent (from 2873 to 1747) and 39.6 per cent (from 2907 to 1757), respectively. See British Columbia, Labour Relations Board, *2000 Annual Report* (Victoria: Ministry of Skill Development and Labour, 2001) at 7, 83; British Columbia, Labour Relations Board, *2006 Annual Report* (Victoria: Ministry of Labour and Citizens' Services, 2007) at 6, 10-11, 42. For a discussion of Ontario Labour Relations Board resources, see Lebi & Mitchell, *supra* note 1 at 476.

¹² Even under card-based certification rather than mandatory votes, there is evidence that ULPs are still prevalent and have significant, though lesser, negative effects on certification and viability of bargaining relationships. See e.g. Terry Thomason & Suzanne Pozzebon, "Managerial Opposition to Union Certification in Quebec and Ontario" (1998) 53 R.I. 750; Terry Thomason, *Managerial Opposition to Union Certification in Quebec and Ontario* (1994) [unpublished, archived at McGill University, Howard Ross Library of Management]; Chris Riddell, "Union Suppression and Certification Success" (2001) 34 Canadian Journal of Economics 396; Karen Bentham, "Employer Resistance to Union Certification" (2002) 57 R.I. 159.

has the advantage of requiring no changes to LRB jurisdiction or procedure, and it is compatible with and actually fosters a voluntary labour relations system.

This theoretical analysis is supported by an empirical analysis of ULP complaints and findings arising from union organizing in British Columbia from 1990 to mid-2007 (the “study period”).¹³ The study chooses to use data from the British Columbia Labour Relations Board (BCLRB), which has the broadest jurisdiction and remedial powers, and among the highest case loads, of Canadian LRBs.¹⁴ For these reasons, it is a rich source of information for a case study of the ULP-remedy experience and highlights the key problem addressed in this article: that despite having broad powers to restore harm done by ULPs, LRBs’ remedial roles are mainly limited by LRBs’ understanding of, and willingness to exercise, their remedial authority. Though this analysis uses B.C. data, the results and conclusions drawn from it are nevertheless broadly applicable to other jurisdictions.

Part I of this article introduces ULPs that can occur during organizing and identifies three categories of harm that may be caused by employer ULPs during organizing: harm to individual employee interests, harm to collective employee interests, and harm to union interests. Part II examines B.C. ULP data to determine the frequency of ULP complaints by employers, unions, and employees, as well as the frequency of different categories of conduct prompting ULP complaints and resulting in findings against employers. Part III introduces the principles governing LRBs’

¹³ This data was collected by performing a date search for each year between 1990 and the end of June 2007, inclusive, in Quicklaw’s “British Columbia Labour Relations Board decisions” database. The database includes all ULP complaints resulting in a decision published by the BCLRB and, therefore, does not include those that did not lead to a published decision. Each resulting decision was then reviewed to determine whether it involved a complaint of ULPs committed during a union organizing drive. All ULP complaints filed by unions, employers and individual employees against any other party were included. Employee complaints of a breach of the union’s duty of fair representation, which are sometimes considered a form of ULP, were excluded from this sample because such complaints are not directly relevant to the question of union organizing.

¹⁴ As described by one group of commentators, “In British Columbia, the labour relations board has reached its fullest flowering and enjoys plenary independent authority as well over conciliations, strikes, picketing and grievance arbitration, *inter alia*. Other labour relations tribunals enjoy some, but not all, of these responsibilities” (Donald D. Carter *et al.*, *Labour Law in Canada*, 5th ed. (Markham, Ont.: Butterworths Canada, 2002) at para. 132).

In comparison with the BCLRB’s case load of 1747 applications and 1757 cases disposed of in 2006, in their 2005–06 fiscal years the Alberta Labour Relations Board received 1025 cases and disposed of 1182 cases, the Ontario LRB received 4295 matters and disposed of 4338, and the Canada Industrial Relations Board received 757 cases and disposed of 809 (BCLRB, *2006 Annual Report*, *supra* note 11, Table 1, compiled from Alberta, Labour Relations Board, *LRB Statistical Data* (Edmonton: Alberta Labour Relations Board, 2006), online: Alberta Labour Relations Board <www.alrb.gov.ab.ca/Stats/casesresolution05_06.pdf>; Ontario, Labour Relations Board, *Ontario Labour Relations Board Annual Report 2005–06* (Toronto: Ontario Labour Relations Board, 2006), Table 1; Canada, Industrial Relations Board, *2005–06 Performance Report* (Ottawa: Treasury Board of Canada Secretariat, 2006), Chart 1).

remedial awards. This is followed in Part IV by an assessment of the compensatory potential of remedies commonly awarded by LRBs. Part V uses this assessment to empirically evaluate whether remedial awards issued by the BCLRB in termination and employer-communication ULP cases tend to compensate all types of harm caused by these forms of wrongdoing. This is followed in Part VI by an examination of the principle of voluntarism, which strongly influences the administration of labour relations, including the treatment of ULPs. Part VII considers the consequences of routinely failing to provide fully compensatory remedies for employer ULPs during organizing. Part VIII offers some concluding thoughts on this problem.

I. Unfair Labour Practices: Harm Caused During Organizing

A fundamental premise of labour legislation is that employees have the freedom to choose whether to be represented by a union and to engage in lawful union activities.¹⁵ To effectuate these rights the legislation proscribes as ULPs certain conduct that interferes with these rights, and it grants the LRB broad powers to provide creative remedies to restore and compensate harm caused by ULPs. In general, an employer will be found to have committed a ULP during organizing where its actions interfere with the rights of employees or the union to seek collective representation.¹⁶ A ULP can be committed by an employer, a union, a person acting on behalf of the employer or union, or any other person.¹⁷ This study is concerned however with actions interfering with unionization. It therefore focuses on employer activities during union organizing that might cause a union to file a ULP complaint.

This part proposes an analytical framework recognizing that employer ULPs committed during organizing are capable of harming three distinct employee and union interests: interests of the individual employee, collective employee interests, and the interests of the union as an institution.¹⁸ Such harm may be pecuniary or nonpecuniary, immediate or prospective.

¹⁵ See e.g. *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 4(1) [*B.C. Code*] (providing that “[e]very employee is free to be a member of a trade union and to participate in its lawful activities”). In *Re Forano Ltd.*, Chair P.C. Weiler (as he then was) described this provision as “the fundamental premise of the whole statute” ([1974] 1 Can. LRBR 13 at 17 (BCLRB) [*Forano*]).

¹⁶ See *B.C. Code*, *ibid.*, ss. 6, 9, 14.

¹⁷ See e.g. *ibid.*, ss. 6, 9.

¹⁸ Use of heuristics is subject to myriad dangers of manipulation, systematic bias, and errors in judgment, all of which are well canvassed in the substantial literature on heuristics and the law, including use of heuristics by legal decision makers. See e.g. Russell Korobkin, “The Problems with Heuristics for Law” in G. Gigerenzer & C. Engel, eds., *Heuristics and the Law* (Cambridge, Mass.: MIT Press, 2006) 45. This article recognizes the potential shortcomings of heuristics, offering this analytical framework as a counterpoint to the outcomes of LRB decisions. However, I argue that LRB decision makers appear to be, implicitly, employing a heuristic leading to systematic under-recognition of, and thus failure to remedy, certain types of harm caused by employer misconduct.

This heuristic serves in this article as the basis for defining a fully compensatory remedy to restore harm caused by employer ULPs during organizing.¹⁹ It is then used to assess the effects of two types of employer ULPs: illegal termination and illegal communications. These categories were selected because they are common responses by employers trying to defeat unionizing efforts and are the most frequently committed types of ULPs. Nevertheless, one may readily apply the analysis below to other forms of misconduct such as illegal discipline or discrimination against workers.

This analysis reveals the complicated and interrelated nature of interests and harm during organizing. It allows for an assessment, in Part II, of whether a given remedy compensates each aspect of harm caused by the wrongdoing and, therefore, whether it is fully compensatory.

A. Individual Employee Interests

Individual employees have a substantive interest in their job and workplace, including the content of their work, remuneration, other terms and conditions of their employment, and the physical and social work environment (including relationships of employees to management, customers or clients, and other employees). The importance of this interest reflects the central significance of work in employees' lives. Employment is necessary for most people to support themselves as well as the other endeavours and responsibilities in their lives. Work is recognized as an important vehicle for self-fulfillment and for individuals to realize their human potential.²⁰ This individual employee interest can therefore be harmed through any diminishment in the terms or conditions of employment. Such a diminishment may arise from being disciplined, being subjected to intimidation, coercion or threats, a worsened working environment through, for example, increased surveillance by managers or the creation of an intimidating or threatening workplace atmosphere, a reduction in freedom or autonomy at work, and, of course, being fired and losing employment altogether.

B. Collective Employee Interests

Individual employees also have a second, distinct, interest that is collective in nature: an interest in the opportunity to engage in collective activity in the workplace

¹⁹ See Part IV, below.

²⁰ The Supreme Court of Canada has repeatedly recognized the centrality of work to peoples' lives. See e.g. *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at para. 25, 176 D.L.R. (4th) 607; *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 at paras. 33-34, 208 D.L.R. (4th) 385; *Dunmore v. Ontario (A.G.)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193.

such as union representation.²¹ This includes an interest in having access to a free and fair process for determining whether the group of employees they belong to will have collective representation.²² The value of employees' opportunity to express their views and freely decide, without employer interference, whether they wish to be represented by a union²³ is one of the premises of the labour relations system and is reflected in express statutory rights and protections.²⁴ This collective interest exists whether or not a particular worker prefers unionization. It is analogous to an individual citizen's interest in having a free and fair political-election process that transcends political preferences. Apart from the intrinsic value of the opportunity for choice, this collective interest may be of greater or lesser value to different individuals. For some employees, it is a way of improving their working conditions and therefore contributes to their substantive interests. For others, the reverse will be true.

Many employer union-avoidance tactics (even those falling short of illegality) may substantially reduce—if not eliminate—workers' ability to exercise their rights to organize and the likelihood of unionization.²⁵ When this happens, the collective interest in unionizing, or at least in having the opportunity to freely decide whether to have union representation, is diminished and may even be lost altogether. ULPs' harm to the collective employee interest often arise from harm directed at individual

²¹ The Supreme Court of Canada has recently recognized that the freedom of association enshrined in s. 2(d) of the *Charter* (*supra* note 5) has both an individual and collective dimension, and it has struggled to reconcile collective employee representation with this *Charter* freedom (*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, 283 D.L.R. (4th) 40). For a comprehensive critique of the Court's approach to this question, see Brian Langille, "The Freedom of Association Mess" McGill L.J. [forthcoming in 2009]. Now that collective bargaining is recognized as a protected *Charter* right, it may be that collective employee interests, including protection from and remedies for ULPs, will be entitled to enhanced protection.

²² Robert J. Flanagan describes this as an interest in the opportunity for "concerted activity" and describes harm to the collective employee interest as "the external effects of violations on a general effort to pursue concerted activity" ("Remedial Policy and Compliance with the NLRA" in *Proceedings of the Thirty-Ninth Annual Meeting of the Industrial Relations Research Association Series, December 28–30, 1986* (New Orleans: Industrial Relations Research Association, 1986) at 26). Weiler also speaks of "group harm" caused by ULPs ("Promises to Keep", *supra* note 1).

²³ Benefits from union representation can be significant. Unionized workers often enjoy significantly higher wages and benefits than similarly situated nonunion workers, and they benefit from an enforceable grievance procedure, and from the workplace voice provided by collective bargaining. See Ernest B. Akyeampong, "Unionization and the Grievance System" (2003) 4:8 *Perspectives on Labour and Income* 5.

²⁴ The fundamental right created by labour legislation is the employees' right to organize, to support and participate in a union's lawful activities, and to bargain collectively. See e.g. *B.C. Code*, *supra* note 15, ss. 4(1), 11, 45(1)(a), 46(1). This right is protected by statutory prohibitions against dismissals and other discrimination, threats, coercion, or intimidation. See e.g. *B.C. Code*, *ibid.*, ss. 5, 6, 9. See also Weiler, "Promises to Keep", *supra* note 1 at 1787-89 (discussing the U.S. version of this basic right and its protections).

²⁵ See Bentham, *supra* note 12; Riddell, *supra* note 12.

employees that, in the first instance, affects individual interests. As discussed below, employer misconduct directed at individual employees, such as illegal termination, may affect collective interests most seriously.

C. Union Interests

The third category of potential harm is to the union's own interests. These interests are separate from—and at times may even conflict with—employees' individual and collective interests. Unions are institutions that exist independently of their members, with goals and concerns often extending beyond a single workplace or group of workers.²⁶ They invest significant resources in campaigns that are often several months long and involve full-time organizers employed by the union, multiple employee meetings, and campaign literature. Their interests in organizing are both immediate and prospective, and they value the reputation and credibility successful organizing establishes during campaigns at the target workplace and beyond.

A particular campaign may focus on organizing a workplace immediately or may be part of a lengthier organizing effort. In lengthier efforts, the union expects the employer to successfully thwart the first attempt at organizing but intends to build support so that a later attempt may succeed. Organizing strategies can also extend beyond a specific workplace. The union may seek to organize all workplaces in an entire industry (e.g., all casinos). The union may also focus on a particular employer (e.g., Wal-Mart) and try to unionize as many of its locations as possible. In these cases, the union's overarching concern is with the target group of workplaces rather than any specific location.

Finally, unions bear the costs of the certification application and of investigating and pursuing any associated ULP complaints, including legal costs, which may be substantial. Where the employer's ULP has illegally deterred workers from supporting unionization, the union's organizing efforts may be partly or wholly wasted, leading to the additional costs of re-establishing support among employees following these ULPs.

D. Harms Caused by Particular ULPs

As is shown in Part II.B, illegal terminations and communications with employees are the most common types of employer ULPs committed during union organizing. Both types have the potential to impose a variety of harms on employees and unions.

²⁶ Originally, and unlike corporations or societies, unions were treated as voluntary organizations without an existence or identity separate from their membership. Unions are now commonly treated as legal entities capable of action under their own name (though this differs among jurisdictions). Legal status aside, recognizing unions as institutions separate from their members more accurately reflects how they actually operate.

1. Illegal Termination

When an employer improperly discharges an employee during union organizing, its purpose may be any or all of the following: to remove a particularly effective union supporter, to remove an employee whom management believes to be active in the union drive, or to set an example for other employees, demonstrating what may happen to union supporters and thereby intimidating or coercing employees to avoid supporting unionization. This employer action can harm both employee and union interests.

Harm to individual employee interests most evidently occurs where an employee is unlawfully terminated, disciplined, or otherwise discriminated against by the employer. An employee who is illegally dismissed, for instance, suffers lost income and benefits, as well as the distress of being fired and possibly other consequent losses, such as penalties for being unable to pay debts or lost opportunities for investing while unemployed. Dismissal may also engender longer-lasting consequences for the employee, such as the increased difficulty in getting hired resulting from having been fired from a previously held job—particularly before the LRB determines that the termination was unlawful.

Beyond these obvious negative consequences, such actions go to the essence of the workplace experience for employees, emphasizing the employer's overwhelming power and prerogative to be arbitrary, and underscoring employees' subordination. This creates an atmosphere of fear, intimidation, and distrust in the workplace that is a detriment to employees—whether or not they were the target of the employer's action, and whether or not they are actually inclined to unionize. The fear influences employees' collective interests by effectively depriving employees of free choice about whether to unionize. Out of fear that they will be punished like their colleague, employees will be discouraged from participating in present or future opportunities for unionization.

As noted above, the employer may intend to dissuade other employees from supporting the union drive by demonstrating what happens to union supporters. Paul Weiler argues that employers bent on union avoidance illegally fire employees to benefit from the broader impact of the termination on other employees: "break[ing] the momentum" of the organizing campaign.²⁷ The "chilling effect" of even isolated illegal terminations during organizing is well recognized,²⁸ and empirical evidence shows that this message is effectively communicated to employees.²⁹ The motivations

²⁷ Weiler, "Promises to Keep", *supra* note 1 at 1788.

²⁸ *Re Valdi Inc.*, [1980] OLRB Rep. 1254 at para. 24 [*Valdi*].

²⁹ For instance, a study of ULP complaints during organizing in British Columbia between 1987 and 1988 found that illegal terminations were associated with a 31 per cent reduction in the probability that the certification application would succeed (Riddell, *supra* note 12 at 405-06).

In the United States, 79 per cent of workers surveyed said that employees seeking union representation will likely lose their jobs, and 41 per cent of nonunion workers said they believe they

for and effects of other unlawful treatment such as discipline, discrimination, or changes to conditions and terms of work can be similar.³⁰

Even if employees do not change their minds about unionization as a result of the ULP, they may be convinced that it is too risky to support or participate in unionization. Consequently, the resources spent by the union on its organizing campaign may have been wasted, in whole or in part. Less obvious is the harm to the union's image and its loss of credibility, not just among those workers at the location where the ULP occurred, but among other existing and potential union members. The employer's misconduct can bring into question the union's ability to effectively represent employees and protect its supporters from illegal retribution.

It may be very difficult and expensive for the union to offset the negative effects of the employer's misconduct, to reassure employees, and to regain their trust and support, particularly where the union has limited contact with workers on the employer's property. Therefore, apart from the immediate setback to this certification campaign, and the potential cost of a ULP complaint, the employer's illegal behaviour may hamper the union's future campaigns. Illegal terminations can thus harm both the union's immediate and future interests.³¹

2. Illegal Employer Communication

Unlawful employer communications to employees can arise in a variety of circumstances. Sometimes such a communication involves an employer who, determined to avoid unionization, takes advantage of its access to employees by illegally communicating anti-union messages to them. Other times an employer may simply express its views about unionization or try to understand the nature of the dissatisfaction believed to be driving its workers toward unionization. Inadvertently, the employer may cross the line. The employer may genuinely not intend to threaten, intimidate, or coerce workers with its communications, but this may well be the effect.

Unlawful employer communications to employees, such as one-on-one conversations or group meetings, can negatively affect employees' individual and

would lose their own jobs if they tried to unionize. The Dunlop Commission, which commissioned this survey, concluded that "[t]his fear [of illegal termination] is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers" (U.S., Department of Labour and Department of Commerce, *The Dunlop Commission on the Future of Worker-Management Relations: Final Report* (Washington, D.C.: United States Government Printing Office, 1994) at 40, online: Cornell University DigitalCommons@ILR <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace>). No similar data is available for Canadian workers.

³⁰ Riddell also found that ULPs directed at individual employees reduced the likelihood of certification by 7 per cent (*supra* note 12 at 405).

³¹ There is empirical evidence that ULPs during organizing have significant, negative, short-term and long-term effects on union support. See e.g. Bentham, *supra* note 12.

collective interests—particularly where the communication is illegal, such as implicit or explicit threats to workers' employment.³² The employee who is the target of the communication, and who is threatened, intimidated, or coerced, clearly suffers harm. Based on her nonunion experience, the employee does not feel she has the privilege of refusing to comply with her employer's questioning or direction to attend an anti-union meeting and listen to whatever the employer has to say. To refuse, or to leave such a meeting, would be insubordination inviting discipline. As with illegal terminations, other employees who merely witness or learn of the incident may also be harmed by the atmosphere of fear and uncertainty created by the employer.

Furthermore, the employer has access to employees at all times during working hours, whereas the most the union can do without the employer's consent is try to engage workers on their way in or out of work—perhaps in the parking lot—or have other employees involved in the campaign try to speak to them during unpaid breaks. Unlike most unions, employers can also telephone or send mail to employees' homes, showing employees that their employer can reach them in their private sphere. This contrast is apparent to employees, and it tells them that in the workplace the union is the interloper without legitimate role or voice. Not only may these employees be discouraged from supporting the union, but they may even be deterred from participating in the process, whether or not they continue to support the union.

Therefore, the potential harm to union interests resulting from illegal employer communications is similar to the harm arising from unlawful termination, discussed above. It can undo past organizing efforts, hinder future organizing, and threaten the union with the expense of a ULP complaint.

II. ULP Complaints and Findings

An examination of ULP complaints during union organizing in British Columbia over the study period reveals that the great majority of these complaints were brought against employers, that employers were the party most often found to have engaged

³² A study of ULP complaints during organizing in British Columbia between 1987 and 1998 found that specific types of illegal employer communications were associated with reductions in the probability of certification. Group coercion was associated with a 29 per cent reduction (Riddell, *supra* note 12).

A survey of 54 Ontario and Quebec unions found that employees' support for unionization and likelihood of certification were both significantly reduced (in one or both jurisdictions) by use of the following union avoidance tactics: captive audience speeches held by the employer, distribution of anti-union literature, employer promises of increased wages and benefits, tightening of work rules, threats against union supporters, and interrogating workers. The researchers concluded that captive-audience meetings were the most effective anti-union tactic (Thomason & Pozzebon, *supra* note 12).

in ULPs, and that illegal terminations and illegal communication with workers account for most ULP complaints and findings.³³

A. Relative Frequency of ULP Complaints by Party

Table 1 and Figure 1, provided below, set out the number of ULP complaints filed by unions, employers and individual employees against each party, and the number and proportion of these complaints that were found to be meritorious (or “granted”) in whole or in part by the BCLRB.

The data demonstrate that, of the 254 ULP complaints filed during the period of the study, 197 (or 78 per cent) were complaints filed against employers, with the great majority of these complaints (194 or 98 per cent) being filed by unions and only 3 (or 2 per cent) by individual employees. Only 54 complaints (or 21 per cent) were brought against a union. Most of these were filed by employers (39 complaints), although unions and individual employees brought 7 and 8 complaints against unions, respectively. Only 3 ULP complaints (about 1 per cent of the total) were filed against individual employees, with 2 being filed by a union and 1 by an employer.

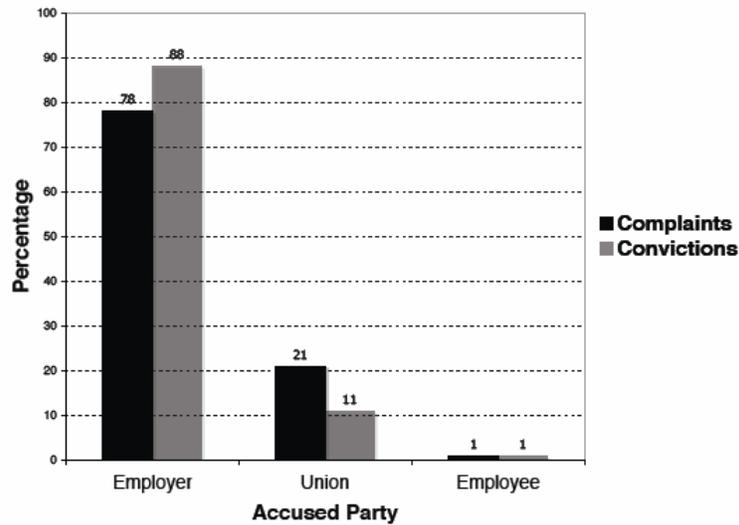
Of the 172 ULP complaints found to be wholly or partly meritorious, there are eight times more ULP findings made against employers (152 or 88 per cent of the total) than against unions (19 or 11 per cent of the total). Meanwhile there was only a single instance of an employee held to have committed a ULP during organizing.

³³ Note that in the remainder of this article, “ULP complaints” refer to ULP complaints arising from alleged misconduct during union organizing, unless otherwise indicated.

Table 1: Unfair Labour Practice Complaints by Complainant and Respondent Filed at and Granted by the British Columbia Labour Relations Board, 1990–June 2007

			Respondent			
			Union	Employer	Individual employee	Total
Complainant	Union	Complaints	7	194	2	203
		Granted	0	149	0	149
		% Granted	0	76.8	0	73.4
	Employer	Complaints	39		1	40
		Granted	16	--	1	17
		% Granted	41		100	42.5
	Individual employee	Complaints	8	3		11
		Granted	3	3	--	6
		% Granted	37.5	100		54.4
	Total	Complaints	54	197	3	254
		Granted	19	152	1	172
		% Granted	35.2	77.2	33	67.7

Figure 1: Percentage of Unfair Labour Practice Complaints and Convictions, by Accused Party, at the British Columbia Labour Relations Board, 1990–June 2007



B. Relative Frequency of Types of Employer ULPs

This study also examined the types of conduct involved in ULP complaints filed by unions against employers and the findings against employers in these cases. Table 2 and Figure 2, provided below, set out the number of complaints that unions brought against employers in the following categories: illegal termination of employees, illegal termination combined with other, nonspeech, employer misconduct, illegal communications with employees, illegal communications combined with other, nontermination, unlawful employer conduct, complaints alleging all of unlawful firing, communications, and other wrongdoing, and complaints involving employer conduct not including termination or communication with employees.³⁴

The data demonstrate that illegal firings and communications with workers, of all the categories, gave rise to the most ULP complaints by unions against employers and were the most common forms of unlawful employer behaviour during the organizing period. Examining the relative frequency of different types of complaints and meritorious complaints shows that over 90 per cent of both complaints and findings of breach involved either unlawful employee termination or illegal employer communication or both (93.8 per cent or 184 of 196 complaints, and 91 per cent or 139 of 156 ULP findings).

Cases involving termination as the sole alleged misconduct accounted for 37 per cent of complaints (72 of 196 complaints filed against employers), and cases involving both termination and allegations of other, nonspeech misconduct accounted for another 6 per cent of such ULP complaints (12 cases). Termination was also the most commonly held form of misconduct, with 32 per cent of breaches (49 cases) involving termination as the sole ULP, and another 7 per cent (11 cases) involving termination and another nonspeech ULP. Together these account for 43 per cent of ULP complaints against employers by unions, and 39 per cent of such meritorious ULP cases.

Unlawful communication to employees by employers was the second-most common source of both union ULP complaints and findings against employers. Cases involving employer speech as the sole alleged employer misconduct made up 12.2 per cent of complaints (24 cases) and 12.4 per cent of ULP findings (19 cases). Complaints involving both speech and allegations of employer misconduct other than unlawful termination accounted for another 12.2 per cent of complaints (24 cases) and 14 per cent of ULP findings against employers (22 cases).

A further 20 per cent of complaints (40 cases) and 24 per cent of violations (37 cases) involved a combination of speech, unlawful termination, and other employer misconduct. Finally, another 12 per cent of complaints (23 cases) and 9 per cent of ULP findings (14 cases) involved misconduct other than speech or termination.

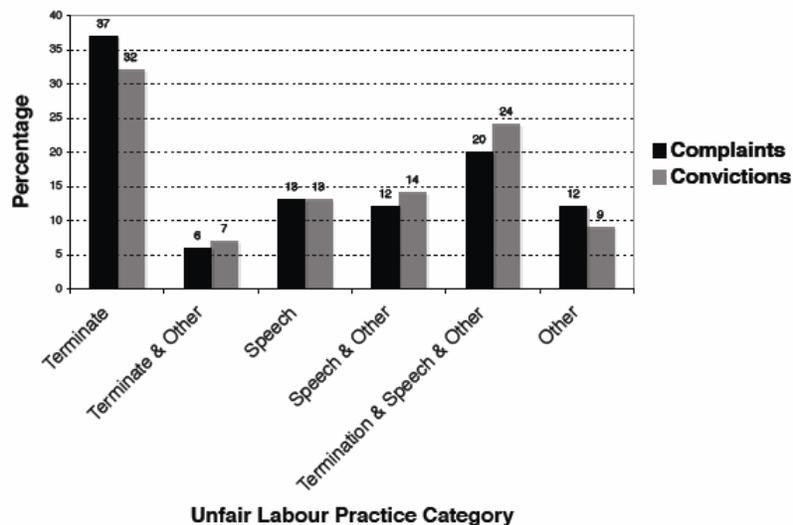
³⁴ Employer communications, including group meetings, individual meetings, slide-shows, letters, etc., are often referred to simply as employer “speech”.

The data clearly demonstrate that employer speech and terminations are the most significant sources of organizing ULP complaints and employer violations during the period of study. Therefore, LRB responses to these categories of employer ULPs, and the effect of these responses on employer, union, and employee behaviour, are important to the question of employee free choice about unionizing.

Table 2: Categories of Unfair Labour Practice Complaints by Unions Against Employers Filed at and Granted by the British Columbia Labour Relations Board, 1990–June 2007

		Complaints		Granted Complaints	
		Number	Percent-age	Number	Percent-age
ULP Category	Termination	72	37	49	32
	Termination & Other	12	6	11	7
	Speech	24	12.2	19	12.4
	Speech & Other	24	12.2	22	14
	Termination & Speech & Other	40	20	37	24
	Other	23	12	14	9
	Total	196	100	153	100

Figure 2: Percentage of Complaints and Convictions, by Unfair Labour Practice Category, Filed by Unions Against Employers at and Granted by the British Columbia Labour Relations Board, 1990–June 2007



III. ULPs and the Remedial Mandate of Labour Relations Boards

Legislatures in Canada have granted LRBs extensive authority to order flexible, novel, and appropriate remedies to rectify violations and restore injured parties to the position they would have been in had the breach not occurred.³⁵ These powers are subject to few specific limitations: there must be a rational connection between the breach, its consequences, and the remedy,³⁶ remedies must be compensatory not punitive,³⁷ they cannot be contrary to the Charter,³⁸ and they should promote the purposes and duties of the legislation.³⁹ Furthermore, a remedy should be designed to deter further violations and should not be so minimal as to simply operate as a licence fee for wrongdoing.⁴⁰ As such, LRBs administer a “purely compensatory and restorative remedial regime ...”⁴¹

In the mid-1970s, the make-whole approach to remedial awards was introduced into Canadian labour law, borrowing a concept developed by the National Labor Relations Board in the United States,⁴² and exercising the newly expanded remedial jurisdiction of the BCLRB.⁴³ Make-whole orders take a broad view of rectifying and

³⁵ See e.g. *B.C. Code*, *supra* note 15, ss. 14(4)(b), 133(1)(c)-(f); *Re Convergys Customer Management Canada* (2003), 90 C.L.R.B.R. (2d) 287 (BCLRB) [*Convergys*]; *Re Tandy Electronics Ltd.* (1980), 30 O.R. (2d) 29, 115 D.L.R. (3d) 197 at 215 (H.C.J.); *Re Clark Reefer Lines Ltd.*, [1988] B.C.L.R.B.D. No. 223 at 5 (QL) [*Clark*], cited with approval in *Canadian Paperworkers' Union, Local 1115 v. McNamara*, [1989] B.C.J. No. 2447 at para. 6 (S.C.) (QL) [*McNamara*]; *Re P.R. Foods Ltd.*, [2005] B.C.L.R.B.D. No. 223 at para. 47 (QL) [*P.R. Foods*].

³⁶ *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269 at 288, 9 D.L.R. (4th) 10.

³⁷ *Royal Oak Mines v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 68, 133 D.L.R. (4th) 129 [*Royal Oak* cited to S.C.R.]. This lack of jurisdiction for punitive remedies arises from both the language of the general remedial provision and the existence of specific penalties in the legislation. See George W. Adams, *Canadian Labour Law*, 2d ed. (Aurora, B.C.: Canada Law Book, 1993) at para. 10.1930. Uniquely, Manitoba's legislation allows monetary awards whether or not any loss was suffered (*Labour Relations Act*, R.C.C.S.M. 1987, c. L-10, s. 31(4)(e), (f) [*Manitoba Act*]).

³⁸ *Royal Oak*, *ibid.* The decision was adopted in British Columbia by, for instance, *Convergys* (*supra* note 35) and *P.R. Foods* (*supra* note 35).

³⁹ *Re CJS Victoria (CopperJohns)*, [2004] B.C.L.R.B.D. No. 46 at para. 84 (QL).

⁴⁰ *Convergys*, *supra* note 35 at para. 40; *Re The Delta Optimist*, [1980] 2 Can. LRBR 227 at 247 (BCLRB) [*Delta Optimist*].

⁴¹ *Delta Optimist*, *ibid.* at 248.

⁴² Theodore J. St. Antoine's seminal article “A Touchstone for Labor Board Remedies” influenced the development of the make-whole remedy for bad faith bargaining in the United States ((1968) 14 Wayne L. Rev. 1039). For early cases involving National Labor Relations Board make-whole remedies, see e.g. *N.L.R.B. v. Tiidee Products (Tiidee No. 1)*, 426 F.2d 1243 (D.C. Cir. 1970); *I.U.E.W. v. N.L.R.B. v. Tiidee Products (Tiidee No. 2)*, 440 F.2d 298 (D.C. Cir. 1970); *I.U.E.W. v. N.L.R.B.; Tiidee Products v. N.L.R.B. (Tiidee No. 3)*, 502 F.2d 349 (D.C. Cir. 1974); *N.L.R.B. v. Heck's Incorporated*, 433 F.2d 541 (D.C. Cir. 1970); *Food Store Employees Union v. N.L.R.B.*, 476 F.2d 546 (D.C. Cir. 1973).

⁴³ *Robinson, Little and Co. Ltd. v. Retail Clerks Union, Local 1518* (1975), [1976] 60 D.L.R. (3d) 712, 1 W.W.R. 171 (B.C.S.C.). Though the make-whole remedy originated in ULPs committed during

compensating for harm done, as they recognize the twin objectives of compensating the wronged party and withholding the fruits of the violation from the wrongdoer.⁴⁴ These orders can include awards of general damages and reimbursement for organizing, administrative, or legal costs resulting from the ULP. For nonorganizing ULPs, such as a failure to bargain in good faith, make-whole remedies can include damages for “loss of opportunity” to bargain.⁴⁵ However, no compensation for loss of opportunity is available as a remedy for organizing ULPs, even where the effect of the wrongdoing defeats certification and deprives workers of union representation.

In addition to remedies available under the general remedial provisions, labour legislation in several jurisdictions specifically provides for punishment or prosecution for failing to comply with an LRB order.⁴⁶ Penalties are often administered in the form of fines and are meant to provide redress and protection; they are not intended to simply be a “licence fee” for law-breaking.⁴⁷ However, such penalties are seldom either sought or applied.⁴⁸ In short, the legislation establishes a scheme for providing fully compensatory remedies for ULPs. This scheme emphasizes nonmonetary awards except where no other remedy will compensate the harm done by the violation, and it gives LRBs significant latitude to formulate a mix of remedial elements to achieve compensation.

IV. Compensatory Potential of Available Remedies

The broad power of LRBs to fashion remedies that respond to harm caused by ULPs translates into an array of possible awards. These remedies are capable, to a greater or lesser degree, and individually or in combination, of addressing injuries to

collective-agreement negotiations, it is applied to ULPs arising in all contexts. The *Labour Code of British Columbia Amendment Act* significantly expanded the LRB’s remedial jurisdiction (R.S.B.C. 1976, c. 26).

⁴⁴ *Re Kidd Brothers Produce Ltd.*, [1976] 2 Can. LRBR 304 at 320 (BCLRB) [*Kidd Brothers*].

⁴⁵ *Clark*, *supra* note 35 at 5; *McNamara*, *supra* note 35 at para. 6.

⁴⁶ Section 158 of the *B.C. Code* makes it an offence for a person to refuse or neglect to observe or carry out an order made under the statute (*supra* note 15). Individuals are subject to a maximum fine of \$1000, while corporations, unions, and employers’ organizations are subject to a fine not exceeding \$10,000 (*ibid.*). Other jurisdictions allow greater opportunities for penalties, such as providing that any contravention or failure to comply with the legislation is an offence subject to monetary penalty. See *Labour Relations Act*, R.S.A. 2000, c. L-1, s. 161 [*Alberta Code*]; *Manitoba Act*, *supra* note 37, s. 149; *Ontario Act*, *supra* note 10, s. 104(1); *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 104 [*CLC*]. Some also provide that each day of non-compliance constitutes a separate offence (*Ontario Act*, *ibid.*, s. 104(2)), or that the penalty is calculated according to the number of days in breach (*Manitoba Act*, *ibid.*, s. 145).

In certain jurisdictions, consent of the LRB, minister, or attorney general may be necessary to pursue such penalties. See *Alberta Code*, *ibid.*, s. 162; *Manitoba Act*, *ibid.*, s. 148(2); *Ontario Act*, *ibid.*, s. 109(1); *CLC*, *ibid.*, s. 104.

⁴⁷ Adams, *supra* note 37 at para. 10.2280.

⁴⁸ Wayne Mullins, a special investigating officer at the BCLRB, has confirmed this observation in conversations with me.

the interests of the union and to individual and collective employee interests. LRB remedies can be classified according to the type of harm addressed. Some remedies, such as reinstatement and back-pay awards, are directed solely at repairing harm to individual employees. Other remedies have the potential to address both collective and union harm, such as communication, access, and posting orders, remedial certification and second votes, and monetary compensation. Finally, some remedial orders are noncompensatory in nature, such as declarations and cease and desist orders. This part introduces the principles governing remedies in labour relations and analyzes the potential of available remedies to address harm to individual, collective, and union interests.⁴⁹

A. Remedies for Harm to Individual Employee Interests

Some remedies are directed primarily at harm suffered by individuals. Foremost among these is reinstatement, which is commonly awarded in cases of illegal termination. Reinstatement may or may not be accompanied by an award of back pay for lost wages. Similarly, employees who have suffered discrimination, such as the illegal denial of a benefit due to the employee's union activity, are usually awarded reversal of the discrimination, often including any lost back pay. Though reinstatement or reversal of discrimination with back pay may appear to fully restore individual employees, on closer examination such remedies fall short of fully compensating the affected employee and provide scant relief to employees, particularly those who have been illegally fired and who have no desire to return to that workplace, perhaps having found new employment elsewhere. Moreover, these remedies offer little or no remedy for harm to collective employee or union interests.

Remedies for harm to individual employee interests are most effective in situations where they are promptly awarded, include both reinstatement and back pay, and both the employee and employer are willing to re-establish the working relationship.⁵⁰ Even in such ideal circumstances, the employee may not be fully compensated for his losses, as back pay does not cover all losses of income and benefits. At the same time, individuals are expected to mitigate their losses during the days, weeks, or months it takes for the ULP hearing to conclude and order a remedy.⁵¹

⁴⁹ ULP restrictions and remedial authority are similar among Canadian jurisdictions. While references in this part are made primarily to the *B.C. Code* (*supra* note 15), legislation from other jurisdictions is referred to where it contains a notable variation.

⁵⁰ The *B.C. Code* allows for interim remedies, including reinstatement, and specifically provides for expedited ULP hearings (*ibid.*, s. 5(2)).

⁵¹ See *Re Securiguard Services Ltd.*, [2001] B.C.L.R.B.D. No. 36 (QL). Note that mitigation requirements are less onerous under labour relations law than employment law because of the potential for reinstatement in the labour context—a remedy that is not available under employment law. See *Re Jacmorr Manufacturing Ltd.*, [1987] OLRB Rep. 1086. Notably, the mitigation requirement is also more demanding under the NLRA than in Canadian jurisdictions (Weiler, “Promises to Keep”, *supra* note 1 at 1789).

This is a burden upon the individual. In addition, once the individual has found a new job, she may be uninterested in returning to the workplace she was fired from. In such cases, reinstatement has no value to the individual, and is no hardship for the employer.

In any event, reinstatement is a fragile arrangement that, to succeed, must survive the employer's resentment and possibly the employee's reluctance to re-embrace the employment relationship. As Weiler points out, an employer who is anti-union enough to illegally fire a worker for supporting a union will probably react negatively if forced by the LRB to rehire the employee. Furthermore, the employee will likely be aware of—and wary of—his employer's attitude.⁵²

Standing alone, reinstatement or reversal of the unlawful employee treatment and compensation are not fully compensatory—not to the union nor to employees' collective interests, and perhaps not even to the individual directly affected by the ULP. This is because the real harm caused is the fear of retaliation that the employer has instilled in employees and the devastating effect this fear may have on the unions' organizing efforts. Reinstatement, reversal, and back pay orders, on their own, do little to assure employees that, as one vice-chair of the Ontario Labour Relations Board describes it, "the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not ..."⁵³ A truly restorative remedy would alleviate this fear. What is necessary to offset the collective and union harm is for employees to be made aware of the LRB finding of illegality and remedy. Such a response by the LRB may demonstrate to fearful employees that the employer is not able to break the law with impunity. In the absence of an LRB order allowing the union to meet with (or otherwise directly communicate with) all employees in order to communicate the decision, or an order that the employer post the decision or otherwise provide or circulate it to employees, it is likely that most employees will have incomplete, inaccurate, or no knowledge of the LRB decision. Unions have very limited access to workplaces and workers in the organizing context. The collective and union benefit of the remedy will therefore likely be diminished or lost without some accompanying communication order.

B. Remedies for Harm to Collective Employee and Union Interests

Remedies directed at harm to collective employee and union interests are varied but may be organized into two categories. "Communication" and "access" orders involve providing information to employees or allowing unions to have access to workers. Remedial certifications and second votes take a different approach and use the certification process itself.

⁵² "Promises to Keep", *ibid.* at 1791.

⁵³ *Valdi*, *supra* note 28.

1. Communication and Access Orders

Communication and access orders allow the union to communicate with employees through one or a series of union meetings, often during working hours or with employees compensated by the employer. For that purpose, the orders require the employer to provide the union with use of a bulletin board, post a statement or LRB decision in the workplace, or mail union materials to all employees.⁵⁴ Such a remedy seeks to counteract the chilling effect employer ULPs may have on other employees' support for organizing, and sometimes to counter erroneous and damaging information the employer has given about the union or unionization. Meanwhile, access orders are intended to offset the very limited access unions otherwise have to workers during organizing.⁵⁵ Therefore, these remedies are directed at repairing harm to collective employee and union interests, and they are potentially effective components of broader remedial orders, particularly in combination with remedies targeted at individual harm, as discussed below, or remedies such as remedial certification and second votes.

2. Remedial Certification

The LRB has discretion to order certification or a “new” or “second” representation election as a remedy for egregious employer ULPs that interfere with the LRB’s ability to discern employees’ true wishes regarding unionization.⁵⁶ Remedial certification is an unusual remedy, awarded sparingly and generally only in unusual circumstances. It was developed in response to the deficiencies of the traditional cease and desist order in cases where such an order was incapable of

⁵⁴ In unusual circumstances, a communication order may extend beyond the workplace and to a broader audience than employees to rectify damage caused by the employer, such as to the union’s reputation. In one such case the BCLRB found the employer had published misinformation about the union in newspaper advertisements, deliberately creating a distorted view of the union in the minds of employees and the general public (*Re White Spot Ltd.*, [1989] B.C.L.R.B.D. No. 7 (QL)). The BCLRB ordered the employer to publish newspaper advertisements running on two consecutive weekdays, of the same size and in the same papers as its own ads, admitting that the employer had been found by the BCLRB to have knowingly misled its employees and the public, and correcting the misinformation. The BCLRB noted that this broad publication was necessary to address the scope of the harm caused by the employer’s actions, because “[t]he ‘harm’ done to [the union] went beyond the employees who read the advertisements and, in fact, were injurious to [the union] in the eyes of the public as well. Since the mis-statements went to the community at large, so should the remedy” (*ibid.*).

⁵⁵ These meetings are generally of set length, without management present, and during paid employee time. See e.g. *Re Lester B. Pearson College of the Pacific and United World Colleges (Canada)*, [2001] B.C.L.R.B.D. No. 347 (QL) [*Pearson College*].

⁵⁶ Remedial certification is provided for by the *B.C. Code* (*supra* note 15, ss. 14(4)(f), (5)), as is the authority to order a second representation vote (*ibid.*, s. 133(1)(d)).

repairing harm done or deterring wrongdoing.⁵⁷ The remedy is meant to compensate for illegal employer interference, granting employees the representation they would likely have obtained in the absence of the employer's misconduct, to preserve employees' freedom of association, and to deter illegal employer conduct.⁵⁸

Remedial certification is described as removing the fruits of wrongdoing from the employer, delivering to the union what it wants, and delivering to the employer exactly what it hoped to avoid. The idea, and the source of its value as a deterrent, is that those employers crossing the line into illegal behaviour risk ending up with a union, while those who remain within the bounds of legal anti-union activities may succeed at discouraging employees from unionizing.⁵⁹ In its result, this remedy may benefit the union, at least in the short term. However, what it offers individual and collective employee interests, and the union in the longer term, is more ambiguous. As significant as a remedial certification order is, on its own it only partly restores union and collective interests, and it temporarily deprives employees of choice about representation. It is this weakness that attracts popular criticism of the remedy from employers, charging that it is "undemocratic" and foists unwanted union representation on workers.⁶⁰

A second shortcoming is that, although remedial certification appears well designed to repair harm to collective rights, this remedy may promise more than it can deliver on its own. Alone, remedial certification simply inserts the union as the workers' bargaining representative, requiring that the employer recognize and negotiate with it. The remedy does nothing to restore the damaged relationship between the union and workers.

These weaknesses allow the remaining union support to be eroded and provides no real counter to the effects of the unlawful tactics employers use to dissuade workers from supporting the union. However, the effectiveness of the remedy may be improved with the help of supplementary remedies. Particular access and communication orders can allow the union to deliver its message and meet with workers, giving them an opportunity to learn about and develop a relationship with the union. In the absence of this communication, the union may face the test of collective bargaining without the requisite employee support, compromising the union's bargaining power and likely reducing its ability to successfully represent the bargaining unit and to resist early decertification. Remedial certification does not, and cannot, require the employer to reach a collective agreement with the union. The

⁵⁷ *Re Cardinal Transportation B.C.* (1996), 34 C.L.R.B.R. (2d) 1 (BCLRB) [*Cardinal*]; *Forano*, *supra* note 15 at 20.

⁵⁸ Canada, Sims Task Force, *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Ministry of Public Works and Government Services, 1995) at 64; *Cardinal*, *ibid.*; *Forano*, *ibid.*

⁵⁹ See generally Weiler, "Promises to Keep", *supra* note 1 at 1794-95.

⁶⁰ However, workers are not deprived forever of deciding whether to be unionized. They can, of course, later choose to free themselves from union certification through the decertification process.

employer may continue to resist the union and lawfully refuse to come to agreement, or it may engage in further ULPs by negotiating in bad faith.

3. Second Vote

The second vote remedy generally entails a finding by the LRB that an election on unionization was so tainted by the employer's wrongdoing that it cannot be used to determine certification. The LRB orders that a new vote be held at some later date, generally within a specified period after the ULP decision is issued.⁶¹ The remedy's primary rationale is that where the original vote has been significantly contaminated by employer ULPs, a new representation election would better reflect employees' true wishes regarding union representation. A key feature of the second-vote remedy is that it imposes less on individual employee choice than remedial certification.

A second vote in and of itself however does not erase employer intimidation, threats, or promises from employees' minds. From the collective employee perspective, then, the second vote remedy provides little benefit as it fails to truly permit workers' genuine wishes to be expressed. Similarly, it provides little benefit to the union, on which substantial additional costs are imposed. The union must overcome the negative effects of the employer's ULPs, as well as gain and maintain sufficient support for unionization until the next vote, which may be weeks or months after the initial election. During this entire time the union is able to show workers few benefits, but plenty of turmoil.

As with remedial certification, some of these shortcomings could be ameliorated with additional remedies, principally communication and access orders, as well as some monetary compensation to the union in recognition of the wasted and additional organizing costs it will suffer with a second election.⁶²

⁶¹ See e.g. *Re South Surrey Hotel Ltd.*, [1994] B.C.L.R.B.D. No. 405 (QL) (ordering that a second vote be held within the ten days after the ULP decision was issued). In *Pearson College* the decision was issued on 22 August 2001, with reasons issued on 13 September 2001 (*supra* note 55). The BCLRB permitted the union two meetings with employees before the end of that month. It also ordered that a new vote be held within ten days of the last meeting and that the list of eligible voters be updated (*ibid.*). In *Re Wal-Mart Canada*, the BCLRB ordered a new vote to be held within 10 days of the ULP decision and the voters' list to be based on the ULP decision date ([1998] B.C.L.R.B.D. No. 90 (QL)).

⁶² The second vote remedy is also criticized as a poor deterrent to employer ULPs, particularly compared to remedial certification. In Ontario, during a period when legislation prohibited the Ontario Labour Relations Board from ordering remedial certification, the United Steel Workers of America criticized the lack of deterrent effect and effectiveness of the second vote remedy. It argued that a second vote provides no disincentive for employer wrongdoing. It also argued that "... under present legislation, an employer can continue to repeatedly interfere with employee rights through successive votes" leading to employees becoming too afraid and frustrated to support the union (*Return to Fairness*, *supra* note 1 at 16-17). It pointed to the infamous case *Re Baron Metal Industries*, in which, after the initial vote was found to have been tainted by the employer's egregious illegal behaviour

4. Monetary Compensation to the Union under Make-Whole Orders

As described earlier, the two objectives of make-whole orders are to compensate the wronged party and withhold from the wrongdoer the fruits of its violation.⁶³ This type of order developed out of recognition of the inadequacy of existing remedies.⁶⁴ In particular, it was a response to the shortcomings of the purely prospective cease and desist order, which allows the employer to retain the benefits of its illegal behaviour.⁶⁵

Nonetheless, LRBs have taken a restrictive approach to make-whole orders, awarding them only in exceptional cases involving serious contraventions, where the LRB is satisfied that other remedies are inadequate, no other practical alternative for meaningful and effective relief is available,⁶⁶ and any monetary relief will only compensate the injured party and therefore is not punitive.⁶⁷ Where applied, the make-whole approach is used to justify a range of creative remedial orders and combinations of remedies, including various forms of monetary compensation to unions such as awards of legal costs or costs of organizing, directed at restoring losses incurred by unions as a result of employer ULPs.

5. Legal Costs

Awards of legal costs are an example of monetary compensation awarded under the make-whole approach.⁶⁸ In the normal course of civil court proceedings, parties request, and courts award, legal costs to the successful party. There is no such practice in LRB proceedings and the legislation does not expressly provide for an award of legal costs, although costs and expenses may be awarded under the LRB's general remedial powers as a remedy for a monetary loss. Legal costs are restricted to cases presenting exceptional and compelling circumstances,⁶⁹ with the goal being to place the successful complainant in a "break-even finale rather than a loss."⁷⁰ As such, a

(recruiting two gang members to threaten employees), one new vote and then a subsequent new vote were ordered ([2001] OLRB Rep. 553), as an example of this phenomenon (*ibid.*).

⁶³ See Part III, above. See also *Kidd Brothers*, *supra* note 44 at 320.

⁶⁴ *Clark*, *supra* note 35 at 5; *McNamara*, *supra* note 35 at para. 6.

⁶⁵ For discussion of this in the failure-to-bargain context, see *Kidd Brothers*, *supra* note 44 at 320.

⁶⁶ *Re Fletcher Challenge Canada Ltd.*, [1997] B.C.L.R.B.D. No. 255 at para. 38 (QL) [*Fletcher*].

⁶⁷ *Clark*, *supra* note 35 at 5; *McNamara*, *supra* note 35 at para. 6.

⁶⁸ Legal costs are not available in all jurisdictions. Though the Canada Industrial Relations Board and BCLRB have awarded legal costs in unusual circumstances, the Ontario LRB has held that it has no jurisdiction to award legal costs and would not, and should not, do so even if it did have the jurisdiction (*Re National Grocers Co. Ltd.*, [2003] OLRB Rep. 467 at paras. 18-20).

⁶⁹ See *Re Kelland* (1993), 21 C.L.R.B.R. (2d) 254 (BCLRB) [*Kelland*] (providing a remedial award); *Re North American Construction Ltd.* (2000), 61 C.L.R.B.R. (2d) 286 (BCLRB); *Re Emral Enterprises Ltd.* (2001), 74 C.L.R.B.R. (2d) 213 at para. 66 (BCLRB), *aff'd* [2002] B.C.L.R.B.D. No. 5 (QL) [*Emral*].

⁷⁰ The goal of an award of costs is described in *Re Graham* (2000), 55 C.L.R.B.R. (2d) 246 at para. 47 (BCLRB) and *McNamara* (*supra* note 35). Subsequent panels have treated this statement as an

reimbursement of costs by the LRB, in the rare event that it is ordered, is more substantial than the usual award of costs in civil proceedings, which usually fall far short of placing the party in a break-even position.⁷¹

Concerns over fairness and avoiding the appearance of punishment have led LRBs to award legal costs very sparingly. Due to the statutory requirement that there be a violation of legislation, a regulation, or a collective agreement before an award of costs is available, one concern for LRBs is that costs are not available to all parties for all matters.⁷² Only successful complainants are eligible to obtain costs and not, for instance, respondents that are found not to have violated the legislation.⁷³ Nor is this remedy consistently available in labour legislation in Canada. LRBs are not authorized to order legal costs for certain matters, such as strikes, picketing, and lockouts, though costs are available for other matters such as ULPs.⁷⁴ These imbalances in opportunities to seek legal costs render LRBs reluctant to make such awards.⁷⁵ LRBs are also concerned that cost awards may be perceived as punitive, and that the prospect of legal-cost awards will alter the informal character of LRB proceedings or discourage nonlawyers from appearing before LRBs.⁷⁶

However, given that the proportion of ULP complaints by unions vastly outnumbers those by employers, that the great majority of these complaints are found

“overriding direction” in the setting of costs (*Re McNamara* (1990), 6 C.L.R.B.R. (2d) 290 at 293-94 (BCLRB)). See also *Re Graham* (2000), 55 C.L.R.B.R. (2d) 246 (BCLRB).

⁷¹ Civil courts routinely award costs to successful parties. However, in the absence of some form of misconduct, these awards provide only partial or substantial indemnity for the true cost of litigation, with ordinary costs generally equal to about half of the fees actually paid, and special costs about 80-90 per cent of the fees paid (Mark M. Orkin, *The Law of Costs*, 2d ed., looseleaf (Aurora, Ont.: Canada Law Book, 2007), c. TR-13-15).

However, in practice, the level of indemnity under ordinary costs is only about 25-30 per cent of actual costs (Hon. Justice M. Macaulay, “Attorney General’s Rules Revision Committee Discussion Paper on the Tariff of Costs” (2003) 61 *The Advocate* 699).

Costs rules in several other Canadian jurisdictions are also intended to provide partial indemnity to successful litigants. For example the intended level of indemnity in Alberta is approximately 30-50 per cent (Alberta Law Reform Institute, *Alberta Rules of Court Project: Costs and Sanctions*, Consultation Memorandum No. 12.17 (February 2005) at 4, online: University of Alberta Faculty of Law <<http://www.law.ualberta.ca/alri/docs/cm12-17.pdf>>), approximately 60 per cent in Ontario (Ontario, Costs Subcommittee of the Civil Rules Committee, *Costs Grid Consultation Paper* (27 February 2004), online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/archives/costs/costgrid.htm>>), and is intended to be 40 per cent for typical cases in Manitoba (Manitoba, Law Reform Commission, *Costs and Awards in Civil Litigation* (Winnipeg: Office of the Queen’s Printer, 2005) at 20, online: Manitoba Department of Justice <<http://www.gov.mb.ca/justice/mlrc/reports/111.pdf>>).

⁷² See e.g. *B.C. Code*, *supra* note 15, s. 133(1).

⁷³ See e.g. *Re R.C. Purdy Chocolates Ltd.* (2001), 77 C.L.R.B.R. (2d) 1 at para. 63 (BCLRB).

⁷⁴ See *Re Roberta Scott and Ronald Scott (Target Resources)* (1992), 16 C.L.R.B.R. (2d) 65 (B.C. Industrial Relations Council).

⁷⁵ See *ibid.*; *Kelland*, *supra* note 69.

⁷⁶ *Kelland*, *ibid.*

to have merit, and that unions spend significant resources on pursuing these complaints, these questions affect unions much more than employers. This imbalance, which has not been recognized by the LRBs, is particularly troubling in circumstances where the employer deliberately or flagrantly violates the legislation. For example, knowing that the remedies awarded for ULPs are likely minimal and probably will not include legal costs, an employer could well decide to drain the union's resources by engaging in illegal anti-union conduct and thus provoking the union to file and pursue costly complaints, while itself investing little or nothing in its own defence.

6. Costs of Organizing

Organizing expenses may also be awarded to the union in compensation for employer violations that effectively waste the resources the union invested in its unionizing attempt.⁷⁷ Seldom ordered, LRBs generally require that there be no potential for a relationship between the employer and union, such that the union's investment in the organizing campaign has been rendered a complete loss, with no prospect of reviving support, and that the only available remedy is monetary compensation.⁷⁸

Awards for costs of organizing primarily address losses to the union. They may also benefit collective employee interests—if only in those unusual circumstances where an order of costs is made in conjunction with remedial certification or another vote—by restoring some of the union's organizing resources.

C. Noncompensatory Remedies: Declarations and Cease and Desist Orders

Declarations of violation of the legislation and cease and desist orders are common elements of remedial awards and are described as the “traditional remedy” for organizing ULPs.⁷⁹ However, they are noncompensatory remedies. A declaration is simply an express statement by the LRB that the conduct complained of violated the statute, while a cease and desist order directs the violator to halt the conduct complained of. Therefore, cease and desist orders are directed at ongoing activity or conduct that is reasonably likely to continue.⁸⁰ Failure to comply with such an order may attract a penalty or a finding of contempt by the courts, or may be taken into consideration in formulating the remedy for the subsequent ULP.⁸¹

⁷⁷ *Kidd Brothers*, *supra* note 44.

⁷⁸ *Ibid.*

⁷⁹ *Forano*, *supra* note 15 at 20.

⁸⁰ *Fletcher*, *supra* note 66 at para. 34.

⁸¹ For a discussion of enforcement through penalties and contempt, see *supra* note 46 and accompanying text; *infra* note 125 and accompanying text.

Where a declaration accompanies a more substantial remedy, it may be beneficial to have such an explicit statement by the LRB that the conduct is unlawful. However, where it stands as the only response to the ULP, the remedy provides little immediate benefit to individual employees, collective interests, or the union. To have any effect at all, employees must be aware of the declaration. Once they are made known, declarations may have some prospective use, such that the parties know for the future that the particular conduct is illegal, but they are of little or no immediate use.

A cease and desist order is somewhat more useful than a simple declaration because it may make it easier for the complaining party to seek a further legal response if the misconduct continues. Thus the order is only really relevant to ongoing activity. However, where an employee has been illegally discharged or the employer has engaged in unlawful speech, the harm has already been done and prohibiting further illegal firings or threats does little or nothing to address that harm. Like a declaration, a cease and desist order is of questionable value to workers (individually and collectively) or the union.

Cease and desist orders are criticized as being “purely prospective”, allowing the employer to harvest the fruits of its wrongdoing, and as doing nothing to restore the harm already done to employees’ ability to make a free and voluntary decision.⁸² Further, they provide little deterrence from future misconduct since “[a] party doesn’t have that much to lose from early and effective intimidation except a little bad publicity.”⁸³

There may be an argument made—though surely it is a weak one in the organizing context—that employees and the union benefit from an unequivocal LRB statement that the employer’s conduct is unlawful, which both declarations or cease and desist orders provide. However, this benefit largely depends on most workers being aware of the declaration or order, which is not likely to be the case unless the LRB also makes a posting or communication order. Therefore, these noncompensatory remedies are highly ineffective on their own, and will likely be of any consequence only where they are granted in conjunction with communication orders.⁸⁴

⁸² See *Kidd Brothers*, *supra* note 44; *Forano*, *supra* note 15 at 20.

⁸³ *Forano*, *ibid.*

⁸⁴ Nevertheless, LRBs defend the significance of these awards as remedies. See *Re Tie Communications Canada* (1996), 27 C.L.L.C. 220-021 at paras. 31-33 (BCLRB). Responding to the hypothetical argument that it should not proceed with a matter because the only remedies requested were declarations and cease and desist orders, the BCLRB objected to this implicit denigration of these orders, contending that a declaration is a “significant matter in and of itself” and a cease and desist order is a “serious admonition” (*ibid.*). The BCLRB claimed it would consider the employer’s failure to comply with the order when setting the remedy for any continuing violations, and stated that, when used in this manner, declarations and cease and desist orders “are not insignificant nor mere boilerplate” (*ibid.*). This explanation underscores the ineffectiveness of these remedies.

D. Restorative Potential Revisited

This assessment of the restorative potential of available remedies suggests that most remedies, when individually applied to termination or communication cases, will allow harm to remain uncompensated. A fully compensatory response will often require a combination of remedies, such as reinstatement, back pay, and communication and access orders, to restore harm caused by illegal termination of an employee.

It is also apparent that the majority of remedies are directed at harm to individuals; fewer target harm to the union, and fewest of all address harm to employees' collective interests. There are also some forms of harm that the LRB explicitly chooses to leave uncompensated, such as mental distress, loss of opportunity for unionization and, in some jurisdictions, legal costs.⁸⁵

V. Analysis of Remedial Awards

This study investigates the LRB response to employer ULPs during organizing. It collects and analyzes information on each case in which the BCLRB found a complaint of an employer ULP during organizing to be partly or wholly meritorious. The dataset is limited to cases that resulted in a published decision during the period from 1 January 1990 to 30 June 2007. Of these cases, those involving either illegal termination or employer communication as the sole ULP were selected for analysis.⁸⁶ These two categories of cases are best suited to assessing the degree to which the LRB's remedial awards are fully compensatory. Illegal termination cases, as discussed above, clearly involve harm to interests of the individual employees affected and likely will be met with the individual-interest-oriented remedy of reinstatement with or without back pay. Although LRBs frequently note the broader "chilling effect" of such terminations on collective employee and union interests, it is anticipated that remedial awards in these cases generally do not address such interests. By contrast, remedies in employer-speech ULP cases will likely be directed at harm to collective employee interests, though these remedies do not provide compensation for harm to the interests of individual employees or the union. In short, this analysis is directed at discerning what types of interests, if any, are systematically overlooked in LRB remedial awards.

The first part of this analysis examines how frequently—or infrequently—remedial awards in several categories of illegal termination and employer-speech ULP cases address harm to different interests. Remedial awards are often composed

⁸⁵ See e.g. *Re Tillicum Haus Society*, [1997] B.C.L.R.B.D. No. 424 (QL) (denying compensation for mental distress on grounds of lack of jurisdiction, and finding the case not to be appropriate to the award of legal costs). See also note 68 and accompanying text.

⁸⁶ For a detailed description of the data collection, see *supra* note 13. The data set contains a total of 172 meritorious complaints of employer ULPs during organizing, including 19 meritorious employer-speech cases and 49 meritorious unlawful-termination cases.

of several elements. Each remedial award is examined first as a whole, and then each element of the award is considered. The awards are assessed to determine which of the three interests are addressed (individual employee, collective employee, and/or union). Figure 3 and Table 3 in the Appendix set out the number and percentages of all remedial awards, first for termination and then for speech ULPs, that either (1) compensate individual employee interests only, (2) compensate collective employee interests only, (3) compensate all three interests, (4) compensate only collective and union interests, (5) compensate only individual and union interests, (6) or, provide no compensatory remedy.⁸⁷

The second part of this analysis examines the frequency of different remedial elements awarded in termination cases and in employer-speech cases. The results are set out in Figure 4 and Table 4 in the Appendix. These include the percentage and number of all remedial awards for termination and employer-speech cases that contain an order for reinstatement with or without back pay, a communication order, an access order, monetary compensation to the union such as legal or organizing costs, a remedial certification or second vote order, a declaration and/or cease and desist order, or an order that the parties shall negotiate their own remedy. A particular award may contain one or more of these elements.

A. Termination Cases

Most striking is the individual orientation of remedial awards for termination ULPs. Though illegal termination is widely recognized as the most blatant and chilling anti-union tactic, with potentially devastating effects on employees' rights and organizing efforts,⁸⁸ remedial awards for these ULPs typically only order reinstatement with or without back pay. These awards focus on repairing harm to individual employee interests and virtually exclude consideration of collective employee or union harm. It appears that, in all but extraordinary situations, neither harm to collective employee interests nor to the union is compensated.

Seventy-one per cent of awards in these termination cases are directed solely at harm to the terminated employees, consisting of reinstatement with or without back pay. Remedies address collective employee or union interests in only 26 per cent of cases, and mostly in the form of communication orders. In 2 per cent of cases no compensatory remedy is ordered. Generally, these are situations where the employee is found to have engaged in some wrongdoing—though not sufficient to merit termination—or has taken employment elsewhere and does not wish to return to that workplace (see Figure 3 and Table 3 in the Appendix).

⁸⁷ The remedial potential of the award is defined in accordance with the assessment of available remedies set out in Part IV, above.

⁸⁸ See *Valdi*, *supra* note 28.

The great majority of remedial awards in termination ULP cases in this study address harm to individual employee interests by including reinstatement with or without back pay (85.7 per cent). Also as anticipated, few remedial awards contain elements directed at addressing harm to collective employee or union interests. Only 10.2 per cent of cases include a communication order; only 6.1 per cent include access orders; only 2 per cent include monetary compensation to the union; and only 6.1 per cent provide for a new representation vote or remedial certification. Nearly half (42 per cent) of the awards in termination cases include a noncompensatory declaration or cease and desist order (see Figure 4 and Table 4 in the Appendix).

Reinstatement, with or without compensation in the form of back pay, addresses only the loss suffered by the terminated worker, leaving harm to other workers and the union wholly unaddressed, except to the limited extent that the LRB's decision and order become known to other workers. Only in those rare circumstances where both reinstatement and back pay are awarded well before the representation vote, and all employees are aware of the ULP finding, will a simple individual remedy be a sufficient response (unless no other employee is aware of the illegal firing).

Given that illegal discharges clearly outnumber any other form of employer ULP during organizing,⁸⁹ there is rarely any repair of harm to collective or union interests for employer ULPs committed during organizing. As a result, it is evident that LRB remedial awards give insufficient regard to, and leave unremedied, harm to collective employee and union interests in termination cases.

B. Speech Cases

This study suggests that LRB awards tend to involve more substantial and wide-reaching remedies in employer-communications cases rather than in termination cases. This is contrary to what we might expect, given that LRBs recognize illegal terminations as the type of employer conduct that is most chilling to organizing efforts.⁹⁰ However, in speech cases, harm to individual employee interests is seldom addressed, harm to union interests is routinely disregarded, and awards often consist of simple declarations and cease and desist orders that provide no compensatory element at all.

In vivid contrast with the termination cases in this study, no remedial awards for employer-speech ULPs were directed solely at individual employee interests, even though some cases involved questioning of individual employees (see Figure 3). In addition, a great majority (79 per cent) of awards addressed harm to both collective and union interests, and another 5 per cent addressed all three types of interests. Also notable was the substantial proportion (16 per cent) of awards that were entirely noncompensatory in nature. These awards are simply declarations or a direction by

⁸⁹ For a discussion of the frequency of different categories of employer ULPs, see Part II.B, above.

⁹⁰ See Part I.D, above.

the LRB to the parties to negotiate their own remedy. Unfortunately, declarations and cease and desist orders will likely be thoroughly ineffective at remedying collective harm. Few if any employees will likely be aware of the order or what it means, or be reassured or vindicated by such a remedy. Such an order may be a legal victory for the union and, perhaps, a particular employee involved—but no more—and is likely to be minimally effective. Therefore, in over 15 per cent of unlawful-communication cases, no effective remedy was granted.

In cases of speech ULPs, declarations and cease and desist orders were the most common elements of remedial awards, appearing in 89.5 per cent of awards. At the same time, individually oriented remedies were uncommon, with none awarded for employer-speech violations. Nor was compensation awarded to the union in any of these cases. Communication awards were made in only 15.8 per cent of cases, and access orders were made in 47.4 per cent. Extraordinary remedies—remedial certification and second votes—were more common in the speech cases than in the termination cases, with 36.8 per cent of illegal-speech cases resulting in awards that included one of these remedies.

Figure 3: Percentage of Remedial Awards, by Type(s) of Harm Compensated, Granted for Termination and Speech ULPs by the British Columbia Labour Relations Board, 1990–June 2007

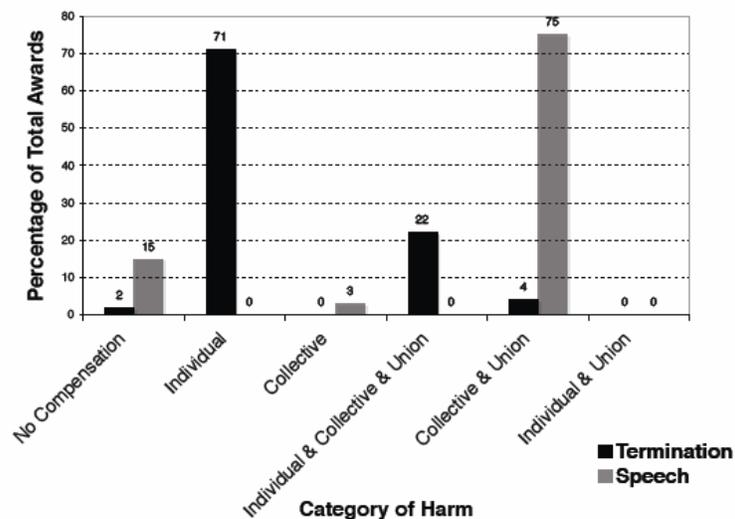
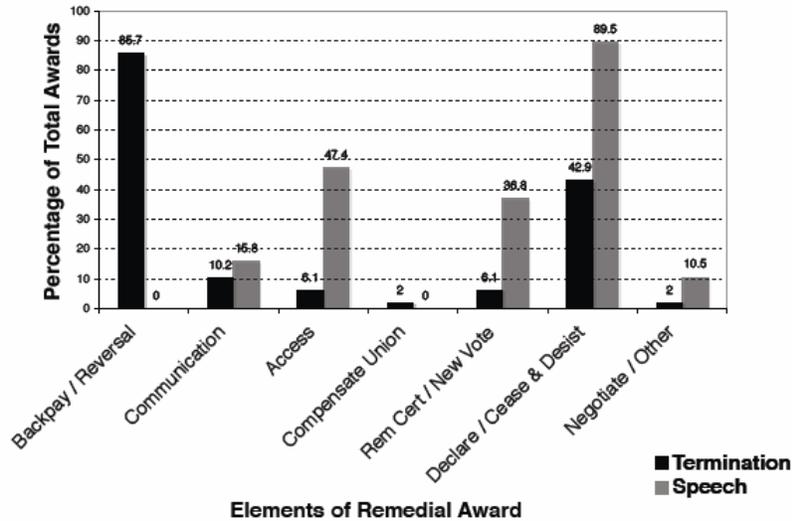


Figure 4: Percentage of Remedial Awards, by Element(s) of these Awards, Granted for Termination and Speech ULPs by the British Columbia Labour Relations Board, 1990–June 2007



C. Overall Trends

Examination and comparison of remedies in termination and speech cases reveals a number of clear trends. The overarching finding is that remedial awards generally do not address all aspects of harm likely caused by the employer's organizing ULP. Although speech and termination cases are treated differently, both types of organizing ULPs tend to be met with standard remedial responses that systematically fail to fully compensate all dimensions of harm potentially caused by the employer's unlawful activity.

In sum, this analysis suggests that victims of termination and speech ULPs during organizing commonly suffer unremedied harm while wrongdoers are not held responsible for the full extent of the harm they have caused.

VI. The Principle of Voluntarism

A. The Traditional Model of Voluntarism

Voluntarism is regarded as a central tradition of our labour relations system.⁹¹ The tradition has its roots in British labour relations and, in differing forms, has been adopted by North American LRBs.⁹² It envisions that private sanctions, such as work stoppages, rather than state intervention, establish the prerequisites for collective bargaining—organization, mutual recognition, and enforcement machinery⁹³—such that the actors will voluntarily agree to the terms and conditions governing their relations.⁹⁴ Consequently, voluntarism regards the proper role of government in labour relations as “inactive and neutral”.⁹⁵ As Kevin Hawkins describes, this noninterventionist role for the state is

based on the assumption that industrial peace was more likely to be achieved if the parties concerned were permitted the maximum amount of freedom to settle their differences on their own terms. It was generally believed that employers and trade unionists were much more likely to obey rules which they themselves had evolved rather than anything imposed on them by a third party.⁹⁶

B. Voluntarism in Canadian Labour Relations

It is clear that labour relations in Canada depart markedly from this traditional model of voluntarism, and have done so at least since modern labour legislation was enacted in the late 1930s and 1940s.⁹⁷ As Geoffrey England points out, labour

⁹¹ Labour relations and labour law scholars note that the term voluntarism is both ubiquitous and elusive. As Mark Thompson notes, “Voluntarism is a concept frequently used, but seldom, if ever, defined” (“The Future of Voluntarism in Public Sector Labour Relations” in England, *Essays in Labour Relations Law*, *supra* note 1, 103 at 104). Geoffrey England writes, “I confess to never having been certain what the term voluntarism is supposed to mean” (“Trade Union Admission Rules: A Legal View” in England, *Essays in Labour Relations Law*, *ibid.*, 149 at 149 [England, “Rules”]).

⁹² England, “Rules”, *ibid.*; Richard Hyman, *Understanding European Trade Unionism* (London: Sage, 2001) at 68-69; Richard Hyman, “Is Industrial Relations Theory Always Ethnocentric?” in Bruce E. Kaufman, ed., *Theoretical Perspective on Work and the Employment Relationship* (Champaign, Ill.: Industrial Relations Research Association, 2004) 276.

⁹³ See Allan Flanders, *Management and Unions: The Theory and Reform of Industrial Relations* (London: Faber & Faber, 1975) at 95-99, 173-78.

⁹⁴ See Eric Tucker, “The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism” in England, *Essays in Labour Relations Law*, *supra* note 1, 219 at 220.

⁹⁵ *Ibid.* at 220. See also Thompson, *supra* note 91 at 104. Critics, including Tucker, contend that the state does not act neutrally.

⁹⁶ Kevin Hawkins, “The Decline of Voluntarism” (1971) 2 *Industrial Relations Journal* 24 at 24.

⁹⁷ See G. England, “Epilogue: Some Observations on ‘Voluntarism’” in England, *Essays in Labour Relations Law*, *supra* note 1, 263 at 263 [England, “Voluntarism”] (arguing that all labour movements depart from the traditional voluntary model); Thompson, *supra* note 91 at 104.

relations in Canada are highly regulated and involve significant state intervention and oversight at all stages:

Today, labour-management conflict in Canada is “judicialized” to an extraordinarily high degree. Trade union organization is secured by a plethora of statutory unfair labour practices administered by labour relations boards; collective agreements are enforced by legislation and administered by arbitrators or, to a lesser degree, by labour relations boards and courts; and the weapons of strike and lockout are closely controlled by statutory provisions governing timeliness, individual rights, and, to a growing degree, even the conduct of the battle itself, again administered by labour relations boards or by the courts. Add to the foregoing the statutory duty to bargain in good faith, which monitors ever more closely the substantive quality of negotiations, and the legislative mandate given to labour relations boards to regulate collective bargaining structure, and the resulting Canadian picture looks nothing like [traditional voluntarism].⁹⁸

Yet, as England also remarks, it is apparent that the actors in our labour relations system perceive the system as voluntary, and value this quality. England concludes that when labour relations actors speak of a “voluntaristic” system in Canada, they are referring to a procedurally oriented understanding of voluntarism rather than the traditional model.⁹⁹ According to this understanding,

the proper role for the law is to secure a procedural framework in which the competition can take place, but not to regulate the substantive outcomes, nor impair the internal autonomy of the competing groups. Put simply, the law is supposed to hold the ring and leave the groups to fight it out.¹⁰⁰

This version of voluntarism does not preclude all legal or state intrusion. While it rejects substantive intervention, it accepts procedural legal intervention in labour relations.¹⁰¹ It envisions a system where actors freely comply with the rules and conventions of the system. Any breaches that occur would generally be inadvertent—the product of employer ignorance of labour law rather than a calculated decision to violate the law.¹⁰² As a result, parties would co-operate to restore harm caused by violations without requiring government intervention, such as coercive or punitive mechanisms.

H.D. Woods, in his excellent treatment of the history of Canadian labour law and policy, maintains that even the earliest Canadian labour legislation contained elements of compulsion, which were certainly a feature of the *Industrial Disputes Investigation Act, 1907* (R.S.C. 1927, c. 112 [IDIA]) (*Labour Policy in Canada*, 2d ed. (Toronto: Macmillan, 1973) at 56-58).

⁹⁸ See England, “Voluntarism”, *ibid.* at 263 [footnotes omitted].

⁹⁹ *Ibid.* at 264.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.* Please note that in the remainder of this article the term “voluntarism” refers to this procedurally oriented understanding of voluntarism.

¹⁰² See Woods, *supra* note 97 at 152.

Though England criticizes this procedural–substantive distinction as flawed and misleading,¹⁰³ he notes that this perception of the labour relations system must be taken seriously because it has become part of the “common ideology” shared by the actors in our system, and it is these shared understandings that bring stability and harmony to labour relations.¹⁰⁴

C. Application of the Procedural Understanding of Voluntarism

This disjunction between the relatively interventionist reality of our labour relations system and the widely held understanding that it is, at least apart from procedure, a voluntary system, is perhaps most evident in LRBs’ treatment of violations of labour legislation. LRBs prefer parties to resolve disputes themselves, without LRB intervention, even where the violation giving rise to the dispute was calculated and intentional, not simply inadvertent or stemming from ignorance.¹⁰⁵ LRBs contend that such resolutions are more conducive to successful collective-bargaining relationships in the future than outcomes that are imposed on parties.¹⁰⁶

Similarly, LRBs are reluctant to foster an impression of “winners and losers” in labour proceedings, decisions, or remedial awards;¹⁰⁷ they try to avoid the “stigma of a public defeat at law.”¹⁰⁸ Such outcomes are regarded as undesirable for the parties’ long-term relationship.¹⁰⁹ As described by H.D. Woods, “[i]f the parties are to achieve a relationship which permits a constructive, administrative approach to the working arrangements, there is a need to reduce the attitudes of triumph and defeat to the minimum.”¹¹⁰ A further reason why LRBs endorse this voluntary approach is their belief in not being capable of fully enforcing labour legislation.¹¹¹ LRBs regard their remedial authority as leaving them unable to “police” labour relations, and therefore beholden to parties’ willingness to comply with the legislation.¹¹²

¹⁰³ England, “Voluntarism”, *supra* note 97 at 264-68.

¹⁰⁴ *Ibid.* at 264. Regarding the central role of “common ideologies” and “shared understandings” in labour relations systems, see John T. Dunlop, *Industrial Relations Systems*, rev. ed. (Boston: Harvard Business School Press, 1993).

¹⁰⁵ See Woods, *supra* note 97 at 152.

¹⁰⁶ See e.g. *Re British Columbia Automobile Association* (1999), 60 C.L.R.B.R. (2d) 267 at paras. 116-17 (BCLRB) [BCAA].

¹⁰⁷ See e.g. *Kelland*, *supra* note 69; *Re Pacific Press*, [1996] B.C.L.R.B.D. No. 292 at para. 47 (QL) (bargaining structure); *Emral*, *supra* note 69; BCAA, *ibid.*

¹⁰⁸ Woods, *supra* note 97 at 152.

¹⁰⁹ BCAA, *supra* note 106 at para. 116.

¹¹⁰ *Supra* note 97 at 152.

¹¹¹ As discussed earlier in this article, labour legislation does not provide for punitive or coercive enforcement mechanisms, though LRB decisions are enforceable as orders of the superior court and the legislation often provides for penalties for breaching LRB orders. For a discussion of these LRB powers, see Part III, above.

¹¹² *Re Radio Shack*, [1980] 1 Can. LRB 99 at 129 (OLRB) [*Radio Shack*]. This decision has been cited with approval and adopted by numerous Canadian LRBs including the BCLRB. See e.g. *Re*

Furthermore, LRBs maintain that, even if they could police labour relations, they should not.¹¹³ LRBs distinguish between their “statutory” and “practical” jurisdiction, and caution that, should they exceed their practical authority by relying on their fuller statutory authority, the efficacy of remedial orders may be weakened because these orders depend on voluntary compliance.¹¹⁴ Due to this perceived dependence on parties’ goodwill, LRBs insist that their decisions “cannot get too far ahead of the expectations” of the parties if they are to “attract as much self-compliance as possible.”¹¹⁵ LRBs understand this limitation as requiring them to apply conservative remedies for wrongdoing to ensure that employers will continue to co-operate with the administration of the legislation. As a result, while they may recognize that the substantive rights they administer are important, LRBs balance enforcing these rights with what they believe will be an outcome that is acceptable to the offending party.¹¹⁶

D. Shortcomings of this Approach

Unfortunately, as explained below, this approach to voluntarism is unrealistic and based on understandings of ULPs that are contrary to the evidence. It understates the need for enforcement and adjudication. While voluntarism may provide a good rationale for avoiding punitive sanctions in labour law, it does not require that LRBs avoid fully compensatory remedies. Voluntarism also fails to reflect parties’ interests, and most of all is poorly suited to the organizing context.

1. Contrary to Evidence and Experience

First, to assume that most ULPs stem from inadvertence or ignorance, rather than intentional wrongdoing, is contrary to the views of numerous experts and to the evidence.¹¹⁷ In fact, ULPs are common.¹¹⁸ Many are blatant and intentional; others

Kamloops News, [1981] B.C.L.R.B.D. No. 36 (QL); *Re White Spot Ltd.*, [1989] B.C.L.R.B.D. No. 7 (QL).

¹¹³ *Ibid.*

¹¹⁴ See e.g. *Re Academy of Medicine, Toronto Call Answering Service*, [1978] 1 Can. LRBR 183 at 193-94 (OLRB); *Re Hunt Manufacturing Ltd.*, [1993] B.C.L.R.B.D. No. 291 (QL).

¹¹⁵ *Radio Shack*, *supra* note 112 at 129-30. See also Antoine, *supra* note 42 at 1057-58.

¹¹⁶ See *Radio Shack*, *ibid.*

¹¹⁷ Substantial empirical research into employer ULPs during organizing exists, demonstrating that such ULPs are common and intentional. Leading examples of this research include a survey of eight Canadian jurisdictions that found 80 per cent of managers surveyed engaging in overt union-avoidance efforts, with 12 per cent of these managers freely acknowledging that they had committed what they believed to be ULPs (Bentham, *supra* note 12 at 173). These results are consistent with an earlier study determining that employers committed ULPs in at least 11.6 per cent of union-organizing cases (Anne Forrest, “Effect of Unfair Labour Practice Complaints on Certification and Collective Bargaining” in Michel Grant, ed., *Industrial Relations Issues for the 1990’s: Proceedings of the 26th Conference of the Canadian Industrial Relations Association, 1989* (Quebec City: Canadian Industrial Relations Association, 1989) 423 at 424.

involve employers knowingly engaging in borderline conduct that is found to have stepped over the line. In such cases, the voluntary system has already broken down. One party has rejected the system by deciding to disregard the law. It makes little sense to then order a remedy that fails to seriously sanction the wrongdoer merely in the hopes that this will ensure future compliance and co-operation from the employer. Consequently, LRBs are building their approach to ULPs on a false understanding of the nature of and motivation for many of these violations.

2. Adjudication and Enforcement

The approach of LRBs to voluntarism, including their perception that they have very limited practical authority, also understates the necessity for LRBs to take a direct role in some cases by adjudicating and enforcing statutory rights. This perspective leads LRBs to promote settlement and to award limited remedies in those cases that are adjudicated.

Although a substantial proportion of disputes are resolved by the parties, not all complainants settle, and settlements should not be encouraged at the cost of important rights.¹¹⁹ As Woods cautions, LRBs must avoid sacrificing rights in the interest of

In the United States, there is also evidence of wide-spread and increasing employer-organized ULPs, especially illegal terminations. Studies from the early 1990s estimated that one-tenth to one sixty-fourth of pro-union workers in representation-election cases were subject to discriminatory firing. See Weiler, “Promises to Keep”, *supra* note 1 at 1802; Robert J. Lalonde & Bernard D. Meltzer, “Hard Times for Unions: Another Look at the Significance of Employer Illegals” (1991) 58 U. Chicago L. Rev. 953; Paul C. Weiler, “Hard Times for Unions: Challenging Times for Scholars” (1991) 58 U. Chicago L. Rev. 1015 [Weiler, “Hard Times”]). A recent study employing the methodology used by Lalonde and Meltzer in 1991 found a significant increase in illegal terminations of pro-union workers post-2000, compared to the late 1990s. The authors estimate that almost one in five active union supporters will be discriminatorily fired during union organizing (John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns* (Washington, D.C.: Center for Economic and Policy Research, 2007) at 1, online: Center for Economic and Policy Research <http://www.cepr.net/documents/publications/unions_2007_01.pdf>). No similar study is available for Canada. See also Daniel H. Pollitt, “NLRB Re-Run Elections: A Study” (1963) 41 N.C.L. Rev. 209 at 222. Pollitt conducts an examination of ULP complaints in second-representation-vote cases and concludes that this misconduct is a “deliberate choice” and that “the most common [ULPs] cannot be inadvertent or unintentional” (*ibid.*). For references to empirical research on the effectiveness of employer ULPs during organizing, see *supra* note 12.

¹¹⁸ For Canada, see e.g. Bentham, *supra* note 12; Forrest, *ibid.* at 430. For the United States, see e.g. Lalonde & Meltzer, *ibid.*; Schmidt & Zipperer, *ibid.* See generally Weiler, “Promises to Keep”, *supra* note 1; Weiler, “Hard Times”, *ibid.*

¹¹⁹ Nevertheless, a substantial proportion of disputes are resolved by parties. For instance, for the 2005–06 fiscal year, the BCLRB reported that approximately 60 per cent of ULP and *B.C. Code* Part V (industrial dispute) complaints referred to the BCLRB’s special investigating officers were settled (2006 Annual Report, *supra* note 11 at 3).

As Harry Arthurs notes in respect of employment standards, “Public authorities responsible for designing and implementing labour standards should neither rely on legislation when alternative strategies are likely to be more effective, nor use other strategies when legislation is needed” (Federal

settlement, and legal rights “should not be ‘conciliated’ away.”¹²⁰ Even relatively trivial violations deserve due consideration from LRBs. As England points out, the standard of justice should not depend on the importance of the harm done:

Once certain conduct has been judged to be unfair, then that constitutes an absolute ... turning the blind eye to acts of unfairness with minor consequences is no way to promote voluntary reform in the more important cases.¹²¹

Those matters that parties do not settle require adjudication and, possibly, LRB-ordered remedies. Adjudication may not be the preferred means of resolving disputes, and only a minority of ULP complaints can actually be resolved in this way, but an important segment of cases nonetheless reach a point where it is needed.¹²² These cases may reflect continued resistance by the respondent and the need for external intervention to effectively protect parties’ rights. Moreover, these are cases where the employer–union relationship is likely already poor. LRB intervention may be necessary to establish a functioning relationship between the parties and may be the only prospect for a constructive long-term bargaining relationship.

Furthermore, LRBs interpret the need for voluntary participation in the labour relations system to mean that the remedial response to violations cannot be so severe that the wrongdoer will reject the system and its regulation. This is a legitimate justification for avoiding punitive remedies or penalties in labour relations,¹²³ but it presents a more difficult problem for awarding even remedial or restorative remedies where there is an unwilling employer.

Imposing a compensatory remedy on an employer may be contrary to the ideal that parties willingly agree to resolve disputes. To capitulate to the wrongdoer by reducing the remedy leaves the other party with unremedied harm, and gives

Labour Standards Review Commission, *Fairness at work: Federal Labour Standards for the 21st Century* by Harry W. Arthurs (Ottawa: Human Resources and Skills Development Canada, 2006) at 12, online: Human Resources and Skills Development Canada <http://www.hrsdc.gc.ca/eng/labour/employment_standards/f/s/final/page00.shtml> [*Arthurs Report*]. Arthurs concludes:

Compliance may be the single most important issue confronting this review [of Federal labour standards]. To put the matter succinctly, if employers do not comply with Part III, if workers do not receive the protections it promises, if government is not prepared to ensure that it is having the intended results, there is not much point in having labour standards legislation at all (*ibid.* at 190).

¹²⁰ *Supra* note 97 at 152, 358. Woods characterized ULP protections as “the first line of defence of the right of employees to join the union of their choice” (*ibid.* at 358), and, in assessing the *IDIA* of 1907 (*supra* note 97), contended that “[a] conciliation board is of no use in preventing the denial of basic rights of freedom of speech and the right to unionize. These are legal rights that should not be infringed upon by compromise solutions” (Woods, *ibid.* at 75-76).

¹²¹ England’s comments were in relation to violations of rights under collective agreements, but are equally applicable to ULPs (“Rules”, *supra* note 91 at 151).

¹²² *BCAA*, *supra* note 106 at para. 116.

¹²³ LRBs’ mandate to provide restorative, compensatory remedies, and their lack of jurisdiction to award punitive remedies, are addressed in Part III, above.

preferential treatment to the wrongdoer at the expense of the innocent party. The lopsided concern of LRBs for employer acceptance demonstrates that LRBs' fear of rejection of the system by employers outweighs their concern for fairness or their concern that unions and employees may abandon the system. When an LRB makes such a choice, it is choosing to purchase employer compliance while simultaneously choosing to devalue the interests and rights of unions and employees.

Adjudication and enforcement is sometimes necessary. LRBs' stated concern about their inability to enforce legislation demonstrates excessive concern for voluntary co-operation and also understates the actual enforceability of LRB orders. Though it is true that an LRB often cannot enforce its own orders, various means nonetheless exist to enforce these orders, such as civil or criminal contempt findings issued by courts and monetary penalties for non-compliance.¹²⁴

3. Parties' Interests

A key requirement for a successful voluntary labour relations system is for parties to view compliance with the system as in their own best interests.¹²⁵ Where parties conclude otherwise, they may decline or refuse to comply, disregarding the rules and any attempted regulation. Even labour relations systems with substantial state intervention as in Canada depend to some extent on willing compliance and co-operation to function properly.¹²⁶

While the notion of voluntarism may at first appear to treat labour and management impartially, focusing on encouraging parties to come to voluntary settlements of disputes, this does not reflect the reality. LRBs awarding remedies

¹²⁴ LRB decisions can be filed in superior court and are then enforceable in the same manner as any other court decision—through civil and criminal contempt proceedings. In some jurisdictions the LRB may exercise discretion in determining whether to file in court. See e.g. *Alberta Code*, *supra* note 46, s. 18(6); *Quebec Labour Code*, R.S.Q. c. C-27, s. 129; *CLC*, *supra* note 46, ss. 23-23.1. In other provinces the LRB must file the decision on request or a party may file it after a specified period of non-compliance with the order. See e.g. *B.C. Code*, *supra* note 15, s. 135; *Manitoba Act*, *supra* note 37, s. 143(11); *Ontario Act*, *supra* note 10, ss. 96(6), 108; *Labour Act*, R.S.P.E.I. 1988, c. L-1, s. 4(4); *Labour Relations Act*, R.S.N.L. 1990, c. L-1, s. 21. Nova Scotia provides explicit entitlement to court enforcement of monetary awards by the LRB (*Trade Union Act*, R.S.N.S. 1989, c. 475, s. 77).

In several jurisdictions, failure to comply with an LRB order is an offence attracting monetary penalty. For a discussion of the legislation that provides for such penalties, see *supra* note 46.

¹²⁵ See Woods, *supra* note 97 at 47, 58-59. Note that Woods says that early provincial legislation setting up systems of conciliation boards, such as the Ontario *Trades Arbitration Act 1873* (S.O. 1873, c. 26), failed because they did not appeal to parties' self-interest in making use of the conciliation machinery (Woods, *ibid.* at 58-59).

¹²⁶ This arises, in part, because the system lacks substantial enforcement or punishment mechanisms. As discussed above, though LRBs do not have jurisdiction to enforce their own orders, they can be enforced through the courts, and non-compliance can attract penalties and offence findings, though these mechanisms are seldom used. See *supra* notes 46, 125; text accompanying notes 46-48.

subject to the principle of voluntarism do not treat labour and management equally. In practice, LRBs show far greater concern that the handling of the complaint and any remedial order is acceptable to the employer than that the union or employees find it acceptable or sufficient. There are practical reasons for this.

First, there is a crucial difference in the role of the labour relations system for employers compared to labour. Labour law is the key source of power and rights for employees and unions, who have few alternatives for protecting their interests.¹²⁷ Consequently, employees and unions are virtually obligated to participate in the system, however poorly it may enforce their rights or however inadequate the remedies may be. It will likely be better than the alternatives. In contrast, employers generally do not regard labour regulation during organizing (or at practically any time) as a benefit, since it primarily curbs employers' otherwise unfettered authority in the workplace. As one pair of researchers notes, employers generally have difficulty identifying any benefits from unionization.¹²⁸ Therefore, while labour has a fundamental interest in participating in the labour relations system, management often does not. This reality makes it difficult for LRBs to seek voluntary compliance from both labour and management while at the same time enforcing the law and fully compensating violations.

Secondly, this conflict of interest among LRBs is particularly acute for disputes arising during union organizing. In such cases, unions and employees are most commonly the injured parties seeking remedies, and employers are usually the wrongdoers that may object to restrictions on their conduct during organizing and resent any remedies ordered.¹²⁹

4. Inappropriate for Organizing Disputes

Voluntarism is particularly ill-suited to regulating the union-organizing period because no continuing relationship has been established between the union and the employer. Indeed, the very question to be decided is whether a union-management relationship will be established *at all*. It is not until certification is issued, recognizing the union as the sole bargaining agent for a group of workers, that an ongoing relationship is formed. Furthermore, those employers seeking to avoid unionization hope certification will fail so they will not have any continuing association with the union. In these circumstances, the short-term employer goal of avoiding unionization may overshadow consideration of the long-term benefits of cooperation, leaving

¹²⁷ For discussion of alternative sources of legal- and industrial-relations power and protection for labour, see Alan Hyde, "New Institutions for Worker Representation in the United States: Theoretical Issues" (2005-06) 50 N.Y.L. Sch. L. Rev. 385.

¹²⁸ Brian E. Becker & Richard U. Miller, "Patterns and Determinants of Union Growth in the Hospital Industry" (1981) 2 Journal of Labor Research 309 at 311.

¹²⁹ See Part II.A, above.

voluntarism as a particularly fragile structure for regulating employer ULPs committed during organizing.

5. Conclusion

A long-standing part of our labour relations system is the tradition of voluntarism. LRBs subscribe to this principle, adopting its underlying rationale—that resolutions voluntarily reached by the parties themselves foster constructive, stable, and harmonious labour relations that are in the best interests of all.

However, as explained above, while this principle may be appropriate for resolving disputes between parties that are already in a bargaining relationship, it is not well suited to disputes that arise during organizing. Within the period of organizing, only the *possibility* of a relationship between the parties being established is at stake, and many employers are very interested in preventing this possibility.

LRBs currently misinterpret voluntarism and misapply it to the organizing context. By observing the requirements of voluntarism in dealing with employer ULPs during union organizing, LRBs limit remedies to what employers will find acceptable as a remedy rather than simply being guided by what will restore the harm done. As a result, LRBs are jeopardizing, rather than fostering, constructive labour relations by encouraging (or failing to discourage) employer violations of the freedom to unionize, failing to enforce legislative rights, and providing inadequate compensation for breaches.

VII. Consequences of Deficient Remedial Responses

This part explores the unintended consequences the LRB's failure to consistently provide full compensation for harm caused by employer ULPs during organizing. First, it examines the incentives and disincentives for industrial-relations actors created by this practice. Next, it considers whether this practice fosters new norms for employer behaviour by encouraging the belief that ULPs are not inherently wrongful acts but simply statutorily created wrongs.¹³⁰

A. Perverse Incentives

A rational-choice approach to analyzing actors' labour relations actions holds that employers are motivated to engage in ULPs not necessarily because of pure anti-union feelings, but out of rational cost considerations. An employer will be expected to engage in ULPs where it anticipates that the benefits of doing so outweigh the

¹³⁰ Legal wrongs fall into two broad categories. *Mala in se* are acts, such as murder, that are considered inherently wrong and illegal in their very nature. The second category contains acts that are *mala prohibita*, or wrongs created by statute rather than inherent wrongs. Marijuana use is often offered as an example of an act that is a *malum prohibitum*.

costs it expects to incur. Meanwhile, unions and employees will tend to file and pursue ULP complaints where the expected benefits sufficiently offset the costs expected to be incurred by doing so—including both the costs of the harm suffered and litigation costs in this calculation.¹³¹ These cost-and-benefit calculations are subject to actors' perceptions of the likelihood that the following will occur: unlawful action will be detected, the union or employee will file and pursue a complaint, the LRB will decide a violation has occurred, it will order a fully compensatory remedy, and, finally, its remedial order will be enforced.¹³²

Consistently failing to award fully compensatory remedies for ULPs encourages employer law-breaking by fostering the expectation that employers will not likely be required to answer fully for their wrongdoing with a fully compensatory remedy. These expectations shape actors' cost-benefit assessments and encourage law-breaking by reducing the expected cost of violations for employers. This discounting of the price for ULPs operates as an incentive to misconduct for a rational employer by making misconduct more "affordable" than if subject to a truly compensatory remedy. Subsidizing rogue employers in this manner also tempts otherwise law-abiding employers to engage in wrongdoing, as they see these other employers gaining an unfair advantage by their wrongdoing.¹³³

¹³¹ Several writers adopt a rational choice perspective of ULPs. See e.g. B.R. Skelton, "Economic Analysis of the Costs and Benefits of Employer Unfair Labor Practices" (1980–81) 59 N.C.L. Rev. 167; Robert J. Flanagan, "NLRA Litigation and Union Representation" (1986) 38 Stan. L. Rev. 957 [Flanagan, "NLRA"]; John J. Lawler, *Unionization and Deunionization: Strategy, Tactics, and Outcomes* (Columbia, S.C.: University of South Carolina Press, 1990); Cynthia L. Estlund, "Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act" (1992–93) 71 Tex. L. Rev. 921 at 927; Morris M. Kleiner, "What Will It Take? Establishing the Economic Cost to Management of Noncompliance with the NLRA" in Sheldon Friedman *et al.*, eds., *Restoring the Promise of American Labor Law* (Ithaca, N.Y.: ILR Press, 1994) 137; Sara Slinn, "An Analysis of the Effects on Parties' Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model" (2005) 43 Osgoode Hall L.J. 407.

Though there are distinct differences between Canada and the United States in prohibitions, institutional procedures, and remedies relating to ULPs, scholars often find it valuable to compare the labour relations experiences in these countries. See Paul C. Weiler, "Milestone or Tombstone: The Wagner Act at Fifty" (1986) 23 Harv. J. on Legis. 1 at 4. For a concise description of these differences relating to ULPs, see Joseph B. Rose & Gary N. Chaison, "Immediacy and Saliency in Remedying Employer Opposition to Union Organizing Campaigns" (1997) 48 Lab. L.J. 662.

Also note that, in the context of federal employment standards, Arthurs identified that one of the factors causing non-compliance with statutory requirements was "... simple greed: a few employers evidently feel that any business strategy—including one that involves violating the law and exploiting workers—is legitimate so long as it leads to higher profits" (*Arthurs Report, supra* note 119 at 195).

¹³² Similarly, sources of non-compliance with employment standards include employers' perceptions that they are unlikely to get caught, and that no serious consequences will result if violations are detected (*Arthurs Report, ibid.*).

¹³³ As Arthurs cautioned regarding compliance with Federal labour standards, "If a small minority of firms secures a significant competitive advantage by operating with substandard labour conditions, it may ultimately drive the majority of law-abiding firms to follow suit" (*ibid.* at 191).

At the same time, unions and employees are discouraged from making or pursuing complaints. The expectation created in these actors' minds is that, aside from the costs and harm already suffered from the ULP itself, they will incur additional costs in litigating the matter. Meanwhile, unions and employees do not expect to receive full compensation for the effects of the ULP, let alone the costs of the complaint. As Robert Flanagan argues, the victim-enforcement scheme of labour relations, locating the responsibility and cost of filing and pursuing complaints on the victim, further reduces the likelihood that a wrongdoing employer will be called to account for breaking the law,¹³⁴ further reducing employers' expected risk of being found in breach and thus the expected cost of wrongdoing.¹³⁵

B.R. Skelton contends that labour law's exclusive reliance on compensatory remedies is based on the assumption that all wrongdoing will be reported and prosecuted. He offers a vivid analogy illustrating how less-than-certain detection, complaints, and convictions create incentives for law-breaking:

Suppose the only remedy the courts can legally impose for bank robbery is to require the thief to repay the bank the money he has stolen. Suppose further that there is some fixed probability, say fifty percent, that the thief will be apprehended, convicted, or forced to repay. The likelihood, therefore, that the robber eventually will have to reimburse the bank is a multiplicative function of apprehension, conviction, and reimbursement, or $.5 \times .5 \times .5 = .125$. This means that there is one chance in eight that the robber will have to return the money to the bank. Under such conditions bank robbery could very well prove to be a worthwhile endeavour.¹³⁶

The analysis in Part VII demonstrates that wrongdoing employers that are caught and found to have engaged in ULPs are only sometimes (and this study suggests it is less than half of the time) required to repay the full costs of their "crime". Consequently, a cost-benefit calculation may well produce an outcome with better odds in favour of rogue employers than the one in eight that Skelton suggests would be so compelling to prospective bank robbers. Clearly, unlawful union resistance may well be worthwhile to an employer who values remaining union-free.¹³⁷

¹³⁴ Flanagan, "NLRA", *supra* note 131 at 977.

¹³⁵ Similarly, in the context of employment-standards violations, Arthurs notes that "... difficulties [in pursuing complaints] may not only dissuade complainants from coming forward, but may also tempt employers to ignore the law as they take note of the long odds against being caught" (*Arthurs Report*, *supra* note 119 at 192).

¹³⁶ Skelton, *supra* note 131 at 171.

¹³⁷ See *Supra* note 117. Bentham discusses survey evidence that union-avoidance efforts are widespread among Canadian employers and that a substantial proportion of managers surveyed admitted to engaging in anti-union conduct they believed to be ULPs (*supra* note 12 at 173).

B. Violations as the New Norm

It is not just exceptional ULPs that are important and deserve compensation, but run-of-the-mill, routine violations too.¹³⁸ Indeed it may be even more important for the legitimacy and functioning of the labour relations system that these unexceptional ULPs be fully compensated. Failure to do so helps create new managerial and workplace norms of disregard for the legal limits on employer behaviour.

If the labour relations system creates incentives for employers to unlawfully resist unions, as described above, more employers may succumb to the temptation to break the law; the norm may become illegal resistance to unionization. The labour relations system thus undermines itself by weakening social disapproval for wrongdoing. In other words the LRBs' application of remedies promotes disregard for the statutory rights and protections of employees. The overall effect is to consistently favour employers at the expense of unions and employees, reducing remedies to little more than "licence fees" for wrongdoing.¹³⁹

VIII. Conclusions and Recommendations

This article has investigated the appropriate remedial response to employer ULPs committed during union organizing. LRB remedies are frequently criticized as inadequate, motivating calls for change by introducing punitive remedies or revising statutory procedures.¹⁴⁰ This article considers an alternative approach to the problem. It proposes that LRBs fulfill their remedial mandate by awarding remedies that fully compensate the harm caused to individual employees, collective employee interests, and the union by employer ULPs committed during union organizing. This proposal requires no change to LRBs' remedial powers, and it reduces incentives for employers to violate labour legislation. Instead, it fosters collective bargaining relationships. Should LRBs adopt this approach, it may have the additional beneficial effect of deterring employer ULPs, given the knowledge that they will likely be required to compensate for the full harm caused by their wrongdoing. As such, a deterrent effect flows from the compensatory nature of awards in particular cases. This is a nonpunitive form of deterrence.¹⁴¹

Though they are authorized to provide fully compensatory remedies for violations of the legislation such as ULPs, LRBs have been unwilling to issue remedial awards addressing all types of harm caused by breaches. The empirical analysis of termination and employer-speech ULP cases decided over a seventeen-year period by the BCLRB substantiates this claim. The analysis shows that remedies

¹³⁸ See England, "Rules", *supra* note 91 at 151.

¹³⁹ See *Convergys*, *supra* note 35 at para. 40; *Delta Optimist*, *supra* note 40.

¹⁴⁰ See Introduction, Section B, above.

¹⁴¹ As noted in Part III, above, LRBs are entitled to design remedies to deter further violations, and such deterrent effect is not considered punitive. See *Convergys*, *supra* note 35; *Delta Optimist*, *supra* note 40.

awarded in these cases systematically fail to compensate particular categories of harm, especially harm to collective employee and union interests. Though this analysis uses British Columbia data, the results and conclusions drawn from it are applicable in other jurisdictions, as the scope of remedial authority and ULP prohibitions are very similar among Canadian jurisdictions.

It is apparent that LRB resistance to fully compensatory remedial awards arises from LRBs' adherence to the principle of voluntarism and its misapplication to the organizing context. While the principle of voluntarism may be an appropriate approach to regulating existing employer–union relationships, it is not appropriate and does not further the avowed purpose of voluntarism—fostering long-term bargaining relationships—to apply it to disputes surrounding the creation of these relationships. While the principle of voluntarism may foster constructive labour relations at other points in the union–management relationship, during the delicate union-organizing period it is vital that rights be enforced and adequate remedies provided.

Overall, there is much unrealized potential for more effective remedial responses to employer illegalities during union organizing lying within LRBs' existing authority and mandate. By fulfilling their mandate to fully compensate harm caused by employer wrongdoing, LRBs would support the labour relations system, promoting a system that is more genuinely based on voluntarism, and allowing employees to more fully realize their right to freely choose to organize. Fulfilling the mandate would also eliminate or reduce the existing perverse incentives for employers to engage in illegal anti-union tactics during organizing.

Appendix:

Table 3: Interest Compensated in Remedial Awards Relating to Unfair Labour Practices by an Employer During Unionizing and Provided by the British Columbia Labour Relations Board, 1990–June 2007

		Type of ULP			
		Termination		Speech	
		Percent- age	#	Percent- age	#
Compensated Interest	Individual Employee	71	35	0	0
	Collective Employee	0	0	5	1
	Union	0	0	0	0
	Individual & Collective Employee	0	0	0	0
	Individual & Collective Employee & Union	22	11	0	0
	Collective Employee & Union	4	2	79	15
	Individual Employee & Union	0	0	0	0
	No Compensatory Remedy	2	1	16	3
	Total	100	49	100	19

Table 4: Elements of Remedial Awards Relating to Unfair Labour Practices by an Employer During Unionizing and Provided by the British Columbia Labour Relations Board, 1990–June 2007

		Type of ULP			
		Termination		Speech	
		Percent- age	Number	Percent- age	Number
Elements of Award	Back Pay / Reversal	85.7	42	0	0
	Communication	10.2	5	15.8	3
	Access	6.1	3	47.4	9
	Compensate Union	2	1	0	0
	Remedial Certification / New Vote	6.1	3	36.8	7
	Declare / Cease and Desist	42.9	21	89.5	17
	Negotiate / Other	2	1	10.5	2