OVERVIEW

Roughly 30% of the Canadian workplace is unionized. It was as high as 38% in the 40s but has declined. The 30% is misleading – certain industries such as broadcasting, transportation, steel making, mining, auto manufacturing are very high and almost none existent in areas such as retail and very well represented in the public sector (e.g. teachers & government employees). Unionized workplaces tend to raise the overall wage level.

Newfoundland and Labrador is the highest unionized province. Ontario is 9th in the country with respect to % unionization.

Unions spend most of their time arguing about the collective agreement or interpreting the collective agreement. During a collective agreement no strikes or lockouts can occur. You cannot abrogate a collective agreement. Employers under labour law cannot get rid of a union once a union is democratically put into a workplace by majority worker vote.

Collective agreements are contracts of a special nature and extinguish all individual contracts (*McGavin Toastmaster*).

WORKING ASSUMPTIONS IN LABOUR LAW

1. There is a natural inherent tension that our legislation assumes between those who own and manage the workplace and those who work or produce in the workplace. If managed properly it is a reconcilable difference but there needs to be a detailed set of rules in order to be able to do this.
2. Labour law assumes that there is bargaining inequality between an employee and an employer. If this inequality is left unregulated it will lead to unjust and intolerable results in the workplace and society. Labour law tries to minimize the worst of the bargaining inequality. Labour law is protective legislation that gives rights to employees and to find their own voice in the workplace on some basis of equality.
3. The workplace cannot be left lawless therefore labour law brings in the rule of law to the workplace to minimize these bargaining differences and to allow employees to have a collective voice. What is often impossible for an employee to achieve individually labour law makes possible to achieve collectively (industrial citizenship).
4. Working people can best achieve individual rights through a collective voice which they can achieve through labour law.
5. Employment contracts are contracts of a very special nature. Collective agreements and employment contracts are viewed by the courts and by workplace tribunals as sui generis (of its own kind) in contract law (it is the sale of human labour).

COLLECTIVE BARGAINING HISTORY

1800s-1872: there was no labour law. All that was recognized were individual contracts. There was a working assumption that there was both legal and actual equality in bargaining power between

employers and employees. The Parliament in Upper Canada passed the Combination Act in Canada which was almost the same as the one in the UK and criminalized unions and made a criminal offence to create any combination of working people that would attempt to force an employer to agree to wages, benefits or working conditions. It also prohibited collective agreements.

1872: Unions were decriminalized in Canada.

1872-1944: Period of tolerization: Unions were tolerated but not protected by the law, there was nothing to stop employers from firing those who went on strike or blackballing union leaders in the industry. The only agreements enforceable were still individual contracts of employment. In 1907 the federal government passed the Industrial Disputes Investigation Act being passed. This required a union and employer to have a 30-day cooling off period before a strike or lock-out where a government mediator would come in to try to solve the problem. In 1925 the JCPC ruled *Toronto Electric Commissioners v Snider* that the presumption of labour relations is that it falls within the property and civil rights of the BNA, 92(13), and assigns the provinces the principle power to regulate labour relations, except for a limited number of federal works. Tort law allowed employers to sue unions if there was damage during a strike.

The first world war led to full employment which gave employees and unions more power. This came to a head in the 1919 Winnipeg General Strike. The federal government intervened and working conditions deteriorated until the great depression. In 1935, the US Congress pass the National Labour Relations Act (Wagner Act) which recognized employees' rights to form unions. This in turn led to more positive reception of unions in Canada. The Wagner Act were incorporated into the War Measures Act by the federal government in 1944 under PC1003. Post-war all provinces adopted legislation similar to the Wagner Act (their own labour legislation). This led to a dramatic increase in unionization.

WHAT DID THE WAGNER ACT DO?

1. Created statutory labour relations board (professional full-time boards whose duty it was to regulate the various employer and union rights under the Labour Relations Act)
2. Under the Labour Relations Act (LRA) it created unfair labour practices
3. It created the duty to bargain in good faith (with the goal of reaching an agreement)
4. It created a certification for unions (if a union could prove it had majority support from the employees the employer could not ban the union)
    a. Card check: 50% +1 have to sign a union card to get certification without a vote
    b. Majority vote: once a union has signed a certain number of cards there is a vote supervised by LBR and if the majority votes in favour of the union then they are certified.
5. It gave legal meaning to a collective agreement.
6. Mandatory Grievance and Arbitration System: this is in substitute to the right of a union to strike during a collective agreement (this is an ADR system). The advantages to this system are it is fast, inexpensive, binding and informal.

Majoritarian and exclusivity (the two corner stones to the Canadian Wagner Act approach): a union becomes certified to represent the workers in a workplace if it represents the majority of the workplace (all or nothing). In Canada only one union can represent the employees and must represent all employees at the workplace (in EU there can be different unions).

TYPES OF LEGISLATION THAT MAKE UP WORKPLACE LAW (APPLY TO ALL WORKPLACES UNIONIZED OR UNUNIONIZED)

1. **Labour Relations Act** (1995) (ON): section 38 automatically incorporates the Ontario HRC into all collective agreements
2. **Ontario Human Rights Code**
3. Employment Standards Act: establishes minimum terms and conditions of employment with respect to wage, modes of payment, leaves, overtime, hours worked etc.
4. Occupational Health and Safety Legislation
5. Workplace safety Act
6. Pensions Legislation
7. Pay Equity Legislation
8. Unemployment Legislation

WAYS FOR EMPLOYEES TO GAIN RIGHTS IN THE WORKPLACE

COLLECTIVE VOICE MODEL (CANADA)

Allows unions to represent workers. This is the most effective way to represent workers in the workplace. Advantages: promotes self-governance within the workplace, allows for a collective voice for workers, allows democratic principles down to the level of individual workplaces and saves the government money because those unionized workplaces don't need to have government inspectors (unions do the regulation of workplace rights)

Disadvantages: increases production costs (wages and benefits increase) and there is a cost to administering the collective agreement. It costs employers more and they lose some control because there are now legally enforceable rights of the employees

LIMITED REPRESENTAITON MODEL (EU)

All work places regulated provincially in Ontario are required to have a joint health and safety committee made up of employees and managers regarding issues of health and safety in the workplace. This is a form of self-regulation and the only example of this model in Ontario.

GOVERNMENT INSPECTION MODEL

The government will hire inspectors to receive complaints who have statutory power to make decisions on unpaid vacation or dangerous machinery. This model is the primary way in which the Ontario government regulates workplaces where there are no unions.

CONSTITUTIONAL DIVISIONS OF POWER

As a result of *Snider,* about 90% of the labour force is under provincial jurisdiction for labour relations persons (under s92(13)). There is a presumption that all employees are under provincial jurisdiction unless the employee comes under a federal work or undertaking then it is federal jurisdiction. The federal works and undertaking (federally regulated industries or work that is integral to a federal work or undertaking) are: interprovincial or international transportation (shipping or trucking), aviation, banking, telecommunications, broadcasting, nuclear power, any port work and occasionally other federally regulated industries (e.g. the coal mines in Cape Brenton).

EMPRESS HOTEL

Facts: Railways are a federal work or undertaking. The workers at the Empress Hotel owned by a railway wanted to unionize. The whole point of the hotel was people travelling on the train would stay at the hotel.

Issue: Are the hotel employees covered under federal jurisdiction?

Held: Provincial jurisdiction.

Reasons: The hotel employees are under provincial jurisdiction because the railway could run without it and therefore was not integral.

AIRPORT EXAMPLE

The janitors at an airport are under provincial jurisdiction. Pilots, security agents and ticket agents are federal because they are integral to the running of the airport.

TESSIER LTEE V QUEBEC (COMMISSION DE LA SANTE DE LA SECURITE DU TRAVAIL), 2012 SCC 23

Facts: Tessier is a heavy equipment rental company or provides employees to do the work for other companies under contract. Some employees were doing stevedoring work. Employees work in all sectors (might be operating a crane one day and driving and crane the next). Stevedoring represents 14% of the company's overall revenue. Tessier said they were covered by federal legislation.

Issue: Are Tessier's employees governed by federal or provincial occupational health and safety legislation?

Ratio: In order to be federal – the work must be a significant part of the employees' time or a major aspect of the essential ongoing nature of the operation. The dominant character of the operation must be federal otherwise jurisdiction remains with the province.

Held: Provincial Jurisdiction.

Reasons: It is not a federal work or undertaking and is not integral to a federal work or undertaking. In *Stevedores Reference*, the SCC held that the federal government has jurisdiction to regulate employment in two circumstances:

1. when the employment relates to work, undertaking, or business within the legislative authority of Parliament; (is it within a federal head of power?)
    a. The fact that Tessier does some shipping does not make it a federal issue. It must be part an integral part of extra-provincial transportation.
2. or when it is an integral part of a federally regulated undertaking, sometimes referred to as derivative jurisdiction.
    a. Tessier's operation is local in nature because only a small portion of the work was stevedoring.

If only the minority of the work falls under a federal work or undertaking or being integral to it the company itself will not be federal in nature.

Exceptions: Hydro-one provides power to all Ontario – that is provincial but the nuclear power plants (so Hydro-one gets split up)

ABORIGINAL SELF-GOVERNMENT

Under s1 of the Constitution aboriginal affairs belongs to the federal government. Any work under the band council that is a core operation of the band is federally regulated (teachers employed by the band council etc.). Any other business (such as a gas station) that operate on band land but are not owned by the band council are under provincially jurisdiction because they do not have sufficient "indianness".

SCUGOG ISLAND FIRST NATION V AG CANADA & AG ONTARIO, 2007 ONCA 814

Facts: The workers at the Casino run on the band land tried to unionize in order to fight work conditions. The band council tried to pass a labour code that banned unions on band land.

Issue: Is the band council allowed to regulate labour relations code?

Held: Not allowed to create their own labour code.

Reasons: The organization of work at that level of generality is a feature of every human society (this right did not exist pre-contact).

HUMAN RIGHTS AND LABOUR LAW

S48(12)(j) of the Labour Relations Act gives arbitrators the express statutory jurisdiction to apply and interpret human rights code in an arbitration setting. This made labour arbitration as important legal forum for human rights jurisprudence as the human rights tribunal.

CHRONOLOGY OF HUMAN RIGHTS AND LABOUR LAW IN CANADA

Important steps:

1. *1984: Abella Report*: **Four recommendations**:
    i. transplant the duty to accommodate from American into Canadian law;
    ii. broaden the definition of discrimination to not only include direct or intentional discrimination but also indirect or non-intentional discrimination;
    iii. The concept of systemic discrimination (*CNR*); and
    iv. Recommendation Employment equity
2. *1985: O'Malley & Bhinder* (adopts first two Abella Recommendations) but didn't do a good job of flushing out what the duty to accommodate meant
3. *1990: Central Alberta Dairy Pool*: The SCC gave a lot of detail to the duty to accommodate including what undue hardship meant (1 flaw: it created different tests for direct and indirect discrimination)
4. *1992: Renaud*: Unions and the complainant as well as other employees also have a duty to assist the accommodation process along with the employer (the accommodation process is a multi-party process). A union can participate in two ways: 1. It can agree to a discriminatory practice or 2. It can unreasonably block an accommodation suggestion
5. *1999*: *Meiorin*: The leading case on the accommodation duty in Canada today: There is no direct or indirect discrimination. There is just one test, the *Meiorin Test*.

ONTARIO (HUMAN RIGHTS COMMISSION) V SIMPSONS SEARS LTD, 1985 SCC (O'MALLEY)

Facts: A department store employee objected to having to work Friday night and Saturday mornings for religious reasons (she was a seventh day Adventist) even though the employer had legitimate reasons for requiring her to work and did not intend to discriminate. The policy of the store was that any employee must be available to work any shift. The store offered to move her from a full-time to a part-time even though they could have just changing her shifts because that would have been unfair to other employees. She filed a human rights complaint.

Issue: Was it discriminatory even though it was not intended?

Ratio: (adopts Abella's recommendation) Intention is not required for a finding of discrimination. There is also a duty to accommodate so long as it does not impose undue hardship.

Held: The policy was discriminatory. The employer had to reschedule her as long as it did not impose undue hardship on them.

Reasons: Direct discrimination is when an employer adopts a rule that is on its discriminatory (e.g. no women). Adverse discrimination is when an employer adopts a rule that is on its face neutral but has adverse effects on the employee. The employee must establish a prima facie case of the discrimination. Onus is on the employer to show they have taken all reasonable steps to accommodate. Ms. O'Malley had been discriminated against on the basis of religion even though the employer did not intend to the effect was discriminatory.

BHINDER V CNR, [1985] 2 SCR 561 *LEADING CASE FOR UNDUE HARDSHIP FACTOR: SAFETY

Facts: Binder would be working in an office and would oversee properties that were under construction or being knocked down. Occasionally Binder had to go to construction sites to ensure the work was going according to plan. Binder was an observant seek. Binder argues it would be against his faith to wear a hardhat while on site as he was required by federal regulation. CNR said he had to wear the hardhat and if he couldn't then he couldn't work there. He was dismissed.

Held: Bhinder lost.

Note: Bhinder was overruled 5 years later.

CENTRAL ALBERTA DAIRY POOL V ALBERTA (HUMANS RIGHTS COMMISSION), [1990] 2 SCR 489 *GAVE BREADTH AND COHERANCE TO THE DUTY TO ACCOMMODATE

Facts: Mr. Christie worked a dairy pool in Red Deer. He belonged to a small Christian sect which had different holidays than most Christian faith. The Central Alberta Dairy Pool was shut down on Sundays for religious reasons. It was therefore very busy on Mondays. Several of Mr. Christie's holidays fell on Mondays. He asked permission to celebrate one of these holidays. His employer said no but he took the day off anyways and was fired. This went all the way to the SCC.

Ratio: The employer has to take every reasonable step to accommodate an employee under a human rights protected ground unless it would cause the employer undue hardship.

Held: The CADP had a duty to accommodate

CENTRAL OKANAGAN SCHOOL DISTRICT NO. 23 V RENAUD, [1992] 2 SCR 970

Facts: Mr. Renaud was a junior employee and a custodian. This was a unionized workplace. He worked afternoon and evenings. He belonged to a Christian sect that observed the sabbath on Friday evening. The employer was prepared to say he could move to the morning shift, but the union said no – we go by seniority and Mr. Renaud doesn't have enough seniority to move to the morning. Renaud brought a human rights case against both the union and the employer.

Issue: Do unions have to accommodate?

Ratio: An employee can expect a reasonable accommodation but not a perfect accommodation.

1. The duty to accommodate applies to unions, employees, and employers
2. Co-operation is an important feature of the duty to accommodate
3. The duty to accommodate is the single most important Human Rights tool.

Held: In-favour of Renaud.

Reasons: Religion is a protected ground. No other possibility was available. The union should have waived seniority in order to accommodate. Moving a more senior employee to the morning is not undue hardship. Human rights law has a quasi-constitutional status and trumps the collective agreement. An employer can only breach the collective agreement for Human Rights Law (duty to accommodate) if no other option is possible.

DUTY TO ACCOMMODATE

The duty to accommodate covers: gender, age, religious beliefs, family status, and disability (greatest impact). It has been part of the law since 1985 (*O'Malley*). An employee looking for an accommodation is entitled to a reasonable accommodation not a perfect accommodation. There is a balance between the employee's right to accommodation and the employer's right to productive workplace.

1. Human rights: quasi-constitution
2. Discrimination can be unintentional or intentional
3. The duty to accommodate is a significant obligation under human rights
4. Rests on the shoulders of Employers, unions, employee seeking accommodation, and fellow employees
5. Human Rights should be interpreted broadly (duty to accommodate) and exceptions (undue hardship) to human rights should be interpreted narrowly

The definition of accommodation: Employers and unions much make every reasonable effort short of undue hardship to accommodate for an employee who falls under a protected ground of discrimination.

BRITISH COLUMBIA (PUBLIC SERVICE EMPLOYEE RELATIONS COMMISSION) V BCGSEU, [1999] 3 SCR 3 (MEIORIN) *MOST IMPORTANT DUTY TO ACCOMMODATE CASE

Facts: A woman forest firefighter was dismissed after failing an aerobic physical fitness test four times. Evidence was provided that women could not meet the standards required and that the standard required was greater than necessary to complete the job. Before dismissal she had always received good reviews.

Issue: Is the aerobic standard unjustifiably discriminatory within the meaning of the BC *HR Code*?

Ratio: The onus is on employers to ensure the practices and policies comply with Human Rights Standards. Unified approach now – no distinction between direct or indirect discrimination. The employer must establish the following three step test for determining if a prima facie discriminatory standard is a BFOR on a balance of probabilities:

1. that the employer adopted the standard (rule or practice) for a purpose rationally connected to the performance for the job; *typically this is a pass*
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; *typically this is a pass*
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Held: The test was discriminatory and not a BFOR.

Reasons: Ms. Meiorin established *prima facie* discrimination and the Government failed to show that the test was a BFOR. 1. The Government's purpose in the test was to identify those who were capable of preforming the forest fire fighting tasks. 2. The government acted in good faith and did not intend to discriminate. This was shown by hiring researchers. 3. The government has not established that it would suffer undue hardship if a different standard was used (tried to rely on safety). The procedure used by the researchers was problematic because it did not distinguish between gender of test subjects nor did it identify minimum standards necessary.

UNDUE HARDSHIP (EXCEPTIONS TO DUTY TO ACCOMMODATE)

There are seven factors for undue hardship (in order of most effective to defense to least from *CADP*):

1. Safety (employers are most likely to use this factor),
2. Impact on collective agreement (Only breached if there is no other reasonable accommodation)
3. Legitimate operational requirements of workplace (*Hydro Quebec*),
4. Size,
5. Interchangeability of workforce,
6. Employee morale (hardly ever wins),
7. Cost (cost will only amount to hardship if it affects the financial foundations of the company).

GOHM V DOMTAR

Facts: Ms. Gohm is a laboratory technician. She applies for a job at Red Rock. In the job ad it says she must be able to work Saturdays. She did not indicate that she could not. During the probationary period she was told she would be hired full time and was informed she would have to work a Saturday every 6 weeks but for religious reasons she couldn't. The employer tried to accommodate but the other employees refused to work one Saturday in five. Another option was that she worked on Sundays but gets paid normal time. The union said she had to get paid time and half. The employer then dismissed her.

Issue: Was this discrimination?

Held: The employer had a duty to accommodate. The employer and the union were equally liable.

Reasons: They just changed the point where the discrimination occurred. The employer was still required to accommodate. Working weekdays only: employee moral (bad reason); Sundays and time and a half: cost (not high enough); Sundays at normal time: collective agreement (there are other options so this is cannot be used).

FOUR IMPORTANT INVESTIGATIVE STEPS

Modify and re-bundle positions:

1. Can the employee do all aspects of their current job?
2. Can the employee do core modified aspects of their current job?
3. Can the employee do all aspects of some other job?
4. Can the employee do core modified aspects of some other job?

SENIORITY

Rule: Seniority trumps unless there is no other way to reach accommodation and there is no significant impact on the seniors' job (*Renaud*).

PROOF AND ONUS

The onus initially rests with employee and union to show discrimination (*Moore*, 2012 and *Bombardier*, 2015 re-establish *Andrews*):

i. Proof of differential treatment
ii. Proof of disability/human rights ground
iii. Proof of link between disability and need of accommodation

Onus now shifts to employer and the three-step test from *Meiorin*.

ANDREWS V LAW SOCIETY OF BRITISH COLUMBIA, [1989] 1 SCR 143

Ratio: established a three-stage test for determining when there was a breach of s15(1) of the charter. To prove the breach, the plaintiff had to show that the impugned legislation or other governmental action did all of the following: that it: (1) made a distinction, (2) which resulted in a disadvantage, (3) on the basis of an enumerated ground set out in section 15(1) or an analogous ground – that is, a personal attribute which is immutable.

MOORE V BRITISH COLUMBIA (EDUCATION), 2012 SSC 61

To demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once this is proven the burden shifts to the respondent to justify the conduct within the framework of the exemptions available under human rights statues. This re-endorses the *Andrews* test.

EQUALITY

Human rights legislation now protects a wide range of grounds such as family status, marital status, sexual orientation, and criminal record.

VRIEND V ALBERTA, [1998] 1 SCR 493

Facts: Mr. Vriend worked for King's College as a lab coordinator. After an inquiry from the president he disclosed he was gay. A year later he was dismissed after the college implemented a policy disapproving of homosexuality. Mr. Vriend tried to file a complaint with the Alberta Human Rights Commission under the *Individual's Rights Protection Act* but failed because it did not include sexual orientation. He then sued for a declaration that the omission of sexual orientation from the IPRA contravened section 15 of the Charter (which included sexual orientation).

Issue: Does the omission contravene section 15 of the Charter?

Ratio: There was sufficient legislative and social consensus that not only is sexual orientation under s15 but Human Rights Codes cannot be under inclusive of the grounds listed under s15.

Held: Sexual orientation should be a protected category under the IPRA.

Reasons: The province is subject to the Charter nor is the charter limited to positive encroachments. Identical treatment does not always constitute equality. This means that the fact that homosexuals enjoy protection under the current IPRA from other forms of discrimination does not mean they are not being discriminated against in other ways. The legislation purports to protect all individuals from discrimination in Alberta and thus by excluding homosexuals from being a protected category they are failing to do this.

Note: Political opinion is protected under UDHR and in 8 or 9 provinces but not Ontario or s15. If someone said they were discriminated against based on Political Opinion in Ontario is there a winnable argument that s15 should include this as a new analogous ground and therefore Ontario needs to include it? Yes UDHR includes this and therefore so should the charter because it reflects core Canadian values.

SEX DISCRIMINATION AND HARRASSMENT

BROOKS V CANADA SAFEWAY, [1989] 1 SCR 1219

Issue: Is pregnancy related discrimination part of sex or gender discrimination?

Ratio: Discrimination based on pregnancy is a form of sex discrimination. We are to interpret human rights broadly and the exception narrowly.

Held: It is a form of sex discrimination.

Reasons: Pregnancy may only occur to some women but since only women will get pregnant it must be part of the definition of gender definition.

JANZEN V PLATY ENTERPRISES LTD, [1989] 1 SCR 1252

Facts: The two complainants were waitresses at a restaurant. A male co-worker repeatedly kissed and touched them and made sexual advances toward them, despite their objections. After complaining to the manager, the sexual conduct stopped but they were verbally criticized and abused by the manager and the worker. They quit and filed a complainant under the Manitoba Human Rights Code.

Issue: Is sexual harassment in the workplace sex discrimination?

Ratio: Discrimination does not require identical treatment of all members of the affected group. Sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex.

Held: Workplace sexual harassment discrimination comes within the definition of sex discrimination.

Reasons: For sex discrimination to exist, gender does not need to be the sole ingredient in the discriminatory conduct. Not all members of the affected group need to be treated identically. Only a woman could be subject to sexual harassment from a heterosexual male.

SHAW V LEVAC SUPPLY LTD (1991), 91 CLLC 17,007 (ONTARIO BOARD OF INQUIRY)

Facts: Shaw worked as a bookkeeper for Levac for 14 years. She was frequently teased by a male co-worker about her weight and her speech. Her complaints to management went unanswered.

Issue: Does saying someone is unattractive repeatedly as sexual harassment?

Ratio: Stating someone is not attractive repeatedly in the workplace is sexual harassment.

Held: Sexual harassment.

Reasons: He knew or ought to have known that these gibes were a sexual put down within the scope of s 6(2) of Ontario *Human Rights Code*. It does not matter that this put downs could also be targeted at males.

RACIAL DISCRIMINATION

MCKINNON V ONTARIO (MINISTRY OF CORRECTIONAL SERVICES NO 3), [1998] OHRBID NO 10

Facts: McKinnon (a native man) worked for the MCS and claimed he and his wife had been discriminated against on the basis of race. He had been subjected to slurs based on his race from his colleagues. His wife was discriminated against based on her marriage.

Held: The ministry has infringed the complainant's right to equal treatment. There was a wide range of remedies order to accommodate Mr. McKinnon, including the difference in pay between normal pay and what he received on disability, there was a requirement for an apology, that some people move to a different workplace, that his work record be amended so his absences would not be held against him, and there had to be racial harassment training given to all staff.

DISABILITY

Most cases that go to labour arbitrations are based on disability (85-90%). Disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

COMINCO LTD. V. U.S.W.A., LOCAL 9705

Facts: As part of a tobacco cessation program Caminco banned tobacco from their property. The property was quite large. The union filed a complaint.

Held: Employer has to accommodate.

Reasons: Tobacco addiction is a disability. The cessation program is fine. The banning in the factory is fine but banning on the property is too much.

SHUSWAP LAKE GENERAL HOSPITAL V BRITISH COLUMBIA NURSES' UNION (LOCKIE GRIEVANCE), [2002] BCCAAA NO 21

Facts: Ms. Lockie has been employed as an RN at the Shuswap Lake General Hospital since May 1994. In April 1997 she was diagnosed with bi-polar mood disorder. She has experienced several episodes since then. One was at work (three close relatives had died within a short period of time) and she made a medication error. She performed well at work except when there were acute stressors. Three more relatives died within a short period of time and made another medication error. No one was harmed either time. Her psychiatrist said she was fit to return to work, but her employer wouldn't let her. The employer sought an assurance she wouldn't have a replace but BPM cannot be accurately predicted. The union says this is discrimination based on mental disability.

Issue: Would the continued employment of the grievor cause the employer undue hardship (in this case safety was being argued)?

Held: Discriminatory. She was put back to work with the conditions listed below.

Reasons: Applying the *Meiorin* principles there is *prima facie* discrimination because the employer's refusal to employ Ms. Lockie is directly link to BPM. The employer failed to establish that the risk to patients was unreasonable or serious. The grievor is observed by her co-workers (who offered to do this) for 30 minutes before the shift and they would be able to observe if she was having an episode. It is not unreasonable to require the co-workers to ensure she is okay to work. Failed the third step of *Meiorin*.

SUNNYBROOK HEALTH SCIENCES (2016)

Facts: A nurse stole narcotics at work for over two years. She was terminated. She denied her addiction but the hospital knew by the time the arbitration started that she had an addiction and she stated was seeking treatment.

Ratio: An addiction is a disability and must be accommodated but the employee must try to become sober so they can be a productive employee.

Held: The hospital failed to accommodate her addiction which is a recognized disability.

Reasons: Once the employer realized it was an addiction the employer had an obligation to take all reasonable steps to accommodate her.

HYDRO-QUEBEC V SYNDICAT DES EMPLOYEES DE TECHNIQUES PROFESSIONNELLES ET DE BUREAU D'HYDRO-QUEBEC SECTION LOCALE 2000 (SCFP-FTQ), 2008 SCC 43

Facts: The complainant worked for Hydro-Quebec. During her employment she had many illnesses (physical and mental) and missed 960 days of work over the last seven and a half years. At the time of her dismissal in July she had been absent since February. Her psychiatrist said she would be unable to attend work for indefinite period of time until the work-related dispute was solved. The employer informed her she was dismissed due to her inability to work on a regular and reasonable basis and that no improvement in attendance was expected.

Issue: Does this impose undue hardship on the employer?

Ratio: Undue hardship does not require proof that it is impossible to integrate an employee who does not meet a standard but instead can take many forms (must balance duty to accommodate and the employer's right to a productive workplace). The goal of accommodation is a human rights tool to make sure an employee who is able to work can do so. There is a new undue hardship factor: legitimate operational requirements of workplace (an employer will expect to get productive work from an employee that they are accommodating).

Held: Appeal allowed. Dismissal of employee upheld.

Reasons: The employer discharged their duty to accommodate by attempting to adjust the employee's duty. However, the absenteeism continued.

SYSTEMIC DISCRIMINATION

Systemic discrimination refers to the operation of a web of factors which lead to the under-representation of particular groups in the workforce, or their over-representation in low-level jobs.

CNR V CANADA (HUMAN RIGHTS COMMISSION), 1987 SCC (ACTION TRAVAIL DES FEMMES)

Facts: CNR's workforce was only 0.7% women in their St. Lawrence Region. In Canada, women represented 13% of the blue-collared workforce. However, women only represented 5% of the applicant pool. CNR had not made any real effort to inform women in general of the possibility of filling non-traditional positions within the company. CN knew that is policies, although not discriminatory in intent, were in fact discriminatory. A group of women in Montreal launched a complaint with the human rights

tribunal stating that CNR had that practices that prevented women from working in non-tradition blue-collared jobs.

Issue: Were there discriminatory practices?

Ratio: Systemic discrimination is defined as the exclusion of disadvantaged groups by fostering the belief that there are natural forces that prevent certain types of people from doing certain jobs. Broad remedies are acceptable to end workplace discrimination. Employment equity is important.

Held: CNR systemically discriminated against women. CNR must implement an equity program (for every 4 hires in the blue collared job, 1 must be a woman until atleast 13% was women.

Reasons: An employment equity program works in three ways: 1. Renders any further discrimination pointless; 2. Makes it more difficult to ascribe stereotypes to a group by proving they can do the work as well; 3. It creates a critical mass of the targeted group in the workplace and eliminates tokenism.

PAY EQUITY

Pay Equity legislation introduced in the 1950s did not address the issue that most women worked in lower-paying positions. Most provinces then enacted legislation that required employers to have pay equity between female and male job categories.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 204 V ONTARIO (AG), 1997 ON

Facts: A 1996 legislative amendment (schedule J) capped existing proxy pay equity adjustments (a method used to compare female to male salaries in female dominated roles in the public sector) at 3% of the employer's 1993 payroll and prohibited any further use of it. As a result, the women affected only had 22% of their pay differential corrected. A union representing 5,200 Ontario public sector employees argued that Schedule J violated section 15(1) of the *Charter*.

Issue: Is schedule J invalid?

Held: The application for a declaration of the invalidity of Schedule J was granted.

Reasons: The group targeted by schedule j was a disadvantaged group. The government had to justify under section 1 (failed). The government made the choice to implement the *Pay Equity Act* and therefore must ensure equal pay. Schedule J denies proxy sector women the chance to obtain equal pay.

WALDEN V CANADA (SOCIAL DEVELOPMENT), 2007 CHRT 56

Facts: The complainants are a group of predominately female nurses who work as medical adjudicators, alongside mostly male doctors (known was medical advisors), in the CPP Disability Benefits Program. The nurses receive worse compensation and assert it is discrimination as they do mostly the same work. A pay equity report said the doctor's work was only about 15% different but they got paid 50% more. The doctors are treated as health practitioners while the nurses are not.

Issue: Is this treatment contrary to section 10 or section 7 of the *Canadian Human Rights Act*?

Ratio: Pay equity is equal pay for work of equal value.

Held: Practices are discriminatory.

Reasons: A discriminatory practice is defined under s7 as "adverse differentiation on the basis of a prohibited ground of discrimination." The complainants must prove they were being adversely treated on the basis of their gender. The Respondent's argued that the female nurses (medical adjudicators) work should be compare to the male nurses' work and compensation. This does not work as they are part of the same female dominated group and are therefore subject to any discriminatory practices. The appropriate comparator group is the male advisors (doctors). The Respondents' have not explained the different in compensation nor did they show that paying them the same would cause undue hardship (federal government can afford to pay the female nurses a comparative amount to the male doctors).

NFLD (TREASURY BOARD) V NFLD & LAB ASSN OF PUBLIC AND PRIVATE EMPLOYEES (NAPE), 2004 SCC 66 *LEADING CASE FOR UNDUE HARDSHIP COST FACTOR

Facts: A pay equity settlement had been granted to female workers in Newfoundland under s15(1) was delayed by a statute because Newfoundland suffered from a financial crisis.

Ratio: The cost has to be so high that it would threaten the financial stability of the employer.

Reasons/Held: The act was discriminatory but was justified under s1 because the government was in the midst of a sever fiscal crisis. The government could either pay the pay equity award or close other government agencies such as hospital.

THE FUTURE OF INEQUALITY

FAMILY STATUS AND CAREGIVING RESPONSIBILITES

Until the early 1990s Family Status was given a very narrow application unlike the factors which were given a broad application of other human rights grounds.

CANADA (ATTORNEY GENERAL) V JOHNSTONE, 2014 FCA 110

Facts: Ms. Johnstone has been an employee of the CBSA since 1998. Her husband also works for the CBSA as a supervisor. They have two children. When returning from her first maternity leave Ms. Johnstone asked to be given a static schedule (normally they were rotating and since her husband was rotating as well, child care would be an issue). CBSA accommodated this but switched her to part time. She accepts this but then filed a complaint under s7 and s10 of the *Canadian Human Rights Act*.

Issue: Are child care responsibilities within the meaning of family status?

Ratio: The test (*Johnstone Test*) for discrimination on the prohibited ground of family status resulting from a childcare obligation is: Take a broad and liberal approach to family status:

1. That a child is under his or her care and supervision;
2. That the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice;
3. That he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible;
4. That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Held: Childcare responsibilities are within the meaning of family status. Ms. J won.

Reasons: 1. Ms. J had children under her care; 2. Her and her husband could not leave the toddlers alone without supervision during their working hours breaching their legal obligations; 3. In this case, the employee sought out reasonable alternatives, but they were unable to fulfil her parental obligations (normal day cares were not open during non-business hours, family members were unavailable, and their house was not big enough for a live in nanny); 4. The interference with her childcare obligations was more than trivial or insubstantial. No *bona fide* occupational requirement was submitted.

QUESTIONS OF SCOPE, COVERAGE, AND CLASSIFICATIONS

ROBICHAUD V CANADA (TREASURY BOARD), [1987] 2 SCR 84

Facts: An employee of the Department of National Defence is sexually harassed by her supervisor and files a human rights complaint.

Issue: Is an employer responsible for unauthorized discriminatory acts of its employees in the course of their employment under the *Canadian Human Rights Act*?

Ratio: Employers are responsible for unauthorized discriminatory acts of their employees conducted in the course of employment and expected to take all reasonable steps to prevent harassment at work. In the course of employment is to be interpreted to mean in some way related to the employment.

Held: The employer is responsible.

Reasons: By its very words, the Act seeks to give effect to the principle of equal opportunity for individuals by eradicating invidious discrimination. An intention to discriminate is not required. The employer is in the best position to prevent sexual harassment at work.

UNITED STEELWORKERS OBO OTHERS V TIM HORTONS AND OTHERS (NO 2), 2015 BCHRT

Facts: The United Steelworkers filed a representative complaint on behalf of a group described as all workers from the Philippines currently and formerly employed through the temporary foreign work program at the Tim Hortons franchise in Fernie BC and also against Tim Hortons Inc. USW allege the

respondents discriminated against them contrary to s13 of the *Human Rights Code* because of the Respondent's race, ancestry and place of origin. The Respondents say the USW does not have the right to represent this group and deny all allegations. Tim Hortons Canada said it should only be against the individual franchise owner.

Issue: Can a franchisor be responsible for the discriminatory actions of its franchisees?

Ratio: The test for a franchisor liability has not yet been finalized but if the franchisor exercises sufficient power over the franchisee they will likely be liable.

Held: Application to dismiss the complaint denied.

Reasons: Tim Hortons Canada is liable too because they played a leading role in creating and endorsing a nationwide anti-harassment policy and in hiring the Filipino stores that it could be co-liable if discrimination was found.

MCCORMICK V FASKEN MARTINEAU DUMOULIN LLP, 2014 SCC *CONTROL TEST

Facts: A law firm partner in BC was required to retire at the age of 65 (after signing an equity agreement which stated he would retire at 65) filed an age discrimination complaint against his law firm (under s13(1) of the *BC Human Rights Code*).

Issue: Is the relationship between Mr. McCormick and Fasken an employment relationship?

Ratio: The test for determining if it is an employment relationship is determining who is in control for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations (*control/dependency test*).

Held: The complaint was dismissed by the SCC. No employment relationship.

Reasons: Mr. McCormick was in more control of, then subject to workplace conditions as an equity partner he had an equal vote in policies, practices and remuneration.

DRUG TESTING

ENTROP V IMPERIAL OIL LTD (2000), 50 OR (3D) 18 (ONCA)

Facts: In a previous disaster involving an Imperial Oil ship, Imperial Oil was accused of having a drunk captain. As a result, Imperial Oil said that in order to work in a safety sensitive position the employee must have worked in spent 2 years in rehab and been dry for 5 years after. The respondent worked for the appellant in a safety-sensitive position. As part of his position he had to disclose his previous alcohol problem to management. After disclosing they reassigned him to a different position. He filed a complaint with the Ontario Human Rights Commission claiming they discriminated against him in his employment based on a handicap contrary to s5(1) of the *Ontario Human Rights Code.* Imperial Oil later refined the policy and Entrop was reinstated to his position after a series of tests with certain conditions.

Issue: Is the policy contrary to s5(1) & does the drug and alcohol testing under the policy violate the code?

Ratio: There is a difference between mandatory drug testing (if there is someone with an addiction who caused an accident) and random drug testing (can be used to ensure that an addict is clean for a set period of time). The use of these have to be calibrated in specific circumstances. They have to be justified in the specific circumstances on the basis of the *Meiorin Test*.

Held: Appeal allowed for three issues. Policy struck down.

Reasons: The policy was implemented after other oil companies experienced many accidents due to drug and alcohol related problems. The stated objective was to minimize the risk of impaired performance due to substance abuse. This policy targeted safety-sensitive positions with random tests but also applied to others if the situation warranted it. Entrop still must satisfy step 3 of *Meiorin* – the duty to accommodate those who test positive. They do not satisfy this step for alcohol or drug testing in its current form or for requiring the disclosure of substance abuse history. The sanction for alcohol testing is too severe – it should not be firing. There was no reasonable justification for Entrop's removal even if his pay remained the same because he had been clean for four years.

STEWART V ELK VALLEY COAL CORP, 2017 SCC 30

Facts: A cocaine addicted employee who worked in a safety sensitive job was terminated.

Issue: Was he terminated because of his addiction or because he breached the drug and alcohol policy by not disclosing his addiction?

Held: Termination upheld. He was terminated for breaching the drug and alcohol policy.

Reasons: He was not terminated because of the addiction but rather because he violated the company's drug and alcohol policy which required disclosure of addiction issues.

COMMUNICATIONS, ENERGY & PAPERWORKERS UNION V IRIVING PULP & PAPER, 2013 SCC

Facts: Iriving pulp and paper is a large pulp and paper plant. It is inherently a safety sensitive workplace. The employer decided to bring in mandatory drug testing for all employees in all instances.

Ratio: Employer must demonstrate there is a significant problem in the workforce in order implement a workforce wide drug test.

Held: The use of the testing for all employees was overly broad.

Reasons: There was evidence of only 8 instances in 15 years of alcohol consumption at work did not reflect that there was a significant alcohol problem and a need to impose this test on everyone.

THE RIGHT TO PRIVACY AT WORK

The *Personal Information Protection and Electronic Documents Act*, SC 2000 c 5 governs information management. S5(3) requires that information may only be collected, used, and disclosed for purposes that a reasonable person would consider appropriate and the purposes for which it is being collected must be disclosed to the employee at the time of collection and any later uses for other purposes require further consent by the employee.

R V COLE, 2012 SCC 53

Facts: A high school teacher was charged with possession of child pornography and unauthorized use of a computer. He was allowed to use the laptop for personal purposes. While performing routine maintenance activities a technician found a hidden folder with nude photos of an underage student. The technician notified the principal and copied the photos to a disk. The principal seized the laptop and the disk and handed them over to the police who reviewed them without a warrant.

Issue: Was this evidence admissible and did the employer handle the issue while?

Ratio: Whether someone has a reasonable expectation depends on the totality of the circumstances. Four lines of inquiry guide this test:

1. An examination of the subject matter of the alleged search;
2. A determination as to whether the claimant had a subjective interest in the subject matter;
3. An inquiry into whether the claimant had a subjective expectation of privacy in the subject matter;
4. An assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances.

Held: Excluded.

Reasons: The information was close to the biographical core protected by s8 of the *Charter*. The school's policy stated that teachers should not assume the files were private but, expectation was reasonable.

JONES V TSIGE, 2012 ONCA 32

Facts: Tsige looked into Jones' banking information, which she had access to because they worked at the same bank, without her permission. They did not know each other however Tsige became common law with Jones' former husband. Jones' claims damages for invasion of privacy.

Issue: Does Ontario law recognize a right to bring civil action for damages for invasion of personal privacy?

Ratio: There is a right of action for intrusion upon seclusion. The key features for this cause of action are: 1. The defendant's conduct must be intentional which includes reckless; 2. The defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; 3. A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Held: $10,000 punitive damages

Reasons: Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. As per the *Charter* this includes informational privacy. Tsige's actions were deliberate and prolonged.

EMPLOYMENT RELATIONSHIP AT COMMON LAW

EMPLOYMENT LAW PRINCIPLES

1. Employment statutes apply equally to all workplaces in Ontario but are particularly important to non-unionized workplace at the lower end of the workplace totem pole (*Employment Standards Act ON, Pensions Legislation ON & CA, Occupational Health and Safety Act, Workers Safety and Insurance Act, Human Rights Code*)
2. The law has stepped in in some fashion to try to limit the fundamental inequalities in the employment relationship (it has been endorsed by the SCC that there is an inherent inequality and legislation is meant to protect the vulnerable employee)
3. There is a difference in law between a contract of services and contract for services:
    a. A contract of services is an employment contract (the law assumes this is between unequals)
    b. A contract for services is between a company and an independent contractor (the law assumes this is between two equals)
4. What are the principle legal obligations that an employer has to an employee (not exhaustive)?
    a. An employer is required to pay remuneration (wages)
    b. An employer is responsible for the employees conduct (vicarious liability)
    c. An employer is responsible for providing a safe working environment
    d. An employer has a general duty of reasonableness in how it treats the employee
5. What are the principle legal obligations that an employee has towards an employer?
    a. The duty to obey: There are exceptions
        i. No duty to obey if the requirement is duty (unless the job is inherently dangerous such as a police officer)
        ii. No duty to obey if the command is illegal
    b. The duty to exercise care and skill
    c. A duty to act in good faith and fidelity
    d. Not to engage in wilful misconduct

DIFFERENCES BETWEEN EMPLOYMENT LAW AND LABOUR LAW

1. Employment law is the law of the non-unionized employee and labour law is the law of the unionized employee or want to be unionized (all employment statutes apply in both but more important in employment because there is no collective agreement)
2. The central contractual feature is the individual contractual agree in employment law but in labour law it is the collective agreement.

3. In employment law there is rarely ever a built-in grievance and arbitration clause. Generally, you sue in court. In labour law there is a mandatory grievance and arbitration clause imposed by legislation in the collective agreement.
4. In employment law there is no right to strike. In labour law there is a limited right to strike.
5. In employment law if you sue your employer for wrongful dismissal and you win you just get damages. In labour law reinstatement is an embedded common remedy ordered by arbitrators.
    a. Exception: if you are a non-unionized employee and file a human rights complaint before HRT in a discriminatory context the tribunal can order reinstatement. However, it is rare because the relationship is often damaged.
6. In employment law there is a range of financial damages available to an employee who has been dismissed without cause (compensatory for lost wages, aggravated damages for mental anguish or punitive damages if the employer has really behaved badly). In labour law there are no aggravated damages and they do not necessarily get back pay with re-instatement. If the reason they were fired was because of human rights breach there can be human rights damages as well. This is less than employment law.

CONTRACT OF EMPLOYMENT AT COMMON LAW

1. A contract of employment in Canada is always a personal service contract. The employer is paying the employee for personal work. The employer is in a position of control. They can direct how the work is done and what work is done. They can discipline if the work is not done according to reasonable expectations. The common law is sensitive to issues of personal freedom. A common law judge will not grant an order of specific performance (because the employee is vulnerable). Some employment contracts will contain restrictive covenants.
2. The power imbalance. Employment contracts are almost always drafted by the employer. Therefore, judges will read employment contracts strictly against the employer and will strike down terms that seem unreasonable. If there is any ambiguity it will be read against the employer (*contra proferentem* rule: ambiguities in the written terms of a contract are to be strictly interpreted against the interests of the drafter)
3. The contract is for an indefinite period of time unless there is a time limited provision in it.
4. There are many examples of employment contracts which have not been reduced to writing so the common law will supplement it and add anything it thinks it is reasonable where nothing is said.
5. You cannot contract out of the Employment statues. They create a minimum floor.
6. Implied terms: Courts will read in certain common law terms (e.g. reasonable notice of dismissal)

CHRISTIE V YORK CORP, [1940] SCR 139

Facts: Mr. Christie is black and was refused service at the respondent's bar on the sole basis that he was black.

Ratio: In the absence of any statutory requirement there is no limitation in the freedom of contract who a merchant may choose to deal with.

Held: The respondent was within his rights.

Reasons: The only law governing this was freedom of commerce.

WHO IS AN EMPLOYEE?

There are three types of workers:

1. Employee
2. Dependent Contractor
    a. Still independent but not a contractual equal to the employer so gets treated like an employee in some circumstances.
3. Independent Contract
    a. Contractual equal to employer

OTTO KAHN-FREUND, "SERVANTS AND INDEPENDENT CONTRACTORS" (1951)

The traditional test (the control test) was that someone was a servant if the master could determine the what and the how of services. If a master could only determine the what not the how than the person was and independent contractor.

LANGILLE "BEYOND EMPLOYEES AND INDEPENDENT CONTRACTORS" (1999)

The new control test comes from *Montreal v Montreal Locomotive Works*: 1. Who has control of the work and how it is to be performed? 2. Who owns the tools of production; 3. Who benefits from the chance of profit; 4. Who bears the risk of loss.

These 4 factors in fact boil down to two: 1. Whether the worker is controlled by the employer/client (step 1 of *Montreal Locomotive Test)*; and 2. Whether the worker is economically independent from the employer, that is, has the characteristics of an independent businessperson (in particular if they have the opportunity for profit or loss) (steps 2,3,4 of *Montreal Locomotive Test*).

Examples: Publishing houses – they outsource a lot of work to contractors who work as editors or proof readers who work at home. Typically, these people are dependent on one publishing company and since they are independent contractors, they have no holiday pay and paid little.

Truck drivers – they own their own trucks and are hired by companies to move material from point A to B and bid on this work. They have no vacation or sick pay. These are not classic employees but are not entrepreneurial people either. They are dependent contractors and have the same status as an employee.

CARTER V BELL & SONS (CANADA) LRD, [1936] OJ NO 203 (CA)

Facts: Mr. Carter had originally been hired as a mercantile agent on commission. The British company moved him to Winnipeg where he supervised a number of agents whom he trained. He earned a

percentage of their commission and any commission on a sale that was entirely his. He was allowed to do as he pleased by the British company except they had to approve all agents.

Issue: Is a sales agent an employee or an independent contractor? Was he entitled to reasonable notice?

Ratio: The law will look closely at the actual status and whether there is a dependent relationship. They will pull back the corporate vail and not let form dictate status.

Held: The plaintiff is awarded $750. He was a dependent contract.

Reasons: Although there was no master-servant relationship Mr. Carter was entitled to reasonable notice as it was implied in the agreement. The choice of sub-agents and their training is indicative of a more permanent relationship. Further, the plaintiff was endeavoring to expand the defendant company's territory and was moved to a new location. The work he did was at the direction of the company even though he had some flexibility.

MCKEE V REID'S HERITAGE HOMES LTD, 2009 ONCA 916

Facts: McKee signed an agreement with RHH on behalf of her company to sell and advertise 69 homes for a fee. The agreement included a termination clause as well. After these 69 homes McKee kept selling homes but a lesser fee as she no longer did the marketing. RHH started providing her with stationary and forms for selling the houses and gave her the title sales manager. She hired her own subagents because she was so busy with work from RHH. There was a 30-day termination clause within the sales agreement. She was always paid through her company and it was based upon commission. Reid died and his son in law succeed him. They couldn't come to an agreement and McKee sued for constructive dismissal.

Issue: Was McKee an employee or an independent contractor?

Ratio: There is a category between employee and independent contractor. This category is dependent contractor. It is for individuals who are contractors but are also in a position of economic vulnerability.

The successor the *Montreal Locomotive* Test is the *Sagaz Belton* test (none of these items are determinative – always look at the entire picture and whether there is a sufficient degree of dependence such that a person is more akin to the dependency of an employee than an independent contractor):

1. Whether or not the agent was limited exclusively to the service of the principal;
2. Whether or not the agent is subject to the control of the principle;
3. The degree of financial risk taken by the worker;
4. The degree of responsibility for investment and management held by the worker;
5. The worker's opportunity for profit in the performance of his or her tasks.

Held: McKee was an employee.

DOWNTOWN EATERY LTD V HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, 2001 ONCA

Facts: In 1992 Alouche was hired to work as a manager at For Your Eyes only, one of two-night clubs owned by the respondents. His contract only mentioned FYEO but said that he would receive the benefits of their sister organization. His cheques were from Best Beaver Management Inc (a company controlled by the Respondents). He received a discipline notice in May and was terminated in June. In October he started an action against Best Beaver for wrongful dismissal. He was awarded money at trial but was never paid. Two sheriffs seized the money from FYEO and Downtown sued Alouche. He counter sued them and all of the Respondents' companies.

Issue: What is the definition of the **common employer doctrine** (can be an employee for more than one organization) in a common law context?

Ratio: Complex corporate structures should not prevent an employee from recovering their money. Form will not defeat substance. The court will look behind the corporate veil to determine the true nature of the relationship and will not be too concerned with how the relationship is described in the contract.

Held: The company had to pay Alouche.

Reasons: The companies were held by the Respondents. It does not matter who paid, who ran the company and who hired employees. All the companies existed with the same purpose of operating the night clubs. As long as there exists a sufficient degree of relationship between the different legal entities who compete for the role of employer, there is no reason in law why they ought not to be treated as one entity for the purposes of identifying the true employer. The group of companies together operated all aspects of the night club and therefore they are all the employer.

INTERPRETING TERMS OF A CONTRACT

CECCOL V ONTARIO GYMNASTIC FEDERATION (2001), 55 OR (3D) 614 (CA)

Facts: Ceccol worked as an administrative director for the federation for 15 years and 8 months. She was given one-year contracts that were renewed each year. All 14 employees were given written notice on Dec 3rd 1996 that they would be terminated on June 30 1997. Ceccol received a letter on May 9, 1997 stating they would not renew her contract and her salary would stop after June 30. Ceccol started a wrongful dismissal action asking for 16 months.

Issue: What is the line between fixed and indefinite employment? What are the requirements to rebut the presumption of reasonable notice?

Ratio: There must be clear unequivocal language used in a contract to establish a fixed term contract. Any ambiguities will be interpreted against the employer because the employer gets to write the contract and the employee is vulnerable.

Held: Appeal dismissed.

Reasons: Ceccol was an indefinite term not fixed term employee and was thus entitled to reasonable notice ($66000). The words "subject to renewal" cast doubt upon whether it is a fixed term.

Justice Dickson from Alberta (re) in dissent: In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees

ELLISON V BURNABY HOSPITAL SOCIETY (1992), 42 CCEL 239 (BCSC)

Facts: The plaintiff was hired as a nurse and then worked her way up to nursing director. At the time of her dismissal she had worked for the defendant for 25 years. She was dismissed due to a restructuring. The benefits policy at issue came into effect 21 years after she was hired. The employer never told her the forms she was given about the policy were going to be part of her contract. She never read them or was notified they were important. The employer relies upon the policy to reduce the amount of money on reasonable notice that she would be entitled too.

Issue: Is the policy part of the contract?

Ratio: Unless the employer takes due diligence steps to ensure that a unilateral alteration of an employment contract has been brought the attention of the employee and invited her to seek legal advice so that she clearly and expressly understands the terms of the contract have been altered, the purported alteration of the contract is null and void.

Held: Not part of the contract.

Reasons: The policy was simply given to her with no request that she read it.

RESTRICTIVE COVENANTS

Restrictive covenants are specifically negotiated clauses that prevent the employee from doing something after the contract ends. Restrictive covenants are often put in to ensure that employees won't leave the company and take all the clients with them.

ELSLEY V JG COLLINS INS AGENCIES, [1978] 2 SCR 916

Facts: Elsley worked as an insurance agent and a real estate broker. He sold his insurance company to JG Collins. As part of this agreement he signed a restrictive covenant that would last for 10 years that he would not work in the same area. He ended up continuing to work for them, so the restrictive covenant got modified to be that he would not operate a life insurance company within the same area for 5 years after leaving the company. He worked for JG Collins from 1956 until 1973 when he left and started his own insurance company and took with him two insurance brokers. While working for Collins he brought his own clients and these clients never saw change from 1956-1973. A large number of clients transferred their files to Elsley he claims he never solicitated the clients (his workers may have).

Issue: Is the restrictive covenant valid?

Ratio: A covenant in restraint of trade is only enforceable if: 1. It is reasonable between the parties and 2. It was reasonable with respect to the public interest. To test this:

1. Did the defendant have a proprietary interest entitled to protection?
2. Were the temporal or spatial features of the clause too broad, overbearing or oppressive?
3. Is the clause unenforceable as it is against competition in general or other public policy reason? The restrictive covenant is not otherwise contrary to the public interest.

Held: The clause is valid.

Reasons: 1. Yes JG Collins paid $46000 to use the trade connections of Elsley; 2. Not too broad; 3. No, the terms were reasonable and a legitimate to protect the business and not of a long period. An overly broad restrictive covenant will harm consumers.

MULTARI (2000)

The court refused to enforce a non-competition clause, on the basis that a non-solicitation clause would have been sufficient to protect the form employer's legitimate proprietary interests.

TERMINATING THE CONTRACT OF DISMISSAL

DISMISSAL

Dismissal is wrongful at common law where: (a) the employer dismisses the employee without alleging cause and without giving notice or wages in lieu of notice; (b) the employer summarily dismisses the employee, alleging cause that is not proven; (c) the employee quits in response to repudiatory breach of the employment contract by the employer, sues for damages, and the employer cannot demonstrate cause (constructive dismissal); or (d) the employee is dismissed in breach of a statutory rule governing the employment relationship.

CAUSE FOR DISMISSAL

Cause can come from the breach of an implied or express term or from the general conduct of the employee demonstrating their intention to no longer be bound to the contract. An employee cannot be terminated for off duty conduct unless there is a nexus with the employment.

MCKINLEY V BC TEL, [2001] 2 SCR 161

Facts: McKinley worked for the BC Tel for 17 years at the time of termination. A year before he was terminated, he started to experience high blood pressure and had to take a leave of absence. He asked to come back in a less stressful position, and BC Tel agreed to look for such a position then terminated him. McKinley rejected the severance and said he was terminated without just cause or reasonable notice. BC Tel claimed he had been dishonest about his medical condition and treatments for it.

Issue: What are the circumstances in which an employer would be justified in summarily dismissing an employee as a result of the latter's misconduct?

Ratio: Not all dishonesty is sufficient to justify dismissal for cause, to be justified (**McKinley Test)**:

1. The dishonesty must violate the essentials of the employment relationship (the employer could not trust the employee anymore)
2. It must breach the employee's duty of fidelity
3. It must be directly inconsistent with the employee's obligations

Held: The employee's lie did not justify dismissal.

Reasons: The dishonestly displayed by McKinley does not go to the fundamental level of trust (he just wanted to get a job he could do). Fraud, theft or violence at work would be enough. Not telling the whole truth do not justify a for cause termination.

Note: Dickson quoted again: Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

CONSTRUCTIVE DISMISSAL

Constructive dismissal: Under strictly applied rules, if the employer commits a repudiatory breach of the express or implied terms of the employment contract, the employee may treat themselves as dismissed, elect to terminate the contract, and sue for damages. The employee can take the fundamental change as dismissal because it is a violation of the original contract. There are two twos: 1. Unilateral alteration of an essential term of the employment contract (e.g. demotion) or 2. Mistreatment that demonstrates that the employer no longer views itself as bound to the employment contract.

POTTER V NEW BRUNSWICK LEGAL AID SERVICES, [2015] 1 SCR 500

Facts: Mr. Potter was the Executive Director of Legal Aid in New Brunswick. He had to take time off for medical leave and began negotiations with Legal Aid for a buyout of his contract. Without telling Mr. Potter, Legal Aid went to the Minister of Justice asking that Mr. Potter be terminated with cause and outlined the cause. Mr. Potter received a letter form the Commission informing him not to return to work. He started an action for constructive dismissal.

Issue: Was Mr. Potter constructively dismissed?

Ratio: The burden rests on the employee to prove a constructive dismissal. If successful, he or she is entitled to damages in lieu of notice. The court must determine whether the employer's conduct demonstrated an intention to no longer be bound by the contract. The test used is:

1. The court must identify an express or implied term that has been breached
    a. The employer's unilateral change must constitute a breach of the employment contract

b. If it does constitute such a breach, it must substantially alter an essential term of the contract
2. Was there evidence of the employer's intention to longer be bound by the contract?

Held: Constructive dismissal.

Reasons: The first branch applies to this test. The commission failed to act in good faith and the unilateral change amounted to a substantial change to the essential terms of the contract.

HILL V PETER GORMAN LTD (1957), 9 DLR (2D) 124 (ONT CA)

Facts: Hill worked for the defendant as a salesman. It was agreed he would receive a certain amount of commission. The President of the company realized customers weren't paying of their debts so implemented a 10% cut from the employee's commission without their consent.

Ratio: Continued employment does not amount to acceptance of a variation of terms.

Held: Constructive dismissal.

Reasons: The employer cannot unilaterally alter the terms forcing the employee to either accept or quit.

LLOYD V IMPERIAL PARKING LTD, [1997] 3 WWR 697 (QB)

Facts: Mr. Lloyd was the city manager of operations in Calgary. The company paid a salary as well as an allowance for a car and insurance. Mr. Lloyd has a bad car record, so his insurance was high and the company only paid part. Upon renewal of this insurance Mr. Lloyd authorized the company to pay the full amount without approval. Mr. Lloyd's relationship with his manager deteriorated to the point where he phoned in sick. Two days later he informed the company that he considered he had been constructively dismissed due to the poor (abusive) behaviour of his manager.

Issue: Does persistent abusive behaviour constitute constructive dismissal?

Ratio: A fundamental implied term of any employment contract is that the employer will treat the employee with civility, decency, respect and dignity.

Held: He was constructively dismissed and entitled to pay in lieu of reasonable notice.

Reasons: The fundamental implied term was breached by the manager's behaviour.

ASSESSMENT OF REASONABLE NOTICE DAMAGES

Where an employment contract is silent on the question of notice, an employee under an indefinite duration contract is entitled to common law reasonable notice (*Machtinger v HOJ Industries*). The reasonableness of the notice must be decided with reference to each particular case, having regard to: 1. the character of the employment, 2. the length of service of the servant, 3. the age of the servant and the availability of similar employment, 4. having regard to the experience, training and qualifications of the servant: Bardal factors (*Bardal v Globe & Mail Ltd (1960), Ont SCJ)*. Two additional factors were added in

Wallace: whether the employee was induced to leave secure employment and whether the employee was given a promise of job security at the time of hire. It is typically one month per year of service.

CRONK V CANADIAN GENERAL INSURANCES CO (1994), 19 OR (3D) 515 (ONT CA)

Facts: Ms. Cronk was dismissed from her position as a clerk-stenographer as a result of internal restructuring. She was 55 years old and had been employed by the company for 35 years except for 6 years she spent raising her children. She sued for wrongful dismissal and argues reasonable notice would have been 20 months.

Issue: Is the employee's position in the hierarchy of a company a major factor in setting the period of compensation to which the employee is entitled when she is dismissed without cause? Was she a 16 year employee (time since returning) or 29 year employee?

Ratio: One must balance all the Bardal factors. Where there is a break in service the employee is entitled to the full length of service unless there is a specific reason why the prior period should not be awarded. **Cronk Rule**: Employees in lower end positions get less reasonable notice.

Held: Entitled to 12 months. Position must be considered.

Reasons: She is entitled to maximum notice in the clerical category due to her age and length of service. The assumption is the higher up you are the harder it is to get an equivalent replacement job.

BARTLAM V SASKATCHEWAN CROP INSURANCE CORP (1993), 49 CCEL 141 (SASK QB)

Facts: Mr. Bartlam was a senior manager who supervised 650 employees and was 63 years old. He had 18 years of service with the employer, but the first 9 were part-time and he was appointed to the senior position only two years before his dismissal.

Issue: Should reasonable notice be based on the parties' factual intentions or on broader public policy grounds?

Ratio: *Bardal* should be amended to take into account general understandings and industry customs and intentions.

Held: The plaintiff is entitled to 12 months reasonable notice.

Note: This is a hiccup – normally it should just be *Bardal principles* – The *Bardal principles* are still important. **THIS IS NOT LAW**

ANDERSON V HAAKON INDUSTRIES (CANADA) LTD (1987), 48 DLR (4TH) 235 (BCCA)

Facts: Mr. Anderson was the branch manager of an engineering company. He was then approached by the Lockerbie and Hole (LH) with an offer of employment. He accepted and became the general manager at the defending company. LH paid Mr. Anderson's salary. Mr. Anderson was terminated 10 years later by

Hole's nephew. He sued for wrongful dismissal. LH says the fact that it was experiencing economic hardship (continual losses) should be considered.

Issue: Should the economic circumstances of the industry in question be considered when determining the correct notice period?

Ratio: The economic performance of an employer would not serve to reduce the period of reasonable notice unless it were demonstrated that those economic circumstances actually reduced the amount of loss suffered by the employee for the breach his contract of employee.

Held: Appeal dismissed.

Reasons: The loss suffered by the plaintiff is not affected by economic uncertainty of an industry.

MITIGATION

Duty to Mitigate: When an employee has left work or been fired, and they are suing, they must take all reasonable efforts (typically to find work with another employer in the same salary and level as the previous job) to limit the amount that the compensatory damages the original employer would have to pay (this can be shown by showing letters they've sent to employers or interviews they've had) *Red Deere Canada*, *SCC*. If the employee goes on EI, part of the money has to go the government of Canada to pay back EI. The employee is only expected to find a job that is either in the area that they are trained in, not a random minimum wage job.

There is a general private law obligation to mitigate one's damages and this applies to the wrongful dismissal claim. Wrongfully dismissed employees must attempt to mitigate their losses by making reasonable efforts to obtain comparable employment (*Ceccol v Ontario Gymnastics Federation*).

EVANS V TEAMSTERS LOCAL UNION NO 31, [2008] 1 SCR 661

Facts: Evans was employed for over 23 years as a business agent in the respondent's Whitehorse office. After the election of a new Union Executive Evans was dismissed (likely because he supported the losing party). The Union stated that Evans failed to mitigate his losses by declining to return to work. The union decided instead of paying him notice they would require him to work out the reasonable notice. He argues he's been constructively dismissed. Mr. Evans argued that he would no longer have the respect of the workers and would not be able to be effective as the union representative in Whitehorse.

Issue: Is an employee who has been wrongfully dismissed required to mitigate damages by returning to work for the same employer who terminated the employment contract?

Ratio: The union's offer to give him 24 months to work is just as equal as giving him paid reasonable notice.

Held: Appeal dismissed without costs.

Reasons: Mr. Evans could have mitigated his losses because his relationship with the employer was not seriously damaged.

OTHER DAMAGES

WALLACE V UNITED GRAIN GROWERS LTD, 1997 SCC

Facts: Wallace had worked for a commercial printing company for 25 years until UGG offered him a job in 1972. They lured him away with a promise of job security until retirement and a good work environment. In 1986 he was terminated without cause at the age of 59 and in front of everyone else in a humiliating way and ordered out of the building (he had been the top performing sales person each year). After being fired he suffered serious mental distress. Wallace was unable to secure similar employment and went into bankruptcy. He sued for wrongful dismissal. The employer argues just cause but doesn't tell Wallace what the cause was. This contributed to his difficult state. Right before the trial the employer said no just cause.

Issue: What damages should be awarded?

Ratio: This case reaffirmed the *Bardal Princples*. Even if there are no aggravated damages [for health issues] or punitive damages [punish vindictive behavior], but the employer engages in a bad faith or harsh unfair manner of dismissal the court may award extended damages (get "Wallace Damages" a bump up). An employer owes a duty of fairness to the employee in the manner which they are fired.

Held: 24 months reasonable notice awarded [15 months compensatory damages, 9 months Wallace damage] (salary in lieu of notice award)..

Reasons: The actions of UGG did not constitute a separate actionable wrong in tort or contract [the lawyer argued bad faith discharge is a tort, they also try to argue there is an implied duty – the court says no]. Because of his 14-year tenure as the company's top salesman and his limited prospects for re-employment, a lengthy period of notice is warranted. Since UGG went to great lengths to ensure Wallace about his job security he should be award damages. Employees are vulnerable – this makes employment contracts different than commercial contracts (employment is key an individual's identity).

HONDA CANADA V KEAYS, 2008 SCC

Facts: Keays worked for the same employer for 14 years when he was diagnosed with chronic fatigue syndrome. He was off work and received benefits for a year until the employer's insurer discontinued them. K returned to work in a disability program that allowed employees to miss work if they provided a doctor's note. The employer became concerned about the changing tone of the doctor's notes and worried the doctor may not be evaluating K and asked K to see one of their doctors and upon refusing he was terminated. K sued for wrongful dismissal. They claimed the cause was insubordination (not upheld).

Ratio: *Wallace* should be confined only to the most egregious employer behavior. This case reaffirmed *Bardal*, and the three kinds of damages: compensatory, aggravated and punitive. Discriminatory conduct

does not amount to an independent actionable wrong justifying punitive damages (breach of human rights legislation cannot be an independent actionable wrong)

Held: Damages reflecting the wrongful dismissal (15 months' notice based on *Bardal*)

Reasons: There was no bad faith, the employers were not punishing K they simply wanted to confirm his disability which was normal in the circumstances. The employer's conduct here was not sufficiently egregious or outrageous to warrant Wallace damages.

BAGDORIA

Facts: A teacher of south Asian origin as a teacher at Seneca. When she wasn't hired she sued for discrimination.

Ratio: Discrimination is not a tort.

Held: She should go to HRT.

Note: This was overruled by HRC amendments, now you can add discrimination to a wrongful dismissal claim. There are 3 different forums for workplace discrimination: 1. Arbitration (labour) 2. Human rights tribunal (employment) 3. Courts for wrongful dismissal (and can add discrimination)

EMPLOYMENT RELATIONSHIP AT STATUTE

RENAUD (RE), [1999] BCESTD NO 462

Facts: Ms. Spivey worked as personal care worker for Mr. Renaud. She was paid for 13 hours but had to be on call the remaining 11 (considered her down time). To make this easier, she slept on the couch. Spivey left after 5 months and made a complaint stating that she should have been paid for 24 and been paid over time. Renaud submits that Spivey is a sitter under the Regulation and excluded from the *ESA*.

Issue: Is Spivey, as a care worker, included under the act?

Ratio: Employee should be given a narrow definition.

Held: Appeal allowed. Spivey is a sitter and thus excluded from the definition.

Reasons: Spivey does not fall under the definition of live-in home support worker, a night care attendant or a residential care worker. She falls squarely within the definition of a sitter (she was hired to work in a private residence, solely to provide the service of attending to Mr. R, who is a disabled or infirm person).

GIREX BANCORP INC V LYNETTE HSIEH, 2004 CANLII 24679 (ON LRB)

Facts: Schmidt is the owner of Girex. It was an e-commerce business. He couldn't afford to hire workers, so he offered "training" to students with the idea that at the end of the three months they would be offered contracts. However, the anticipated money did not materialize, and he could not afford to hire

the students. He offered them jobs as independent contracts and they sued for wages. S maintains that he obtained no benefit from the training. He stated they were trainees within the exception in the *Act*.

Issue: Do the students fall within the exception?

Ratio: In order to not be employees, you must meet all 6 exceptions under trainees. The court was trying to close off some loopholes with respect to payments and minimum standards.

Held: Appeal dismissed. Employees.

Reasons: There is no evidence that the work experience the Claimants received can be characterized as training similar to that which is given in a vocational school. Nor can it be said it was for their benefit. The primary benefit was for the company which needed the software developed. Although the Claimants did not displace any workers, the company turned to them because it had run out of money. Since only 2/6 conditions for trainees under the *Act* were met the claimants were employees and covered under the act.

NEW JENNY NAIL & SPA V QIURONG COA JANE AND DIRECTOR OF EMPLOYMENT STANDARDS, 2016 CANLII 28478 (OLRB)

Facts: Coa worked for New Jenny Nails. She made 50% of her sales. New Jenny provided clients and tools. Coa also provided some tools. She worked from 10-7 five days a week.

Issue: Was Coa an employee or an individual contractor?

Ratio: There has been some modifications to the control test (*Locomotive Test* – the new one is). The central question is whether the person who has been engaged to perform the services is perform, look at equipment and helpers, degree of financial risk and financial profit. The more the work life of the individual is controlled and the more they are dependent the more likely they are an employee

Held: Coa was an employee, and is therefore entitled to minimum wage, public holiday and vacation pay.

Reasons: New Jenny was responsible for determining the working conditions and financial benefits under which Coa performed her work. Coa had no independent source of worked. Coa was in a position of dependence on New Jenny.

MACHTINGER V HOJ INDUSTRIES LTD, [1992] 1 SCR 986

Facts: The appellants, Machtinger and Lefebvre entered into a contract with the defendant for an indefinite period of employment which stated that the defendant could terminate Machtinger with zero weeks' notice. Lefebvre entered into a contract with the defendant also for an indefinite period of employment, however, this contract stated the defendant was required to give the Lefebvre two weeks' notice before termination. On June 24, both appellants were dismissed without cause or notice. After the appellants were dismissed the respondent paid them each four weeks' salary. The appellants argued that the four weeks' payment was insufficient and that they were entitled to reasonable notice. The issue

became the parties' intention. The employees argued the mistake made it void and the employers argued the intent was to follow the minimum notice under the *ESA*.

Issues: What happens when *ESA* requirements are put with an error into the contract?

Ratio: Where an employment contract fails to comply with the minimum notice periods set out in the Act, the employee can only be dismissed without cause if he or she is given reasonable notice of termination. You cannot contract out of the *ESA*. Any provision that does not comply with the *ESA* is removed and then the dismissal must comply with the common law reasonable notice.

Held: Appeal allowed.

Reasons: The object of the Act is to protect the interests of employees. Not only is work fundamental to an individual's identity, but also the manner in which employment can be terminated is equally important. Most employment contracts are drafted by the employer and results the inequality in bargaining power between the employee and the employer.

WILSON V ATOMIC ENERGY OF CANADA LTD, [2016] 1 SCR 700

Facts: The amendments set out notice requirements for firing non-unionized employees who had worked for 3 or more consecutive months and stipulated a minimal rate of severance pay for those who had worked for 12 months. Those who were dismissed with cause were not entitled to either. Further, any employee who was unjustly dismissed and had worked for at least 12 months had 90 days to file a complaint with an inspector. Wilson was terminated without cause after working in the position for 4 years. Even though he was given a generous severance package he filed a complainant that was heard before an adjudicator. He wants his job back but can only get it back if he was fired without cause.

Issue: Was Parliament's intention to offer an alternative statutory scheme consisting of expansive protections much like those available to employees covered by a collective agreement?

Ratio: The employee can get damages and can get reinstated if they are fired without cause and they are eligible for all loses that are tied to their dismissal.

Held: This was exactly Parliament's intention. Notice was required.

Reasons: At common law, a non-unionized employee would be dismissed without reasons if he or she was given reasonable notice or pay in lieu. Parliament's objective was to protect non-unionized workers from unjust dismissal and provided them with a cost-effective alternative to the civil-court system.

WHAT IS AN A UNION? WHO IS AN EMPLOYEE?

IMPORTANT TERMS

Bargaining Unit: a group of employees working for an employer who share some commonality in the work that they are doing, this is different than a union

Collective Agreement: this is (1) an agreement (2) in writing between an (3) employer and a (4) trade union which contains provisions (5) dealing with terms and conditions of work. There is no limit as to what you can put on a collective agreement or how long it is. They cannot contain discriminatory clauses or contract out of statutes or legislation. You cannot contract out of Employment Standards or the *Charter*. A collective agreement has to have a union recognition clause where the employer recognizes the union as the exclusive bargaining agent for all employees in the bargaining unit (s45). All collective agreements must say that there is to be no strike and no lockout during the life of the collective agreement (s46). The employer can deduct union dues off all employees pay checks in the bargaining unit and send it to the union (s47). In Canada we have the RAND formula allows people to opt out of being union members but they still have to pay union dues, but the union must still represent them all equally.

Employee: This includes a dependent contractor (*Ontario Labour Relations Act*). An employee is someone who is not performing managerial duties. A manager is an employee of the *ESA* **BUT NOT THE *LRA*.** This is narrower because it is recognizing a reality that is in the workplace. The LRA is there to help employees unionize. Managers are not included because they owe their loyalty to the company for which they work.

Pendulum Effect: Depending who's in power there is a swing towards union or towards management

Strike: a strike can only occur lawfully at the expiry of a collective agreement and once a number of procedural requirements are met (as a result of the *Wagner Act*).

Trade Union: means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency (*LRA*).

Lockout: a lockout can only occur lawfully at the expiry of a collective agreement and once a number of procedural requirements are met

STATUS UNDER COLLECTIVE BARGAINING LEGISLATION

The right to join a union and thereby engage in collective bargaining is reserved for employees. In order to fall within the definition of a trade union, an organization must have been formed for purposes that include representation of its members vis-à-vis their employer.

WHO IS AN EMPLOYEE?

The *Competition Act* prohibits any activity against trade but makes an exception for unions.

DEPENDENT CONTRACTORS

Four factor test for employee instead of independent contractor: control of the relationship, ownership of the tools, chance of profit and risk of loss. According to the Ontario *Labour Relations Act,* a dependent contractor is a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing, or any other thing owned

by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contract.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS LOCAL 849 V EGG FILMS INC, 2012 NSLB 120

Facts: The union wanted to become certified as the bargaining agent for certain employees for the Respondent. The respondent says it has no employees performing the work described in the proposed bargaining unit. It only hires independent contractors on a sporadic basis (sometimes only for one or two days not reaching more than 15 a year).

Issue 1: Can a person who performs occasional paid work for an employer be considered an employee for the purposes of the Trade Union Act in Nova Scotia (notwithstanding that the employer has classified them via contract as an independent contractor)?

Held 1: Yes. They are dependent contractors notwithstanding the fact that they are an employee only occasionally and are labeled as independent contractors in their contracts.

Issue 2: In substance, are the contractors (i.e. technicians) more like an employee or an independent contractor? What is the degree of the technicians' dependence on the person generating work?

Held 2: Technicians are dependent on the employer for work.

Ratio: Labour Relations Boards will take a broad view of who is an employee if there is vulnerability. Dependent contractors can unionize if they are considered employees.

Held: The workers for the film company were employees.

Reasons: Joining a trade union is protected under s2(d) of the charter. The four *Montreal Locomotive* factors, also called the control test, (control of the relationship, ownership of the tools, chance of profit and risk of loss) can be boiled down to two (1. Whether the worker is controlled by the employer/client; 2. Whether the worker is economically independent (calculating profit and loss and owning expensive tools to carry out a commercial contract being the indicia)). The court must look at substance rather than form when determining if a worker is an employee or an independent contractor. The technicians were under the direct supervision of the director and the producer.

EXCLUDED EMPLOYEES

Certain types of employees are excluded from collective bargaining under the *Ontario Labour Relations Act s1(3)(a)*. The list of exclude types of employees includes: civil servants, firefighters, police officers, domestic workers, agricultural workers, and members of certain professions.

PROFESSIONALS

Doctors, Lawyers, dentists, and architects have been excluded from collective bargaining legislation.

PUBLIC EMPLOYEES

Most public employees are covered by special public sector collective bargaining statutes.

MANAGERIAL EMPLOYEES

S1(3)(b) LRA

RE BURNABY (DISTRICT) AND CUPE, LOCAL 23, [1974] 1 CLRBR 1 (BCLRB)

Ratio: The reason for management exemption from unions is to keep the two sides separate (employers and unions). The employer wants the undivided loyalty of the senior people responsible for overseeing that the work gets done and the terms of collective agreement are met. It also prevents all union leaders being senior managers.

CAPTAINS AND CHIEFS ASSOCIATION V ALGOMA CENTRAL MARINE, 2010 CIRB 531

Facts: ACC owns and operates ships. It has a tanker fleet and dry-bulk fleet that are the responsibility of SMT pursuant to a bare-boat charter with ACC. However, the workforce on the bulkers, including captains and chiefs are provided by Algoma. The CCA is seeking the right to represent some 63 marine captains and chief engineers employed by Algoma.

Issue: Are the captains and chief engineers employees under the *Canada Labour Code* or are they excluded from the collective agreement as they perform management functions?

Ratio: There is a presumption that individuals have a right to organize and bargain collectively. The burden of proving that the individuals should be excluded rests with the part seeking to exclude them. The traditional indicia of management responsibilities are authority over the employment conditions of other employees, particularly to the authority to hire, fire, promote and discipline employees.

Held: Both are not managers and have the right to unionize.

Reasons: *Hiring:* The captains did not get to pick their crew members, Algoma HR does. *Promotion*: Captains make recommendations for promotions (other than in times of emergency) that HR can either listen to or not *Discipline:* The Captains have the right to discipline but this can be overridden by HR or dismiss for cause (not greater than any 1st line supervisor). *Firing:* The captains can dismiss employees but the nature of this is no greater than that of a first line manager. *Supervision:* The nature of the supervision responsibility is supervisory rather than managerial as it is exercised within established and commonly understood parameters. *Policy Development:* Captains cannot set policies and were not invited to decision making meetings. *Other Duties:* The Captain is responsible for determining how much cargo each boat can take and ensuring the root is safe. In Maritime law masters have the managerial responsibilities. Captains are not possessed of and exercise the level of independent decision-making authority necessary to find that they are managers. Same applies to Chief Engineers.

CHILDREN'S AID SOCIETY OF OTTAWA-CARLETON, [2001] OLRD NO 1234

Facts: OPSEU applied to represent a unit of 43 supervisory social workers who had traditionally been excluded from bargaining. Their job description emphasized their role in supervising the daily work of employees in their area. Supervisors assist in the hiring process by sitting on a board of 2 supervisors and one HR representative that came to a decision based on consensus. Supervisors write performance reviews to be given to directors and monitor employee attendance. Discipline is handled by the manager in the principles in which they are trained. They also approve of vacation, set schedules and assign cases. They also sat on a board to discuss a sizing down and how to deal with layoffs.

Issue: Do the supervisors exercise managerial functions within the meaning of s1(3)b?

Ratio: The employer has the onus to prove the supervisors are managers. Involvement in discipline and discharge of employees is perhaps the most critical indicia of true managerial authority.

Held: The supervisors were not employees within the definition in the Act.

Reasons: It is important to look at if the alleged manager has the power to hire, fire, promote, demote, grant wage increases or discipline employees. *Hiring*: In this case, the supervisors played an important role in hiring, promoting and demoting by sitting on panels and giving input. Even though they could in theory be overruled by the Director or HR they rarely were. *Discipline, Promotion, Termination:* As the sole performance monitors the supervisors played an important role in the promotion or termination of an employee because they wrote the performance appraisals.

CONFIDENTIAL EMPLOYEES

Confidential employees are excluded due to conflict of interest but only those who are employed in a confidential capacity in matters related to labour relations (s1(3)(b)).

GRAND PRAIRIE ROMAN CATHOLIC SCHOOL DISTRICT V CEP, LOCAL UNION 2011 ALTA LRB

Facts: The union has unionized the catholic school board. The Board requested that two employees be excluded claiming they are confidential employees.

Issue: Are the payroll and finance officers covered under the confidential employees' exception?

Ratio: Test for confidential employees (all 3 must be met): does the employees duties involve labour relations duties (industrial relations duties) and access to confidential information? Is this involvement on a regular basis? Would disclosure of this information to the union adversely affect the employer?

Held: Both are excluded

Reasons: The payroll officer assists the employers during bargaining agreements and goes through the pros and cons of each strategy (i.e. should pay them monthly, weekly, etc.) 1. It was core to the industrial relations of the employer 2. It was neither accidental nor incidental 3. It would adversely affect the

employer. The finance officer assists the department in creating its budget (and how much money they have to play with during negotiations). She would know how much an offer coming from the union or employer would affect the overall budget. She too is excluded.

SOUTHAM, 2000 ALRB

Facts: There was a secretary to the managing editor of a newspaper who want to join the union.

Issue: Is the secretary to the managing editor excluded?

Ratio: Access to confidential files must be core to the employee's duties for them to be excluded from collective bargaining.

Held: She is an employee and therefore not excluded.

Reasons: She does not have regular involvement in industrial relations and therefore does not have regular access to confidential information.

TRADE UNION

S1(1) of the Labour Relations Act provides the definition. In order to be a trade union, it must be 1. an organization of employees and 2. among its purposes must be the objective of relations between employees and employers. When talking about the definition use a. statutory b. U of t case

ONTARIO WORKERS' UNION V HUMBER RIVER REGIONAL HOSPITAL, 2011 OLRB

Facts: Newly formed Ontario Workers Union is claiming to be a union. It is trying to raid the incumbent union. The incumbent union is arguing that the new union does not meet the definition of trade union.

Issue: Is the newly formed union a Trade Union for statutory purposes?

Ratio: Look at substance not at form. Look at both the case law AND the statutes for the definition of union. **UofT** case said: There are four parts to the definition of Trade Union:

1. Trade unions are unincorporated association of individuals with
2. At least two people who are willing to be bound by the written terms of an agreement and
3. One of its purposes, typically expressed in the constitution, must be the regulation of relations between employees and employers and
4. It must be a viable organization and therefore must have at least one officer, official or agent to act on its behalf one leader

Held: It was a union and could conduct a raid

Reasons: The employees had drafted a constitution, which was to create a union and regulate the relationship between the hospital and hospital worker, the 3 creators had determined who would be the

leader, it was sufficiently clear that it was a constitution and that amendments could be made. 1. Because there was a constitution; 2. There were officers; 3. More than 2 people; 4. Purposes of relations

SMITH & RHULAND LTD V NOVA SCOTIA, [1953] 2 SCR 95

Facts: Smith and Rouland is a boat sophisticated ship yard in Luneberg. James Bell was the hired union rep for the industrial union of marine and ship building workers of Canada. He gets the majority of workers in S&R to sign union cards. He was a communist. The employer argued that because he was a communist the union should not be certified.

Issue: Should the union be excluded?

Ratio: A union cannot be refused certification on the basis of the union rep's political views.

Held: The union should be certified. Appeal dismissed

Reasons: There is nothing in the *LRA* that says that communists cannot be part of the union.

EMPLOYER INFLUENCE

Labour law functions on an arms-length relationship between unions and management. S15 of *LRA* prohibits unions that are under the influence of the employer. S15: "*The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial*"

There are some exceptions that have been created by the OLRB. In any large factory where UNIFOR represents employees, the employer will give office space to the union in the plant. No one considers this as compromising the independence of the union. No one would think the university was financially contributing by giving the union office space either.

WHO IS THE TRUE EMPLOYER?

For the purposes of labour relations there should be one employer. The LRB should use the LRA and the factors in *Point Claire* (selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business) to determine who the employer is.

POINT-CLAIRE (CITY) V QUEBEC (LABOUR COURT), [1997] 1 SCR 1015

Facts: A receptionist went to a temp agency to ask for a job and they placed her with the municipality of Point Clare. The agency received a fee from the employer where they placed the receptionist which they use to pay the worker. The initial appointment was 6 weeks and then took time off at Christmas. She then went back for 18 weeks. The city ended up hiring her permanently. The union said the city owed 24 weeks of union dues for her time as a temp agent. The city said no, not owed until she was hired permanently.

Issue: Who is the real employer for bargaining purposes?

Ratio: Whoever has greatest control over: the selection process for the person, the hiring, the remuneration, the performance of work, the discipline of the employee, and the working condition; is the employer. Labour law is not concerned with appearance or description, it is concerned with the essence of the relationship.

Held: The city was the employer and should have been deducting union dues.

Reasons: The work of the employee was entirely at the discretion of the city even though she was employed and paid for by the agency, therefore city hall directed her, evaluated her, and had the power of discipline. The principle control was with the city.

RELATED EMPLOYERS

This happens when there are two or more corporate entities involved in the running of a workplace. S1(4) gives the power to the OLRB to be able to make decisions where there is common control or direction. If company A runs the workplace and company B is owned in part of in whole by the same owners and has some in part or in full control over the workplace as well, Labour Law is concerned with the essence. Corporate appearances will not defeat a labour relations purpose. If there is sufficient common control or direction between two or more companies than both are the true employers for labour relations. S1(4) tries to prevent double breasting (one company's employees unionize and so the company sells itself to a new company and transfers all the assets to the new company).

A union side lawyer would put a case for both related and successor employer (DO THIS ON EXAMS).

WHITE SPOT LTD V BRITISH COLUMBIA (LABOUR RELATIONS BOARD), [1997] BCJ (SC)

Facts: There is a restaurant chain in BC and Whitespot owns most of its restaurants but decides to sell a couple restaurant franchises to Gilee group and Gilee wants to negotiate with the union separately from Whitespot. The Union filed a complaint under s1(4) and asked for a declaration that they are a common employer for the purpose of labour relations. The products that Gilee will sell will be the same and there will be a common accounting, management training and marketing system.

Issue: Are they under the same common control or direction (does s1(4) apply?)?

Ratio: The test is: is there functional interdependence or not? Is there common control or direction? If yes, then single employer for industrial relation purposes.

Held: The franchisee is bound by the collective agreement.

Reasons: Whitespot so dominated the employer obligations s1(4) did apply and the original collective agreement did apply.

SUCCESSOR EMPLOYER, S68 & 69

S68 and s69: the successor employer provisions. Where there is an allegation of a merger, sale or amalgamation of a business the new employer must step entirely into the shoes of the old employer for the purposes of collective agreement and union recognition.

HOSPITALITY & SERVICE TRADES UNION V SERVICE STAR BUILDING CLEANING, 2013 OLRB

Facts: Aramak, a unionized employer, cleans buildings on contract. The contract was put up for tender and Service Star won. The union files a claim because they are not recognized by the new company and state that all employees and managers were hired by the new company. Sale of a business is supposed to be liberally interpreted and the collective agreement with Aramak should continue with Service Star.

Issue: Was there a sale of the business?

Ratio: There must be some continuity in the employing enterprise. Loss of a business to a competitor is not a sale of a business.

Held: There was no sale therefore there was no flow through of union representation.

Reasons: There is no allegation of a sale. The transfer of work and employees does not matter because there was no sale. There was simply a loss of business to a competitor.

Note: In 2014 the LRA was amended. Included s69.1 which now rectify this: For the purposes of section 69, the sale of a business is deemed to have occurred,

a) if employees perform services at premises that are their principal place of work;
b) if their employer ceases, in whole or in part, to provide the services at those premises; and
c) if substantially similar services are subsequently provided at the premises under the direction of another employer. 2017, c. 22, Sched. 2, s. 7.

CONTRACTING OUT

RE CANADA POST CORP V CUPW, 2013 CIRB

Facts: Canada Post is contracting out a range of services that they used to provide in house. When they moved that work out of house, did the bargaining rights flow through to the Shoppers workers who were doing the former work of the post offices. CUPW files a complaint under the equivalent of s1(4) and s68 and s69 saying it is either a collective agreement or a sale of business and the employers.

Issue: Are the companies one company?

Ratio: Common control or direction provisions deal with complex corporate arrangements that conceal the relations of a corporation. It is not to prevent the erosion of bargaining rights. The test is the degree of interrelationship between the employer and the contractors.

Held: The contracts for moving the mail between cities were not used by Canada Post to undermine CUPW's bargaining rights or its responsibilities. Not a common employer.

Reasons: There is no evidence that employees from Canada Post have moved to the new company. This is an honest and good faith relationship and sometimes they don't win the tender. There is no sufficient interrelations between Canada Post and Pope (the company). Canada Post contracted out for honest commercial reasons.

THE RIGHT TO JOIN A UNION

DEFINITIONS

Sharp Practice: You've stepped over the bright red line in your practice.

Union Organization: With a minimum of 40% a union can file a certification claim with the LRB and that triggers a mandatory vote with in 5 days of the filing. Ordinarily the union does not want the employer to know until they file.

THE RIGHT TO JOIN A UNION, S5

S5 of the labour relations act says Every person is free to join a trade union of the person's own choice and to participate in its lawful activities. S5 is the broad principle and the following provide life to it:

- Unfair labour practices provisions: s70, s72 and s76. If you are claiming an unfair labour practice you will always claim all 3. They say in essence that employers cannot use intimation, coercion, threats, promise or undue influences for someone who wants to join a limit. An employer is limited in what it can do during an organizing phase and once the collective agreement is in place.
    - S70 contains an employer free speech provision. Employers are limited in what they can do but they are not forbidden from free speech.
- Reverse onus provision: s96(5). If a union brings an unfair labour practice claim and has laid out sufficient detail, then the onus starts with the employer to prove that it didn't commit an unfair labour practice. This often happens when employers try to fire or punish employees active in union organization.
    - **Taint Theory**: If an employer fires an employee who was active in the union organizing draw, if one of the reasons (even if it's a secondary reason) was that they were part of the union, that is sufficient for a finding of an unfair labour practice.
- Automatic certification provision: s11. If during a union certification process an employer fires a union leader and after the firing no one wants to join the union, the union is able to apply to LRB for an unfair labour practice and if the LRB upholds that then the remedy could be a s11 automatic certification because the firing of that inside union organizer put a damper on the unions ability to sign up other employees the remedy should be to certify it even if they did not have 50+1%. It is used to discourage employers from engaging in unfair labour practice
- Statutory Freeze: s86. A statutory freeze limits the changes that can occur once a union has filed an application to be certified. It limits the employers' interference with the employees' choice.

CANADIAN PAPERWORKERS UNION V INTERNATIONAL WALLCOVERINGS, [1983] OLRB

Facts: The company kept operations going during a lockout using agency supplied strike breakers (scab workers). These breakers were picked up at secret locations which was one day discovered by the union. The union leaders went to the site and a scuffle ensured and a fight broke out between the replacement and striking workers. The employer found out and dismissed all 9 employees which led to this complaint. What is the remedy? There is no collective agreement. The union could have 1. As part of the protocol to settle the collective strike or lockout the union could try to force the employer to hire back the employees; 2. If the union isn't strong enough to force the employer to hire back the employees there could be an agreement that would create an arbitration process that would allow the employees to grieve; 3. If the union isn't strong enough for one or two the union could file an unfair complaint with the LRB and say the firing occurred because the workers were union members and were in support of the union. The union must show that there was a subjective intent by the employer that it had anti-union feelings when firing the workers. These employees were fired for confronting the scabs and fighting them. 3/9 workers were actively involved in the assault. 2/9 were not involved in all. They were fired by honest mistake. 4/9 were involved on their outside and said things but were not actively involved in the physical fight.

Issue: What is the definition of unfair labour practice in Ontario?

Ratio: There needs to be a subjective intend by the employer to commit to an unfair labour practice. There are two exceptions where an objective intent may be sufficient to find a violation (under s70, 72, 76): 1. If there was an honest but mistaken mistake made by the employer; 2. Where the punishment imposed by the employer was disproportionate to the offence that occurred.

As long as an employer has acted in a legitimate business purpose they will be given a lot of deference unless they made a mistake or over reacted.

Held: 3 were fired for legitimate reasons. 5 were allowed back.

Reasons: s 72 and 76 have motive requirements where as s70 is expressed more in terms of effect (conduct that offends the first two will also offend the third but not necessarily the other way round).

CANADIAN BROADCASTING CORP V CANADA (LABOUR RELATIONS BOARD), [1995] 1 SCR 157

Facts: The union filed a complaint with the Canada Labour Relations Board (now Canada Industrial Relations Board) alleging that CBC had breached sections 94(1)(a), 94(3)(a)(i), 94(3)(b), 94(3)(e), and 96 of the *Canada Labour Code*. Goldhawk was President of ACTRA (represents writers, actors, and journalists) when he was hired by CBC to host Cross Country Check-Up. CBC was aware of this. ACTRA took a position against FreeTrade. Goldhawk published an article in the President Report column of the fall issue of ACTRASCOPE and took a strong position against the Free Trade Agreement being negotiated with the States. As host Goldhawk is supposed to be neutral. Charles Lynch published article about this and said that it should have been disclosed on air that Goldhawk was ACTRA's president. This article came to CBC's attention and made him choose between CBC and being ACTRA's president. He stepped down from ACTRA

and ACTRA filed an unfair labour practice claim against CBC stating it was interfering with the right of a union to choose its executive.

Issue: Did CBC interfere with the administration of the trade union or representation of employees by that trade union unnecessarily?

Ratio: Unions have the right to choose its executive from its entire membership and employers cannot set rules that would prevent certain employees from being an executive.

Held: No reason to interfere. Agreed with Union.

Reasons: CBC interfered with union matters in two ways: 1. Prohibited future ACTRA presidents from publishing articles in the union news magazine on issues such as free trade if the president was a journalist at CBC; 2. It prevented union members from choosing an on-air journalist as their president at all. This falls within interfering with the administration of the trade union or representation of employees by that trade union. In the past they had used less intrusive methods such as on-air disclosure.

Note: Under the federal labour code you don't need to show anti-union animus, you only need to show that the effect was anti-union.

ALTERATION OF WORKING CONDITIONS: THE STATUTORY FREEZE

S86(2) and 86(1). s86(2) comes in first. This is designed to prevent employers from changing anything as a bribe or punishment as an incentive or warning to not join a union or sway the vote. Unless it is business as usual. A mandatory freeze starts the day the application is filed with the LRB and ends when the certification is issued. The employer is allowed to do no more than business as usual in terms of working conditions. Wages cannot be altered.

S86(1) is a different statutory freeze. It starts upon delivery of a notice to bargain (s16) and continues until either there is a collective agreement signed or until a legal strike or lockout occurs.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION V ROYAL OTTAWA HEALTH CARE GROUP, [1999] OLRB *CURRENT TEST IN ONTARIO

Facts: The hospital admits to lowering the level of employee wages during the negotiation of a collective agreement (during the freeze). The hospital maintains it was due to serious budget constraints.

Issue: Did this violate the freeze?

Ratio: The compelling economic circumstances exception to the business as usual test for 86(1) and (2) is: employers can make changes if compelling economic reasons require it during a statutory freeze unless it is something the employers would have to bargain about. The employer cannot use bribes or threats while negotiating for a collective agreement or union.

Held: Compelling economic reason.

Reasons: The old test limited the scope of collective action once the union had been certified. This is a little bit more pro-employer and allows them if there is a valid economic reason. The decrease in funding to the hospital is a valid business as usual reason.

EMPLOYER FREE-SPEECH

During an organizing drive, employers still have free speech, but they cannot use undue influence to sway its employees. The employer can hand out information or provide it if asked as long as the employer does not force all employees to listen or watch anything about why unions are bad (that would amount to an unfair labour practice).

S70 provides employer free speech as long as the free speech does not constitute coercion, intimidation, threats, promises, or undue influence. This includes during a certification drive. What the law in Ontairo accepts is that the employer does have a stake in the outcome about if its employees are unionized and it is entitled to provide correct information to the employees (can correct mistaken positions taken by a union during a certification drive – employees are entitled to make an informed decision). Due to the wide authority the employer has in a workplace the areas it may comment on are well regulated and narrow.

UNITED STEELWORKERS OF AMERICA V WAL-MART CANADA, [1997] OLRD NO 207

Facts: A certification organizing drive at Wal-Mart's Windsor store was going well. A week before the vote an employee told the manager the employees were attempting to unionize. The union had signed 90 membership cards but at the vote, only 40 voted in favour. The employer started trying to get the employees not to unionize after 91 cards were signed. The union brought allegations of unfair labour practices against Wal-Mart. After getting wind of the union attempt Wal-Mart sent 4 additional Managers to the store to talk to employees about their work and what Wal-Mart could do. In opening meetings Wal-Mart would allow one employee who were opposed to the union to speak but would not allow those in favour to speak. Wal-Mart then sent out a flyer stating that they were unsure if the store would close if it unionized. The remedial request by the union was to be given automatic certification under s11.

Issue: Was the employer's behaviour a breach of the act?

Ratio: In order to use s11 there still must be adequate employee support.

Held: The behaviour breached s70 of the act. The union was automatically certified under s11.

Reasons: The employer's actions amounted to coercion or undue influence contrary to s70.

Note: When the union sat down to bargain the employer did "hard bargaining" and offered nothing more than they already had. This led to the employees to de-certify the union.

RMH TELESERVICES INTERNATIONAL INC, BCLRB 2005 *EQUALLY APPLICABLE IN ONTARIO

Facts: The employer displayed anti-union messages on the wall during working hours while a union was organizing.

Issue: Was this an unfair labour practice?

Ratio: Compelled or forced listening raises serious concerns regarding employee free choice on the issue of unionization. Employers cannot force their employees to listen to anti-union speech.

Held: Unlawful.

Reasons: The slide shows were so prominent that they were impossible to miss, and the employees would have been forced to view then. This the type of communication where otherwise permissible views become coercive or intimidating.

Note: What s70 tries to state is that the law is opposed to forced listening. If the employer simply invites them but does not require employees to attend might be okay

SOLICITATION ON EMPLOYER PROPERTY

The general rule is that the union cannot solicitate employee support on company property during working hours. The exception to the rule is when employees are on a break they can be solicitated but usually only by other employees (outside union organizers have no right to be on company property). The purpose of this rule is to protect production for the employer. If the lunch hour is paid or not is irrelevant. This is codified under s77.

S13 of the act is the exception to the rule. If you are working for an employer and living at the worksite (e.g. a remote mine) the union does have the right to gain access to the workplace to gain employee support but not during working hours.

CANADA POST CORPORATION (1995), CIRB

Facts: The background was that there were two unions, one for inside workers (CUPW) and one for outside workers. In 1990 Canada Post filed for a re-organization within the union workplace, they wanted to have one union to limit the number of shutdowns. The inside workers supported this but LCUC did not. CLRB agreed with the employer and made the unions one. There was a vote to see which union would win. The inside voters won. LCUC wanted to get certification. The letter carriers were in the open period of a collective agreement and were trying to get cards signed to see if they could trigger another vote to displace CUPW. The Letter Carriers Union of Canada (LCUC) alleged that CPC violated the labour code by not allowing them to access employees at other locations or their own location at non-working hours. The employer states they were concerned about being neutral.

Issue: Did the CPC interfere with the organization and formation of the union? Are workers allowed to solicit workers at other locations for union organization during non-working hours?

Ratio: Membership solicitation should only be restricted for compelling and justifiable reasons including safety and security concerns. To establish this the employer must show that its operations are being disrupted or that other legitimate business interests are being adversely affected.

Held: LCUC allowed to canvas during non-working hours.

Reasons: By remaining neutral CPC was giving the incumbent union preferred treatment as they already had access to employees at all locations.

REMEDIES FOR INTERFERRING WITH THE RIGHT TO ORGANIZE

Unfair labour practices are found in S70, 72, 76. There are two important remedial provisions (s11 and s96(4)) that give broad remedial powers to LRB if there has been an unfair labour practice.

ROYAL OAK MINES V CANADA (LABOUR RELATIONS BOARD), 1996 SCC

Facts: There was an extraordinarily bitter and ugly strike just outside of Yellowknife in a mine. There were new owners and were seeking a lot of concessions from the miners. One of the striking miners went into the mine and put dynamite on one of the rails that went into the mine and when the replacement miners went in, they were killed. The LRB found that the mining company had negotiated in bad faith and had committed unfair labour practices during bargaining and the subsequent strike.

Ratio: Labour remedy provisions are to be broadly interpreted. Boards can order any remedy so long as it is equitable. In determining whether or not a remedy order fits within its jurisdictional powers the board has to be able to show that there is a relationship between the breach of the act, the consequences caused by the breach, and the remedy itself. Labour relations power to issue remedies is be remedial. Remedies cannot be punitive.

Held: The LRB had ordered broad remedies against the employer.

Reasons: This is because parliament has given the LRB wide remedial powers to allow the board to ensure as much as possible there is a constructive labour relation between the employer and the union. LRB have the expertise, knowledge and specialization in order to determine how to shape a labour remedy and therefore courts should be very careful when interfering with remedies ordered for unfair labour practices.

WESTINGHOUSE CANADA LTD, [1980] 2 CLBR 469 (OLRB)

Facts: The employer closed a plant that had been unionized. It opened several new plants in places with little union presence. The union filed an unfair labour practice and asked for the old plant to be reordered.

Issue: Should the board order the plant to be reopened or is it outside its jurisdiction?

Ratio: No matter how egregious the violation, the remedy of ordering the company to reopen the plant is too far. It would require the LRB to maintain on going monitoring of the plant.

Held: The employer was motivated by anti-union *animus* and committed an unfair labour practice. The employer was ordered to give the old employees the right of first refusal on new jobs with all their seniority and benefits intact and to pay a reallocation allowance for those who chose to move. The

employer was also ordered to give the union a list of the new employees, bulletin boards, and ability to speak to employees during working hours. The company also had to pay the union for costs incurred in organizing in new locations.

Reasons: The primary purpose of any remedy is to put the parties in the position they would have been had there not been a violation. Re-opening an old plant would create too many administrative issues.

NATIONAL BANK OF CANADA AND RETAIL CLERKS' INTERNATIONAL UNION, 1982 CLRB

Facts: The union was certified to represent employees at the bank's Maguire Street branch. During the statutory freezes the union was delayed in giving notice to bargain by 30 days [Note: this break could not exist in Ontario]. This led to about 3 days where neither the application freeze or the bargaining freeze were in place. During this time senior bank officials met and changed a plan to reduce services at the Maguire branch to close and transfer all accounts to a non-unionized branch (Sheppard Branch).

Issue: What is the appropriate remedy?

Held: The board ordered: 1. The union must be given a list of employees at the Sheppard Street branch; 2. The union must be allowed to hold meetings at that branch during working hours; 3. The union must be allowed to install a bulletin board in the staff area of that branch; 4. The employer must pay all associated costs; 5. The employer must send a letter to employees nation-wide saying that it had violated their rights and recognized their right to organize and all managers must recognize this as well; 6. Deposit $144,000 into an account to be administered jointly by the bank and the union to promote the objectives under the *Code* (this was the amount estimated the bank saved by closing the branch).

Reasons: The employer's decision was motivated by anti-union *animus*. The Bank's actions had a lasting impact on all employees.

NATIONAL BANK OF CANADA V RETAIL CLERKS' INTERNATIONAL UNION ET AL, SCC 1984

Issue: Were remedies 5 and 6 appropriate?

Ratio/Held: The remedies cannot be punitive. 5 and 6 were struck down.

Reasons: It was unfair to create a trust fund that affected all branches and the letter was humiliating a form of forced speech. There was an insufficient connection between the breach and its consequences and the remedy therefore they not remedial, it was punitive.

WHAT IF THE EMPLOYER CLOSES DOWN THE WORKPLACE?

UNITED FOOD AND COMMERCIAL WORKERS V WAL-MART CANADA CORP, 2014 SCC 45

Facts: An all-employee unit was formed at a Wal-Mart store in Jonquiere and certified to a local of UFCW. The following week Wal-Mart closed the store and dismissed all employees. The union files a claim under s59 of the labour code claiming that the employer had violated the statutory faith and had not done so in

good faith. The LRB damages must be given to the union for bargaining cost and to the employees for severance and damages from losing their job. Wal-Mart said that the statutory freeze cannot be violated by going out of business (note: this was not accepted).

Issue: Was the employer justified in dismissing its employees and closing the store?

Ratio: The purpose of the statutory freeze (s68) is to facilitate the parties bargaining in good faith.

Held: Appeal allowed. Remanded to Arbitrator to determine what the appropriate remedy would be given that the store closure and terminations violated the statutory freeze provision.

Reasons: The employer is not shielded by the closure of its establishment that is not consistent with its practices. To test this, arbitrators must ask if a reasonable employer would have acted the same.

CRIMINAL LAW PENALITIES

R V K-MART CANADA LTD, [1982] OJ NO 54 (ONT CA)

Facts: The respondent opened a new factory and moved some employees from the original unionized factory to the new one. Upon moving them they wanted to vote to unionize. In an effort to prevent this the Respondent hired fake employees to vote against it. The fake employees and the Respondent lied to the OLRB about this. A new vote took place, the union was certified and after a strike the union ceased.

Ratio: In exceptionally rare cases there could be criminal law sanctions if some of the acts taken by an employer are particularly egregious.

Held: Fined $100, 000

THE PROFESSIONAL RESPONSIBILITY OF LAWYERS

LAW SOCIETY OF UPPER CANADA V ROVET, [1992] LDD NO 24

Facts: R advised a company on illegal practices to avoid unionization. Upon seeking another lawyer's advice, the company realized it was illegal and the matter was report to R's firm and the Law Society.

Held: Professional misconduct. 6 months no practicing. This was a sharp practice.

ACQUISITION OF COLLECTIVE BARGAINING RIGHTS

There are two ways a union can gain the right to represent employees of a workplace.

1. Legal certification: requires lawyers
2. Voluntary recognition: an employer agrees to recognize a union as the bargaining unit for the employees. The LRB is aware that the employer might sign a "sweetheart" deal with a union that is not at arm's length. The LRB will always check to make sure it is at arm's length.

The main provisions in the LRA are s5 and 7. Under **s7(1) [most important]:** In order to become the union for a workplace it must sign 40% of the employees in the proposed in order to apply for a certification vote. The application will have the name of union and the bargaining unit it is seeking to represent [typically it will say "all employees at X plant except for Y, Z, A", it is framed in the negative] and a photocopy of all signed cards. Unions want to have as many cards signed as possible. Generally, there is a slippage between the number of cards signed and the percentage of cards signed, and the votes received. There is a **5 working day period** within which the vote has to be held.

Under s7(2) & (3): if a union gets certified but doesn't sign a collective agreement within a year, any employee can attempt to decertify the union. S7(4) & (5) are the raiding provisions. These provisions ensure that there are not long-term sweetheart provisions signed between the employer and the union. It provides a specific amount of time for a raid to occur and the time it must happen.

S9 of the LRA is the provision which talks about appropriate bargaining unit. The board decides whether to certify the union and what the correct bargaining unit is. S9(1) says the board shall determine the unit of employees which is appropriate for collective bargaining. <u>It does not say MOST appropriate.</u> The bargaining unit serves two purposes: 1. Defined in the labour relations act (s8(1)) as the voting constituency to be used in the certification vote; 2. If the union wins, the bargaining unit is the unit of employees that the union is certified to represent.

The two guiding principles of certification are the **exclusivity and majoritarianism** (only one union ever represents one bargaining unit and it is all or nothing, if it gets 50% or more it represents everyone).

LYNK EXAMPLE

Facts: An associate crown counsel goes to a Christmas parties and drinks. He drives home and is stopped by police officer and blows over. He was charged and reports it to his senior officer at the crown officer. He admits he's an alcoholic and goes off to rehab and has stayed sober since. He was convicted at trial and was fined about $2000 and lost his driver's licence for a year. The crown's office fired him saying they couldn't have someone work for them who committed a serious office in their office as it would stain their reputation. This goes to arbitration as there is an informal union (lawyers can't be unionized).

Issue: Was the dismissal just?

Ratio: The employer as a general rule does not have any authority what the employee does off duty unless there is a nexus between the off-duty conduct and the nature of employee's work.

Held: The employee was reinstated. It was a serious offence, but dismissal was not justified.

Reasons: In this case there was a sufficient connection between the employment and the off-duty conduct such that the employer could punish the employee. In this case, the employee had a disability and took all necessary rehabilitation steps to address the issue and took responsibility. As well there were a large number of reference letters.

WAGNER ACT MODEL AND THE PRINCIPLE OF EXCLUSIVITY

In every Canadian jurisdiction there is a statutory procedure known as certification, which allows a union, upon proving that is has the majority support among a unit of employees, to become the exclusive bargaining agent for those employees and to compel their employer to bargain with it on their behalf. This is known as the majority rule and exclusivity of bargaining rights.

APPROPRIATE BARGAINING UNIT S1

A bargaining unit is a group of employees defined on the basis of the employer for whom they work and the positions they occupy. A bargaining unit has two distinct functions: 1. It serves as an electoral constituency for the purposes of certification and decertification; 2. It serves as the basis for collective bargaining. In general, the bigger it is the powerful (unless it is small with specific powerful employees).

There are two ways a union could get certified 1. Voluntary 2. By the board. The board wants to ensure the union is an independent, arm's length association that is not dominated by the employer

The most common delineation of the bargaining unit is during an application for certification, however, the employer and the union may be able to delineate the bargaining unit on their own through voluntary recognition or through collective bargaining after certification. For voluntary recognition the employer agrees to the union and bargaining unit as long as there is no inappropriate influence. Or the parties can agree to the bargaining unit by altering the recognition clause after collective-bargaining.

The two most widely accept criteria for a bargaining unit are

1. The presence of a community of interest (work they do, geographical area, method of pay)
2. The concern that a particular bargaining unit not create a significant degree of labour relations harm.

Labour relations board would prefer to see as large a bargaining unit as possible, but they also won't stand in the way of smaller bargaining units if that's the only way from employees to get access to collective bargaining (bigger is better but small is good). This goes back to s(1) and s8(1).

METROLAND PRINTING, PUBLISHING AND DISTRIBUTING LTD, [2003] OLRD NO 514

Facts: Metroland is a large community newspaper publisher. The trade union applied for certification of an all employee bargaining unit of the employees of Metroland (10 people) in its operation in Midland. The employer asserts the unit is not appropriate. The employer wants smaller units with no casual workers. There are two departments at Metroland: Sales and Distribution. There is a variety of skill set, how they are paid, hours, benefits. The employer also uses temporary and part time workers from time to time as well as co-op students. Splitting them up by skill would result in 2-3 people per unit.

Issue: Should part-time, temporary and co-op students be included in the unit?

Ratio: The board prefers a larger bargaining unit and wants to be employees in the same bargaining unit who share a community of interest. While the board has a preference for a community of interest the board would prefer industrial stability (as big a unit as possible to ensure if there is a strike one unit who strikes instead of each unit striking on its own as it causes disruption). Small bargaining units will be accepted to allow unions to get into the workplace. The board will take into account both the union and employer's wishes when determining the unit and will try to figure out the best solution based on their operating principles and the facts of the case.

There are two parts to the *Hospital for Sick Children* test: 1. Sufficient community of interest (usually met for employees of the same employer unless there is a serious labour relation problem created for the employer) and 2. No serious labour relations problems for the employer.

Held: All employees constitute a bargaining unit and union is certified.

Reasons: They share a sufficient community of interest by being employed by the same employer and working in the same place and no labour relations problems are created. The employer's proposed unit would create inappropriate bargaining unit fragmentation. It is already a very small workplace with only 10 employees. Bigger bargaining units increase efficiency, enhance employee mobility. **Bottom of page 485 policy reasons are laid out**.

CANADIAN IMPERIAL BANK OF COMMERCE (POWELL RIVER BRANCH) V BRITISH COLUMBIA GOVERNMENT EMPLOYEES' UNION (1992), 15 CLRBR (2D) 86

Issue: Should casual employees be put into same bargaining unit as full-time employees?

Ratio: This should be dealt with on a case by case basis. Casual employees are employees who are on a call-in basis and when they are called there is no obligation on them to accept. If the employer relies on a regular standby group of employees to do its extra production work or to fill in for its regular staff on an ongoing basis, this pool of employees should be viewed as an integral part of the employer's workforce.

Note: Banking = federal jurisdiction

SERVICE, OFFICER AND RETAIL WORKERS' UNION OF CANADA [SORWUC] V CANADIAN IMPERIAL BANK OF COMMERCE, 1997 CLRB *IMPORTANT DECISIONS

Facts: The applicant asked to be certified for eight bargaining units, each corresponding to a different branch of the bank. The bank claimed that the appropriate unit was all of its branches across Canada or a regional administrative zone. CIBC is a charted bank with 40,000 employees. The bank had 5 administrative zones across the country. The union was a small feminist union and stated it would not be able to organize across the country or province but that allowing them to enter branch by branch would allow the union to enter the market.

Issue: What is the appropriate bargaining unit for a bank (all employees, zones or individual branches)?

Ratio: Organizing branch by branch while not the preferred policy Is the only realistic decision to come to given the very real difficulties ongoing among bank workers who are largely vulnerable employees. This is not the best solution but is the least worst solution.

Held: The bargaining unit is appropriate.

Reasons: It would cost a lot of money to have a nation-wide unit and would could restrictions to the *Charter* right. It would also take far too long to reach all employees across the country. The board would like to see the biggest possible unit. The employees all know each other within the branch while they might not know people in other branches. If the right to organize is to have any meaning at all it must be achievable. If it is not achievable it is a breach of the right to unionize.

Note: According to Elizabeth Lennon (Elizabeth Shilton) there are three major reasons the unions largely failed in banks: 1. The small numbers of staff in each branch-based bargaining unit and the large number of these units means that costs are high; 2. The powerful centralized nature of bank makes it easy from the to resist unions; 3. Frequent change over results in the loss of the initial majority that supported the union. Further, most employees were women (most managers were men).

Note: Union cards are only good for 6 months and then they go stale.

Note: The union unionized about 6 banks but then withdrew them all and lost all certifications. Organizing branch by branch is one issue and negotiating branch by branch is a completely different issue. The bank was not willing to budge and the union had no power to bargain because if they went on strike the bank would move the work to a different branch.

UNITED STEELWORKERS OF AMERICA V TD CANADA TRUST IN THE GREATER CITY OF SUDBURY, 2005 CIRB 316 *CLUSTER APPROACH

Facts: This is an application for certification filed by USA pursuant to section 24 of the *Canada Labour Code* for a bargaining unit of all employees working in retail personal financial services at TD Canada Trust in Greater Sudbury. The bargaining unit scope being sought comprises 8 branches and 111 employees (because the union had a majority overall but not branch by branch, so they wanted a cluster approach). TD opposes this unit because it says the appropriate unit should be branch by branch or all 19 branches within the Greater Sudbury area.

Issue: What is the appropriate unit?

Ratio: It does not have to be the most appropriate unit only an appropriate unit. Bargaining units are not configured to accommodate the employer's administrative structure, but in a view of giving employees access to collective bargaining rights.

The board considers: 1. What is the structure of the employer 2. What are the wishes of the employees 3. What is the geographic scope 4. Is there a sufficient community of interest?

Held: The proposed unit is acceptable. This is an improvement on CIBC. The Board will add any of the other branches in Sudbury if they can get them to sign in the future.

Reasons: Employee or customer satisfaction is not relevant to the community of interest of employees within the bargaining unit. This also goes for variances of hours or reward funds. Geographical area is relevant. In this case all branches are close to each other and serve the same customer base. This is bigger than CIBC, as it has more branches and is less likely to fail.

UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA, LOCAL 1028 V MICHELIN TIRES (CANADA) LTD, [1979] 3 CLRBR 429

Facts: Michelin was promised a large number of government inducements to setup two factors in Canada in an area where there wouldn't be strong union support. The company had two plants (one would make the raw rubber and the other would melt it into tires so they were connected) in Nova Scotia about 140km. The union wanted to create a separate bargaining unit in each one. At the time the second was being built the first plant was almost unionized. Michelin lobbied the government stating that a strike at either location would affect their business so that the government should pass an amendment stating that if a company had more than one location and the locations were interdependent on each other the factories had to be one bargaining unit. The rubber workers were trying to get their certification in before the amendments. By the time the application had gone in the amendment had passed.

Issue: Is the unit appropriate?

Ratio: The board must take into account the majority at EACH plant before a vote can be triggered.

Held: Application dismissed.

Reasons: Even though one plant was dependent on the other, it does not outweigh the need for two separate bargaining units.

Note: The provincial government subsequently passed s24A of the *Trade Union Act* overturning this.

BRIAN LANGILLE, "THE MICHELIN AMENDMENT IN CONTEXT" (LYNK'S OLD PROF)

The Michelin amendment either made a serious and unnecessary error in reconciling the tension between the two functions of bargaining units or it recognizes that tension and exploits it in order to render organization extremely difficult. This was likely done to encourage business to come to the province because of bargaining structure stability. This was done at the expense of the ability to organize at all.

This error might have been unnecessary. It may be possible to both ensure that organization takes place and a broad based and stable bargaining structure results for collective bargaining purposes. In BC (*Amon Investments Ltd (1978) BCLRB*), the board held that a single location bargaining unit could exist but any other locations that the union seeks to represent will enlarge the existing bargaining unit rather than creating new ones (*Amon* Principle). This allows for both organization and stability. The one

distinction is in the Michelin case the locations were interdependent. However, the *Amon* priniciple could still work.

CERTIFICATION

Step 1: Organizing Drive: The first thing that happens in the certification process is the union initiates an organizing drive (and will do research on if they have a shot a certification). **S7(1)** says that if there is no union in the workplace a union can start a drive at any time.

Step 2: Signing Cards: After this the union will launch a certification drive and will try to get employees to sign certification cards. The union will try to do this covertly so that the employers does not know this. Cards can be signed during lunch breaks or coffee breaks but typically the union will try to get employees to sign cards off duty (at Tim Horton's or home or a union hall).

S8(1) focuses on voting constituency. Unions organize until they have at least 40% of the employees (this is guess work because they have no legal access to the number of employees at work). Sometimes the union will try to get an employee to give them a list of the number of employees. Unions will always want to get more than 40% to sign cards because it is a good way to educate employees about unions and ensure they will pass the subsequent vote.

Step 3: Filing of certification: Filing of certification of application with the labour relations board: this includes the proposed bargaining unit and the signed cards. It could be all employees at a certain location or it could be smaller. The day that this is filed is the day that the statutory freeze under s82 starts

Step 4: Vote: If they are satisfied that 40% of people have signed under s8(5) the board will order a quick vote within 5 working days. The vote is administered by the LRB under s8(6) and s8(7) but will occur at the workplace and workers can vote during breaks or non-working hours. If 50%+1 vote for the proposed bargaining the union is certified.

Step 5: Certification: There may be residual questions. There may be employees who contest whether their duties are managers (active participant in making decisions in hiring, firing, promotions) or employees. They will still vote but their ballots will be segregated and dealt with after. Once this is done the board will issue a certification stating that the board is the exclusive union for that bargaining unit. S86(1) statutory freeze now comes into play.

S7(2): collective agreements that are three years or less and deals with the last four months: During the last three months of the agreement.

END OF THE COLLECTIVE AGREEMENT

Employees are allowed to change their mind about a union during the opening period (last 3 months of current collective agreement). The employees have 3 options: 1. Do nothing (keep incumbent union); 2. Vote to get rid of the union (most reach a 40% threshold in order to trigger a vote by the LRB – 50% +1); 3. Change unions (a raid). Employers cannot be seen to have fingerprints on move by the employees to

get rid of the union or change unions. If the employers are not expressly and implicitly neutral that can be enough to sink the application.

KELLY'S AMBULANCE, NSLRB (1982) (CONSISTENT IN ONTARIO)

Facts: The union got certified and could not get a first collective agreement and got locked out. The employer hired replacement workers. The replacement workers made an application to the board to decertify the union.

Issue: Do replacement workers get to vote in the decertification vote?

Ratio: Replacement workers are not employees under the LRA because they are temporary workers whose employment terminates at the end of the strike or lockout and cannot vote on a decertification vote. The locked-out workers are employees.

Held: The replacement workers cannot vote.

Reasons: Temporary or casual workers are typically excluded from bargaining units as they have no community of interest with the full or part-time workers. Further, members of the bargaining unit must remain members during the lock-out and therefore could not be at work.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AND COURTESY CHRYSLER (NSLRB) 2001 (CONSISTENT IN ONTARIO)

Facts: There was an application for decertification by the employees. The employer had allowed a supervisor to go to any employee during company hours to convince them to decertify. The employer had consented to this to decertify the union and crossed the bright red line.

Issue: Did the employer interfere in the decertification process?

Ratio: The test for employer interference is an objective test. It is sufficient that the employer's conduct could led a reasonable person to believe they supported decertification.

Held: The decertification application was rejected.

Reasons: The employer's wishes would likely impact the employees' votes.

ALTERNATIVES TO THE *WAGNER ACT* & WAGNER ACT RECAP

Wagner Act is based on exclusivity and majoritarianism. The Wagner Act means highly decentralized bargaining. Unions get a certificate to bargain for a specific location. Union will bargain on a location by location basis. They will negotiate for each bargaining unit.

Most counties don't use the *Wagner Act* Model (only CAN, USA, KOR, PHILIP). We are a minority. Increases in technology have allowed for "flexible production". This is when employers have suppliers to provide parts "just in time" so that when demand fluctuates they are not left with employees not working or an

accumulation of product. It further allows the employer to control quality even when the production actually takes place kilometers away in Asia or Latin America (workplace fissuring). The employer can therefore cut costs by lowering the amount of work done in the bargaining unit. This puts pressure on unions to lower their demands. This has undermined the old bargaining system.

MINORITY AND OCCUPATIONAL UNIONISM *MOSTLY USED IN EUROPE

In a factory of 100 employees there would be one union that represents 20, another that represents 30, a third represents 10, and the other 40 have no union. Each union try separately to negotiate with the employer. The employer will try to keep them all equal.

Some labour scholars say that minority unions are required by international standards and that we should revise the *Wagner Act* to allow for both minority and *Wagner* negotiating (Lynk doesn't like this).

CYCLDE SUMMERS

Clyde Summers advocates allowing unions to play a role in representing pro-union minorities. This is allowed in most countries that have a system of free collective bargaining. The employer remains to free to provide more or less benefits to the employees not in the union. It would not have as strong an economic position as a majority union but still provides a grievance process and the assurance of an uncompromised advocate and may help employees to know their rights.

ROY ADAMS

Roy Adams recommends the adopting in Canada of a variant of the minority unionism concept which could revise *Wagner* type legislation so that in addition to allowing for union certification based on exclusive-majoritarianism, statues could also provide for certification based on the concept of a most representative union (perhaps 30% at minimum). This would it mean it would have all of the rights and duties of exclusive agents but would not have exclusive representation rights.

BROADER-BASED BARGAINING

Because under the *Wagner Act* Model it is workplace by workplace unions tend to be decentralized. There is nothing in the *Wagner Act* that prevents Broader-Based Bargaining. Broader-based bargaining implies collective negotiations between a representative employers' association or bargaining agency on one side, and a union or association of unions on the other, covering employment relationships in a local, regional, or national labour market. This might remove the advantage of contracting out workers. However, it could also decrease labour mobility.

Broader-based bargaining is done sector wide for auto manufacturing for Ford, GM, and Chrysler. UNIFOR will sit down once every three years and renegotiate their contracts. The union will pick one of them (typically the one doing the least well) and will expect the other two to more or less accept the first the agreement. Honda and Toyota will try to mirror these agreements to prevent unionization. This also occurs with forestry and construction.

Advantages: Unions like it because it takes wages out competition (the price differences between the products is due to other factors such as technology but not wages) – consumer advocates may say this is not so good; employer says they can live with it.

MICHAEL MITCHELL AND JOHN MURRAY

Models for broader or sector-wide bargaining in Canada:

Construction Sector: The employers banded together to force the union to negotiate with one employer entity. The can only be one provincial agreement between the entities. All construction unions will negotiate with all the employers.

Arts Sector: The federal *Status of the Artist Act* (SAA) allows for artists to collectively bargain and does not require proof that it represents more than 50% of the artists in a given sector as it is often hard to gage the size. It also allows for the creation of a producers' bargaining unit to bargain with the artists union. These agreements only establish minimum terms and conditions of engagement. Private negotiations between the employers and employees for terms above this agreement is allowed. A weakness is only producers bound to the agreement are subject to its terms and conditions and there is no process for binding a producer that does not voluntarily agree to be bound. It does however provide some protection to artists who are not typically employees under the LRA.

Other sectors: the Decree system is common in Quebec and Europe. This institutes a system by which certain terms can be extended by decree to cover all workers, both union and non-union within a specific sector (ie. *Industrial Standards Act* in Ontario that was repealed in 2000).

NEGOTIATING A COLLECTIVE AGREEMENT

Unions have now been certified. This applies to where a union is negotiating the first collective agreement as well as when they are negotiating a renewal. By in large labour law thinks of itself as a process. Not as dictating the result. It provides the rules of what can/cannot be done during collective bargaining. This is the rule but there are exceptions. The general rule is that parties are free to include what they want in a collective agreement. The *Wagner Model* allows parties to include what is needed based on the particular industry and business. The are some legal limits.

TYPES OF ARBITRATORS

There are two different hats for a labour arbitrator. The main hat is a **rights arbitrator** who is someone who arbitrates a difference between the parties during the life of the collective agreement. Some arbitrators also wear the hat of being an **interest arbitrator**. This is someone who arbitrates when the parties (typically public sector) don't have the right to strike but cannot reach an agreement during collective bargaining.

STATUTORY TIMETABLE

The timetable starts when the union is certified. The certification entitles the employer or the union to serve notice to bargain. Once the notice is served the duty to bargain is triggered. Under the duty to bargain is the duty of good faith and the duty to make every reasonable effort to reach a collective agreement. Normally before there is a strike or lockout, the parties must try conciliation or mediation.

LABOUR RELATIONS ACT PROVISIONS

NOTICE TO BARGAIN, S17

S15: When a union has just been certified it will give notice to the employer to bargain. This ends s82 freeze and starts s86(1). This lasts until the parties have reached the collective agreement or the parties are in a strike or lockout position.

S59: Just like s15 but if you are negotiating for a renewal of a collective agreement

DUTY TO BARGAIN IN GOOD FAITH *PILLAR OF *WAGNER ACT*

S17: Once the notice to bargain has been given under s15 or s59, the parties are to meet within 15 days or such further time as they may agree **parties once they start sitting down to negotiate they shall bargain in good faith and make every reasonable effort to negotiate in good faith.** This bargaining period lasts from when the notice is given to when an agreement is reached. S17 exists throughout this period including a strike or lockout. It is judged on two aspects: 1. The good faith of the parties (subjective) 2. The reasonableness of their bargaining positions (objective)

From the time notice is given s86(1) comes into play. This last until there is an agreement reached or a commencement of a lawful strike or lockout.

There is a significant difference between hard bargaining and surface bargaining. Hard bargaining is union and management defending their economic interests at the bargaining type. It is lawful and is in compliance with the duty to bargain in good faith. Surface bargaining is on the other side of the red line. It is when a party goes through the motions of bargaining but is masking a desire to not reach an agreement. It is illegal.

ARCHIBALE COX: REASONS FOR THE DUTY OF GOOD FAITH

Cox laid out the values and assumptions as to why we have a duty to bargain in good faith:

1. Having the duty to bargain in good faith and a union certification process removes a large number of strikes that occurred in an attempt to get the employer to recognize the union.
2. Certifying unions and giving exclusive bargaining power to the union is creating almost the equivalent bargaining power on both sides of the bargaining power. This means the parties have to listen to each other and reach a collective agreement.

3. It establishes the notion of collective bargain instead of individual bargaining. This creates respect on both sides of the table which means that parties are less likely to undercut each other and more likely to try to find terms and conditions that they all agree upon.
4. By creating equivalency on each side and requiring the employer to recognize the union creates a rational basis of persuasion (this eliminates all irrational discussion and ensures that each side can state what it needs). The employer can state what they need for production and the union can state what they need in terms of benefits and safety in their working environment. The parties are encouraged to build upon a productive relationship that goes well into the future (this creates some form of stability between the parties).

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA V DEVILBISS (1976) OLRB

Facts: The employer was found to have breached s17 (duty to bargain in good faith) because the company refused the union's request for economic date to evaluate the company's proposal that this was all they good afford.

Issue: Did the employer breach s17?

Ratio: The basis for the duty to bargain in good faith is rational discussion. It fosters rational informed discussion thereby limiting unnecessary industrial problems (such as strikes or lockout).

Held: By failing to deliver the economic supporting evidence for its costing proposal the employer breached the duty to bargain in good faith.

Reasons: s17 reinforces the employer's obligation to recognize a trade union lawfully selected by employees are their bargaining agent.

GRAPHIC ARTS INTERNATINAL UNION LCOAL 12-L V GRAPHIC CENTRE (ONTARIO), [1976] OLRB

Facts: The employer served notice to renegotiate the collective agreement. The union tabled all of its proposals. The employer didn't accept them, put forward one proposal which was rejected and put their next proposal directly to the workforce. An employer is entitled once during a round of collective bargaining to go over the head of the union to put its suggestion directly to the employees for a vote. The employees voted for the employer offer. There was an outstanding an issue with respect to settling a grievance that occurred before the collective agreement expired. The union claimed they waited until this point so as to not interfere with the negotiations. The employer refused to sign the collective agreement until grievance was dropped and brought forward 16 new demands for the collective agreement. The union claims this breached s17.

Issue: Did the employer breach s17?

Ratio: The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in good faith.

Held: The employer breached the duty to bargain in good faith. The 16 demands had to be dropped.

Reasons: The decision-making capacity of the parties depends on not only a full and open a discussion but knowledge of all of the issues on the table at the start of the bargain. This will only create ill-will and mistrust on the bargaining table.

CANADIAN ASSOCIATION OF INDUSTRIAL, MECHANICAL AND ALLIED WORKERS V NORANDA METAL INDUSTRIES LTD, [1975] CLRBR (BC) (PAUL WEILER)

Facts: There was a deadlock. The employer had gone over the head of the union to make statements to the employees about fringe benefits on the table but withheld information from both the union and employees. The union asked the employer to provide economic data to backup what it had said to the employees, it refused.

Issue: Was s17 breached?

Ratio: A party violates the duty to bargain in good faith if it winds up with holding relevant information (particularly relevant economic information) without reasonable grounds to do so. If you are going to take a position in regard to monetary issues you must be prepared to back it up. *In Canada rational discussion is important as well as playing fair at the bargaining table – 2 cases above as well.*

Held: s17 was breached.

Reasons: Noranda raised the issue of affordability the fringe benefits and made it a public obstacle to settlement. Noranda refused to provide back-up information after raising the issue.

SIMON FRASER UNIVERSITY V CUPE LOCAL 3338, 2013 BCLRB

Facts: All employees are unionized with at least 4 different major bargaining units. There were new negotiations between CUPE (clerical staff or facility workers) and the university. They have their own collective agreement however, they are all part of a common pension plan. Any changes to the pension plan required the consent of all other unions and the employer. SFU said they are running into difficulties funding their pensions liabilities. SFU was looking for a way to reduce their pension cost. All unions said SFU had to sit down and bargain with all four unions at one table. SFU did not accept this and went ahead with CUPE and wanted them to agree on certain pension reform conditions. This was the last issue left. CUPE said you are entitled to raise that, but you cannot bring it to an impasse (strike or lockout issue). If CUPE doesn't agree to find an agreement on the pension issue, then SFU had to let it go and raise it at the common bargaining power. CUPE went on rotating strike alleging that the employer had breached s17.

Issue: Did SFU breach the duty to bargain in good faith?

Held: Yes, SFU breached their duty. This issue had to be removed.

Reasons: The employer was entitled to raise the issue but since it could not be resolved with only one union there, the employer was not entitled to use the issue to create an impasse.

UNITED STEELWORKERS OF AMERICA V RADIO SHACK, 1980 OLRB **IMPORTANT CASE ON DUTY OF GOOD FAITH – DEFINITION OF SURFACE BARGAINING**

Facts: Radio Shack was based in Texas and resisted any unions in their stores. The Steelworkers tried to unionize their stores and RS resisted. They were found to have committed unfair labour practices during the certification process and the union was certified. More troubles ensued at the bargaining table. After receiving the notice to bargain the employer sent letters to the employees ridiculing the union's demands. *The employer then did not want any dues deduction clause (this brought in s46 or s47 – rand formula).* The parties kept bargaining and the end of the day the Rand Formula was still on the table. This was unusual because almost all collective agreements had this included even before it was mandatory. The union went on strike alleging a s17 breach. During this litigation the employer started a rumor that anti-union employees were starting a decertification application (no truth to this rumor). [adverse interest: if one side doesn't put forward a key witness, the other side is entitled to argue that the absence of that witness should lead the court to give an adverse inference that their testimony would not have helped their case]. RS told the union that the US parent company would only listen if they threatened a strike. RS still refused to budge. In this case RS did not call their lead negotiator and the union asked the LRB to draw an adverse inference that its evidence would have been damaging to RS' case. The LRB accepted that argument and the union's argument about what happened at the table was accepted as proven fact. The employer committed unfair labour practices during the union certification.

Issue: Can an adverse inference be drawn from the absence of a key witness?

Ratio: This draws a distinction between hard and surface bargaining . **Definition of surface bargaining**: It is a term that describes going through the actions without the intent to reach a collective agreement (missing intention that is required under s17 of the act) it constitutes a subtle refusal of an employer to accept a union.

Held: s17 violated.

Reasons: Each factor on its own might not have breached s17 but together, as well as with the earlier unfair labour practices, led the LRB to say: the totality of evidence before us tells us that the employer had no serious intent to reach a collective agreement. Its primary goal was to operate union free. It went over the head of the union to go directly to the employees. The employers can only do this in connection with the employer triggered vote. RS was tough on the remaining issues without offering a persuasive economic justification to do so. On the totality of the evidence RS could have afforded to accept some or all of the minimal positions the union was advancing for the first collective agreement and it was standard in the industry or the province. The last thing was the absence of the negotiator which allowed the board to draw an adverse inference. In this case the employer went beyond hard bargaining.

CANADIAN UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKS V CANADA TRUSTCO MORTGAGE COMPANY, 1984 OLRB ***LEADING CASE ON HARD BARGAINING**

Facts: The union had been certified at only two of the many branches of Canada Trust in Ontario (Cambridge and St. Catherine's). There were only minor improvements over the non-unionized branches. The union alleged the employer bargained in bad faith. The union said that the company was a well-off company and that did not pay their employees well and refused to negotiate.

Issue: Did the employer bargain in good faith?

Ratio: Rational exchanges of positions is an integral part of collective bargaining but so is economic self-interest. Putting forth both positions is important but power and economic pressure is important as well. Not offering more to a union is hard bargaining and is allowed as long as the employer has a rational basis for its position. Parties have a right to use economic sanctions in pursuing its own self-interests and legitimate business interest.

Held: Complaint dismissed. No breach of good faith. This was an example of hard-bargaining.

Reasons: In this case the employer's conduct is hard bargaining in pursuit of its own self-interest and legitimate business objectives. Even though the employer could afford better conditions, it was not compelled to.

Note: RS was an irrational and powerful employer so was on the other side of the bright red line but Canada Trust was rational and powerful and therefore on this of the bright red line.

CRITIQUE OF CANADA TRUSTCO: BRIAN LANGILLE AND PATRICK MACKLEM

The law should come down hard on powerful but irrational individuals because it undermines the public good (*Radio Shack* is right). However, there is really no difference between a powerful and rational/irrational employer because it has the same effect, and both do so for their own self-interest. The only difference is how the company approaches the bargain. We need to move where the bright red line between hard/surface bargaining is. Labour law is intended to capture more than the irrational employer, it is intended to make collective bargaining more meaningful.

ROYAL OAK MINES V CANADA (LRB), [1996] 1 SCR 369

Facts: The unionized workers in Yellowknife voted to reject a tentative agreement put forward by the employer. An 18-month strike followed (9 people were killed in an explosion). They had reached an agreement, but employer said that all striking workers would be on probation after returning. There had been the firing of certain employees on the picket line and the employer refused to remove this. The employer also did not want a just cause provision in the collective agreement which meant they could be fired on a lesser standard. The CLRB ordered the employer's proposal to be put back on the table without 4 issues that still needed to be negotiated during a 30-day arbitration period.

Issue: Did the employer bargain in bad faith?

Ratio: The duty to bargain in good faith is subjective but the requirement to make a reasonable effort to bargain is objective and can be ascertained by a board looking to comparable standards and practices

within the particular industry (is the employer insisting upon provisions that are not common within the provisions or refusing provisions that are common within the industry).

Held: The appellant failed to bargain in good faith with their requirements. The employer was ordered back to the bargaining table with an earlier agreement that they had put forward without 4 issues that still needed to be negotiated during a 30-day arbitration period.

Reasons: Where a party refuses to include in its proposals terms which have been widely accepted in other agreements throughout the particular industry, it may be appropriate for the board to find that party in breach of its duty to make every reasonable effort to reach a collective agreement.

NATIONAL AUTOMOBILE, AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) V BUHLER VERSATILE, [2001] MLBD *SURFACE BARGAINING

Facts: New Holland was purchased by BVI and became a party to the Collective Agreement covering plant employees. During their first bargaining negotiation Buhler state that his first offer is always his last offer. The union attempted to modify their proposals to match that of BVI but BVI kept offering less at each meeting. The parties met on 6 occasions prior to the strike.

Issue: Did BVI fail to bargain in good faith and make every reasonable effort?

Ratio: The quality rather than quantity of negotiations matters when determining bad faith. Tabling of inflammatory proposals which would likely provoke a breakdown in negotiations may violate the duty. Pg569 : elements of the duty to bargain in good faith: The employer recognizes the union as the exclusive bargaining agent; they meet and bargain; **they engage in full rational informed discussion about the issues**; the employer is required to disclose decisions that have been made affecting the bargaining unit; employers avoid surface bargaining and misleading the other party

Held: Buhler's tactics went beyond hard bargaining as he refused to engage in rational and informed discussions.

Reasons: Buhler provided no justification or documentation to support his demands and why he offered less at each meeting. He was not prepared to discuss, in any rational way, any of the positions put forth by CAW. Buhler knew or ought to have known that certain of his demands would eliminate a number of longstanding provisions in the existing Collective Agreement, including the current health and welfare benefits and seniority and could not have been accepted by the union as it would undermine its credibility with its members.

UNITED FOOD & COMMERCIAL WORKERS CANADA V WHL MANAGEMENT 2014 OLRB

Facts: The relationship of the union and the employer had deteriorated. The parties could not reach a new collective agreement even after a lengthy strike. The union filed a duty to bargain in good faith complaint. The employer objected to the board's decision on the merits stating it thought that witnesses and evidence should be heard along with the documents as well that the Board breached its duty of fairness.

The employer had used replacement workers during the strike. The employer did not want to remove the replacement workers.

Issue: Can the board hear the case?

Ratio: The Act confers upon the board the ability to determine its own practice and procedure. The role of the Board is to monitor the process of bargaining, not the content unless the content of the bargaining proposal impinges upon the integrity of the process such as to signal breach of the good faith bargaining duty. Such would include illegal proposals or proposals that are contrary to public policy informing the Act and bargaining techniques such as surface bargaining. Solidarity of workers when engaged in a conflict with their employer. Our law allows employers to pierce this by hiring replacement workers. However, replacement workers have no legal claim to keep their job after the conclusion of a strike.

Held: The board refuses to recuse itself. The employer in engaged in bad faith bargaining. The failure of the employer to not put the striking workers back to work as soon as possible was a content demand and was a bad faith bargaining tactic.

Reasons: Oral evidence may have taken up unnecessary time. Further, the expansive documentary record was filed into evidence as evidence by the parties and there were no material facts in dispute on which oral testimony needed to be called.

PROVISIONS FOR THE FIRST COLLECTIVE AGREEMENT BARGAIN

S43: This makes it harder for employers to avoid concluding a first collective agreement.

This was put in because unions were dealing with an employer who was not used to bargaining with a union and may think that there is an incentive or motivation to turn hard bargaining into surface bargaining and to avoid a collective agreement.

EXCEPTIONS TO THE RULE THAT LABOUR LAW IS JUST A PROCESS (PROVISIONS THAT HAVE TO BE IN A COLLECTIVE AGREEMENT)

UNION RECOGNITION CLAUSE

S45: every collective agreement has to have a provision where the employer recognizes the union as the sole and exclusive bargaining agent for the bargaining unit in question

STRIKES/LOCKOUTS

S46: Every collective agreement must contain a provision that says there will no strikes or lockouts as long as the agreement is operating

RAND FORMULA

S47: The Rand Formula: Every collective agreement shall have a provision that says that at the union's request the employer make a union dues deduction for every member in the bargaining unit regardless of union membership. This gives the union funds and ensures there is no incentive not to join the union.

ARBITRATION PROVISION: ONE OF THE MOST IMPORTANT MANDATORY PROVISION

S48: Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

DISCRIMINATION

S54: There can be no discrimination in any collective agreement and collective agreements must be consistent with human's codes and the charter of rights.

BINDING AND ENFORCEABLE

S56: Collective agreements are binding and enforceable.

TIME LIMITS

S58: Collective agreement is for a minimum of one year (cannot be less than 12 months). Most are generally 3-4 years. If there is low inflation, then there are longer collective agreements. If there is high inflation, then there are shorter collective agreements (unions don't want wage to be erode).

DISCLOSURE OF DECISIONS OR PLANS SUBSTANTIALLY AFFECTING THE BARGAINING UNIT

WESTINGHOUSE CANADA LTD, [1980] OLRB

Facts: During negotiations for the renewal of a long-standing agreement, the company had been considering a plan to move one of the manufacturing operations (Hamilton) to a less unionized area. This was not mentioned at the bargaining table. The union focused on issues such as pension instead of severance pay. Shortly after the renewal agreement was signed, the company announced the move and proceeded to implement it. The union alleged the company breached good faith by not disclosing this at the bargaining table and that the move was motivated by anti-union animus.

Issue: Did the employer's failure to disclose their plans to the union breach good faith?

Ratio: The employer must respond honestly to any union inquiries at the bargaining table about the existence of company plans that may have a significant impact on the bargaining unit but does not place the employer under an obligation to disclose, on its own initiative, plans that have not yet ripened into at least *de facto* final decisions.

Held: The company engaged in an unfair labour practice by moving but there was no bad faith.

BRIAN LANGILLE: WESTINGHOUSE REVIEW

Westinghouse creates an incentive upon employers to not tell employees about possible or actual decisions of change until after an agreement has been signed. Nondisclosure of plans to shut down, relocate, or contract out is inconsistent with a duty to bargain in good faith. The Board in *Westinghouse* avoid this by wrongly assuming that some issues were not within the scope of the duty. The duty includes the duty to disclose. The board acted upon the assumption that the union has and should have no say in the decision-making process.

The whole point of labour relations is to create a rational and informed discussions. Trying the bright red line between *de facto* decision and seriously thinking about places this line in the wrong spot. The standard should be lowered so that it includes thinking serious about a decision that a has a serious impact on the collective agreement and collective negotiations. The worry is that an employer could purposely pause the plan and the thinking serious stage until after collective negotiations which would mean that the union was left in a highly vulnerable position.

INTERNATIONAL WOODWORKERS OF AMERICA V CONSOLIDATED BATHURST PACKAGING [1983] OLRB

Facts: The union and the employer negotiated a renewal of the collective agreement covering an all-employee unit in the employer's Hamilton plant. The union sought to have the employer tighten provisions in the expired agreement about plant closures and severance pay. In the end the union dropped this, and the old provisions were renewed. At no point did the company indicate that its Hamilton plant might or would be closed during the term of the collective agreement. A few weeks after the agreement was reached this was announced. The union argued that this breached the duty to bargain in good faith because: 1. Unlike Westinghouse the plan was finalized during bargaining, or 2. Westinghouse should be reconsidered. 3. The union urged the board to extend a duty to bargain with a union over major and unexpected changes introduced or intended to be introduced during the lifetime of an agreement.

Issue: Was the union correct?

Ratio: *Westinghouse reaffirmed*. The duty to bargain in good faith does not extend into the lifetime of the collective agreement unless there is significant impact upon the employees and then the employer must meet with the union. The employers must disclose any major finalized plans made during collective bargaining to the union.

Held: The employer violated the duty of good faith by failing to disclose the closure during bargaining as the decision had reached the *de facto* decision stage. *Westinghouse* reaffirmed.

Reasons: It is a misrepresentation for an employer to not reveal a decision it has already made during negotiations. Moving the redline lower puts too pressure on an employer who is faced with a complex matrix of decision making.

REMEDIES FOR VIOLATING THE DUTY TO BARGAIN

In *Radio Shack* the Board held that a remedy should not be seen as a penalty (monetary relief to the union) nor should a remedy impose a collective agreement.

ROYAL OAK MINES V CANADA (LABOUR RELATIONS BOARD), [1996] 1 SCR 369

Issue: Did the labour board exceed its jurisdiction in imposing a particular remedy (to put an offer back on the table with modifications that it had tabled earlier).?

Ratio: Under s99(2) of the CLC, the board has been given a wide remedial role because of its expertise. It may order anything that is equitable for a party to do or refrain from doing in order to fulfil the objectives of the Code. **The remedy must be rationally connected or related to the breach and its consequences (must be proportional).** A remedy will be unreasonable if:

1. Where the remedy is punitive in nature;
2. Where the remedy granted infringes the charter
3. Where there is no rational connection between the breach, its consequences, and the remedy;
4. Where the remedy contradicts the objects and purposes of the Code.

While remedies ordered by LRB should not ordinarily mean imposing terms into a collective agreement, if the disagreement is serious enough and if the behaviour of one party is egregious enough, it is within the Board's jurisdiction to impose terms of a collective agreement upon the parties.

Held: The Board's decision was not unreasonable. Remedies upheld.

Reasons: The Board was obliged to take into account the violent history. A cease and desist order would have been a waste of time. The parties would never have come to an agreement on their own. The board did not impose an agreement upon the parties, they order the employer put forward again their previous proposal and that they negotiate again and if it was not accepted they would enter into binding arbitration. In this case the issue was under 3. And 4. Above. There was a clear rational connection in this case because of the unwillingness of the mine to want to enter into an agreement that was consistent with industry standards the order to put back the proposal fits within the nexus and was consistent with the purposes of the code which was to encourage fruitful and mutually productive collective bargaining.

BUHLER

The principal remedy was for the employer to pay all lost wages and employment benefits they would have paid had the strike not occurred. With 250 employees it was several million dollars in damages. It was by far the largest award for a breach of the duty to bargain in good faith in Canada.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, V EGG FILMS, 2015 NSLB

Facts: Egg films bitterly but unsuccessfully contested certification of the newly formed trade union as a bargaining unit. At the end of the first collective agreement it was found the employer engaged in many subversive tactics to avoid a new collective agreement.

Issue: What remedy should be ordered for the breach of duty to bargain?

Ratio: Boards do have the power to impose arbitration on parties to secure compliance with their obligation to bargain in good faith but should only be used where there is no other way to secure the various social policies that underlie labour relations legislation and the employer's tactics have created a toxic industrial relations climate. It is a remedy of last resort.

Held: Egg films breach its duty to bargain in good faith. The parties were ordered to return to collective bargaining and use the previous collective agreement as a basis for their negotiations.

Reasons: Egg Films made no effort at all. It made unlawful proposals that it knew the union could not accept and refused to provide supporting information. It engaged in surface bargaining. Mandatory arbitration should not be imposed at this point and the parties are directed to return to bargaining.

FIRST CONTRACT ABRITRATION

An arbitrator finalizes the very first contract between a newly certified union and the employer when they parties fail to reach an agreement. This is laid out in s43 of the *LRA*. It came into existence in the late 1980s. *Radio Shack* is a prime example of how employers will drive to prevent unions from being certified. If they failed, they would often think they had a second chance during first contract negotiations and try to drain the unions money and resolve. FCA was brought in to allow unions who had just gotten a toe hold in a workplace to get a first contract and establish a more permanent relationship with the employer during the life of the contract. FCA is an exception to the assumption that Labour Law is a process and that parties can negotiate on their own.

YARROW LODGE LTD V HOSPITAL EMPLOYEES' UNION (1993), BCLRB

Ratio: The principals that should gone FCA are:

1. No breakthrough provisions
2. look carefully at other industry collective agreements and should not give novel breakthrough provisions
3. there should be equity and consistency internally
4. Financial health of the employer
5. Existing marketing conditions

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, V MING PAO NEWSPAPERS, 2011 OLRB *EXAMPLE OF EMPLOYER UNDERMINING UNION AUTHORITY

Facts: The employer offered a wage increase and threatened job reductions during a union drive. It laid employees, including union leaders.

Ratio: Two actions (unfair labour practice and FCA) can be pursued simultaneously as separate complaints. What matters for an FCA application to be successful is whether the parties to bargaining are

unable to finalize an agreement. The board should consider the totality of the parties' conduct during the bargaining process. The FCA remedy seeks to facilitate, in the long run, good faith bargaining in sustaining robust collective industrial relations.

Held: The employers actions caused unsuccessful bargaining.

Reasons: Collective bargaining has been unsuccessful because of the Employer's refusal to recognize the bargaining authority of the trade union. Its conduct could only undermine the union. The employer's actions convey the message that the employees would be better off without a union.

SUSAN JOHNSON FCA

FCA legislation establishes a more permanent relationship between employer and union and to get a first contract while also reducing the incidences of work stoppages associated with the negotiation of first agreements by a substantial, statistically significant amount. Further, it creates an incentive for parties to settle their disputes on their own.

KEY CHANGES TO LABOUR LAW

Murray Mitchell report (two-person commission) became Bill 148. The conservatives' Bill 47 will roll back some.

Bill 148	**Bill 47**
Adopted an amendment that allowed unions to apply to the labour board to obtain a list of employees if they were looking to run a union drive. The union needed to show they had the support of 20% and the employer would have to turn over the list. This helps unions because otherwise they are trying to organize in the dark.	This amendment would be removed.
In Ontario it is an automatic vote. The union has to show that it has 40% of the members of the proposed bargaining unit to get a certification vote. Prior to Bill 148 this was not needed in construction where the union can be certified through cards alone. After Bill 148 it was recognized where Unions have a hard time organizing where employees were vulnerable, and the following industries need 55% to get	The Bill 148 amendment would be removed.

certified through cards alone (building services, home care, temporary health agencies).	
S11 provides that a union can be certified if an employer committed unfair labour practices during the certification drive. Bill 148 made it easier for a union to get certification through s11 in response to unfair labour practices. If a union could show: 1. Unfair labour practice 2. A vote was not likely to represent the true wishes of the employees; then the board was required to certify the union under Bill 148.	The Bill 148 amendment would be removed. Now the union has to show an unfair labour practice and the board has a choice whether or not to order a vote.
First Contract Arbitration (s43 *LRA*): This has to do with when a union is certified and it is having difficulty reaching a collective agreement, s43 gives powers to the LRB to order an interest arbitrator to decide the outstanding issues for first contract. Bill 148 gave more power to the LRB to have intensive mediation between the parties and where that was unsuccessful for the LRB to arbitrate (this made it easier for unions faced with difficult first negotiations to get access to FCA). Bill 148 made it almost automatic to get FCA for a union.	The union would have to satisfy a number of steps in order for the board to agree to order FCA.
S80 – before Bill 148 if a union went on strike, if the strike lasted up to 6 months the *LRA* under s80 guaranteed that the striking workers had the right to go back to work and could replace any replacements. Ontario was the only province with a time limit. Bill 148 removed this 6 month ceiling.	Bill 47 reinstated the 6 month ceiling.

REGULATING INDUSTRIAL CONFLICT

The ultimate means of dispute resolution is the use of economic sanctions (strikes/lockouts). This means the ability to maintain or withstand a work stoppage remains central to collective bargaining. If a union cannot withstand a strike or lockout it probably will not get a favourable agreement. Only a small minority of bargaining rounds actually lead to strikes or lockouts. The threat is often enough to bring the

parties to wind up agreeing. The ability to win a strike in part depends on the employer's ability to hire replacement workers. This depends on the employer's market position, the unemployment rate, and the skill level required. Unions have had to take into account the international competition and its impact on the employer's ability to offer higher wages.

The right to strike is included in the 2d) Charter right (*Saskatchewan Federation of Labour v Saskatchewan*, [2015] 1 SCR 245).

PROBLEMS WITH LIMITING THE RIGHT TO STRIKE

1. The right to strike allows big changes to be made (human rights, pay equity, maternity leave). These are the sorts of issues an interest arbitrator would not likely impose;
2. If parties are forced to bargain, the parties have much greater ownership over the final document (see in public service where employees have a bitterness towards arbitration where there is no right to strike);

MECHANICS OF THE ABILITY TO STRIKE AND LOCKOUT

In Canada we have some of the strictest restrictions on strikes in the world. In Canada you cannot lawfully strike during a certification drive (to get union recognition) nor can you strike or lockout during the life of a collective agreement nor can you have a lawful strike or lockout unless all of the procedural and statutory steps have been taken to put you in a lawful strike or lockout. These are strict boundaries on when strikes can take place.

The definition of strike is laid out in s1(1): **"strike"** includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

This captures almost everything and is not exhaustive. This is as clear a signal from the Ontario legislature that the definition of strike is objective not subjective and it includes any time of refusal or slow-down of work that is done with more than one employee. All that needs to be shown is: 1. Cessation or refusal to work; 2. Done in concert with two or more employees; 3. Where the intent is to limit work or production

Lockouts: The definition of lockout is subjective. This is because it is the employers ability to lockout employees as a means of economic sanctions during a strike but, an employer can shut down for other reasons and that should not be include. The purpose must be to force the union to agree to certain terms and conditions.

The seven steps to put an employer or a union to lockout or strike:

1. The collective agreement has to have expired (s79(1) and s79(2))

2. The parties (almost always the union) have to give a notice to bargain and the parties have to have engaged in a good faith attempt to reach a collective agreement (s16 & 17 – 1st CA; renewal – s59 and 17)
3. If the parties are reaching an impasse and cannot move beyond it then one party or the other will ask the Ministry of Labour to appoint a conciliation officer (employees of the Ministry of Labour) who meets with the parties at least once.
4. Conciliation Report: When the conciliator comes to the decision that they cannot provide anymore assistance to the parties they write a report to the Minister of Labour saying I have been appointed to conduct conciliation between the parties and have done so on these occasions and have not come to a solution. I recommend that you do not appoint a conciliation board (a no board report) (s79(2)).
5. The Minister of Labour has several choices: they can appoint a mediator (usually a private arbitrator); disregard the advice of the conciliator and appoint a conciliation board (3 person) to try to reach a collective agreement (rare); 3. Minister accepts the advice and doesn't appoint anyone (this is what happens 99% of the time)
6. There has to be a secret mandatory vote taken by the bargaining unit members to endorse a strike. Unions cannot unilaterally impose a strike.
7. 14 days must have elapsed from the Minister releases the no board report to the parties (s79(2)).

COMMUNICATIONS, ELECTRONIC, ELECTRICAL, TECHNICAL AND SALARIED WORKERS OF CANADA V GRAHAM CABLE TV/FM (1986) CLRBR NS

Facts: The parties have satisfied all prerequisites under the CLC to strike or lockout. In this case, the union took the tactical decision to keep showing up to work but to have a slowdown to increase pressure. Once they are in a lawful position to strike or lockout, but the employees continue to show up to work and the employer continues to accept them there is no collective agreement, but the employer is likely to continue to pay the employees under the conditions voluntarily. The union decided to do work to rule, which is when the employees work strictly by the book and generally working slower to put economic pressure on the employer by not accomplishing as much. The tactics used in this case were not working overtime, not training other employees, and taking your time getting tasks accomplished. The employer let this go for about a week and then the employer warned the employees that they had to do their jobs as per their job description or they would face discipline. The employees who continued to do work to rule tactics were disciplined. Eventually the Employer issued a document for employees to sign. When they refused they were suspended from work.

Issue: Did the employer have the right to discipline the employees for work to rule actions when the union was in a lawful position to strike?

Ratio: An employer is not free to discipline or punish employees who are engaging in a lawful strike.

1. Was the union in a lawful position to strike?
2. Were the actions taken by the union a strike?

3. The employer cannot discipline the employees if they are engaged in a lawful strike.

Held: The employees were engaged in a lawful position to strike.

Reasons: 1. Yes; 2. Yes; 3. Could not take actions.

Note: If the employer didn't like what the union was doing by slowing production, the employers' option was to lock them out.

CANADA POST CHRISTMAS CARD

Facts: The union agreed to send any Christmas card with a 10 cent stamp when all letters needed a 30cent stamp

Held: It was a strike because it limited production. Illegal because steps weren't met

AIR TRAFFIC CONTROLLERS

Facts: During difficult negotiations large number of air traffic controllers called in sick.

Held: This is a strike. Illegal because steps weren't met

BC TERMINAL ELEVATOR OPERATORS' ASSOCIATION ON BEHALF OF THE SASKTCHEWAN WHEAT POOL V GRAIN WORKERS' UNION, LOCAL 333 (1994) CLRB

Facts: Union was not yet in a position to lawfully strike but the employees started refusing overtime. The employer sought an unlawful strike declaration and other remedies. The employer argued that there had been a concerted refusal by its employees to work voluntary overtime following the temporary layoff of ten employees in the bargaining unit. The collective agreement explicitly stated that employees could refuse overtime work.

Issue: Was this a strike with the definition of s3(1)(a)?

Ratio: Refusal to continue a concerted activity prior to a strike constitutes a strike.

Reasons: Normally a sufficient number would have accepted the work. Actions which are acceptable for individual employees may constitute an unlawful strike when done in combination, in concert, or in accordance with a common understand that is aimed at restricting or limiting output.

INTERNATIONAL LONGSHOREMEN'S ASSN V MARTIME EMPLOYERS' ASSN 1979 SCC

Facts: There were numerous unions with multiple different bargaining units. One unit went on strike (the police). They put up picket lines at the entrance to the port. Other employees from other unions who were not in a strike position, saw the picket line and refused to cross it. They argued that union solidarity is a universally understood doctrine and thus Parliament could not have intended to include this in the definition of strike.

Issue: Does the refusal to cross the picket line constituted an illegal strike?

Ratio: Strike has an objective definition. Deciding to not cross a picket line out of solidarity when your collective agreement is in place amounts to an illegal strike.

Held: There was a strike.

Reasons: The definition of a strike is objective. Even though the police were involved in a lawful strike, the refusal to cross the picket line by other employees meant they were involved in a strike (limiting ouput) which was illegal. The only way it would be lawful was if they had a genuine fear of harm if they tried to cross the picket line.

UNILUX BOILER CORP V UNITED STEELWORKERS OF AMERICAL, LOCAL 3950, 2005 OLRD

Facts: A strike was going on by unionized workers in a workplace. The non-unionized workers had a genuine fear of crossing the picket line because of violence.

Issue: Was this a lawful strike?

Ratio: If the employees who are obliged to report to work have a genuine fear of violence or a threat of violence as a result of crossing the picket line there is no strike.

Held: No strike.

Reasons: Employees made individual decisions not to cross out of fear.

NELSON CRUSHED STONE AND UNITED CEMENT, LINE & GYPSUM WORKERS' INTERNATIONAL UNION, LOCAL UNION 494 V MARTIN, 1978 OLRB

Facts: There were a couple different unions working for a company. One goes on strike. The other employees who are not strike refuse to cross the picket line because the union has negotiated a sympathetic strike clause (which states their members don't have to cross a lawful picket line).

Issue: Was there a strike?

Ratio: The LRA takes precedent over provisions which purport to legalize strikes during the life of the collective agreement. You cannot negotiate your way out of the LRA requirements and actions done in concert, in combination or in accordance with a common understanding within the meaning of s1(1)(m) constitute a strike.

Held: Those employees are engaged in a lawful strike but because the provision was in the agreement the employees can escape punishment or the union might not be held liable for the employees not crossing the picket line.

Reasons: s79 the LRA says no union or employer shall agree to a strike or lockout during the life of the collective agreement. The statute takes precedent over the collective agreement when they conflict.

POLITICAL STRIKES *PRE-CHARTER

Facts: This was a big issue in P Trudeaus wage and price controls to address information. The labour movement organized a national strike to counteract this because Trudeau campaigned on not doing this. The goal was not to limit production but to state a political view.

Issue: Does the definition of strike include political strike?

Held: Based on the objective definition of Strike, this is a strike and since it is during the collective agreement, it is an illegal strike.

Note: Freedom of expression and freedom of association, this would likely breach both but the government might be save under s1 and would not violate the charter.

REGULATING EMPLOYER SANCTIONS

Lockouts do not include a purpose limitation. For an employer action to be a lockout, it must seek to influence employee and union views on collective bargaining issues. Employers cannot use these with anti-union animus.

UNITED STEELWORKERS 1-2693 V NEENAH PAPER COMPANY OF CANADA, 2006 OLRB

Facts: Collective agreement expired, and the seven steps have been satisfied (lawful position to strike or lockout). Employees keep showing up to work and the employer tells the union if they don't make a collective agreement by 5 December then the employer was going to impose new working conditions (such as a wage cut). The employer did this and the employees kept working and the union informed the employer they did not accept this. The union argued that the employer had to lockout the employees and was in violation of s86 (statutory bargaining freeze) and that the employer bargained directly with the union contrary to s73(1).

Issue: Was this an unfair labour practice?

Ratio: Once the employer is in a lockout position it can change the terms and conditions of work without locking out the employees without the union's consent. If the union employees continue to show up to work, they are in effect agreeing to the change until and unless they reach a new collective agreement.

There is nothing wrong with either side using constrained economic warfare even if they continue to show up to work.

Held: It was not an unfair labour practice.

Reasons: Once the parties are in a lawful strike or lockout position, they can continue to show up to work and the union has the right to refuse to do certain aspects of work and not be punished. The employer has the right to change the conditions of work (as long as there is no anti-union animus). The union could have withdrawn its labour if it did not like the change.

WESTROC INDUSTRIES INC V UNITED CEMENT, LIME AND GYPSUM WOKERS 1981 OLRB

Facts: A union was negotiating with its employer for a renewal of a collective agreement. The union was slowing down the process to wait for other bargaining units, so they could all strike at once. The employer locks out the union before the union had wanted to pull the plug. The employer hires replacement workers and resumes production. The union complained that the lockout and hiring of replacement workers was an unfair labour practice and breached the duty of good faith (s64 is now s70).

Issue: Was there an unfair labour practice under s70?

Ratio: Replacement workers are lawful if they are being used as an economic tool without an anti-union animus and just meant to put pressure on the union. A strike/lockout are the use of economic warfare and are lawful unless they constitutes an unfair labour practice.

Held: There was no violation of the unfair labour practice prohibitions.

Reasons: If the employer wanted to bring in the replacement workers to replace the workers permanently that would be a violation but that did not happen here. The locked out employees still had job security.

REMEDIES

ILLEGAL STRIKES (OR LOCKOUT)

If there is an illegal strike the remedial forum is the OLRB. Under s100 of the LRA the employer is looking for a declaration that there was strike and that it was illegal and for a cease and desist order.

In order to get compensation for financial losses as a result of an unlawful strike the employer would go to an arbitrator who has the power to deal with all issues during the life of the collective agreement.

During an unlawful strike or lockout, the courts are not involved unless the union has defied the cease and desist order by the OLRB and continues to strike. If this occurs the employer would go to court and seek a declaration that the union is in competent of court. Or if there is judicial review.

LAWFUL STRIKE/LOCKOUT

The OLRB has the power to determine if the strike is lawful or unlawful and has the power to adjudicate if there was unfair labour practice (e.g. *international wall covering* case). The OLRB has a very limited jurisdiction during a lawful strike/lockout.

The courts are involved to regulate picketing. The courts can issue injunctions if the picketing is too large, violent or obstructive and the employers work place.

An arbitration board would only get involved as an interest arbitration board if the government put in back to work legislation and ordered remaining issues to go to arbitration (settling outstanding interest).

Or through rights arbitration if there is an agreement between the employer and union as a means for settling the strike. if employees were fired or disciplined during a lawful strike or work and they could not decide if the employees could get their job back.

NATIONAL HARBOURS BOARD V SYNDICAT NATIONAL DES EMPLOYES DU PORT DE MONTREAL, 1979 CLRB

Facts: The union was not in a lawful strike position. There was a conciliator appointed. The union members walked out without union authorization. The employer asked the CLRB for a declaration that the strike was illegal and for a cease and desist order and to be allowed to prosecute in court.

Issue: What remedy could be ordered?

Ratio: Innovative remedy: cease and desist order (workers perform the duties of their employment and refrain from any concerted illegal activity).

Held: The LRB gave the employer a cease and desist order. The employer could prosecute but only if the union violates the no strike ban.

Reasons: Under the CLRC one side can ask the LRB to allow them to prosecute the other side for a serious violation. This forced the union to stay at work until there was a new CA or they were in a lawful strike position.

Note: this was done in order to maintain relations between the two. Boards prefer to give forward looking rather than backward looking prosecutions.

ROLE OF THE COURTS

COURTS POWER TO ISSUE INJUNCTIONS?

Courts have a very limited jurisdiction:

1. for a lawful strikes courts can determine if picketing has gotten out of hand because of threats to violence
2. Courts retain the rights to judicially review LRB or arbitration but with deference
3. Internal trade union affairs – union constitutions are contracts between all union members, so differences (issues) are settled by the courts

ST. ANNE NACKAWIC PULP & PAPER V CANADIAN PAPER WORKERS, 1986 SCC *IMPORTANT

Facts: There are two bargaining units. The officer workers are in a lawful strike position and do. The other is not but does not cross the picket line. The employer goes to court to get an injunction to tell the production to report to work. They get an order to go back to work and do but then strike again. The employer goes after the union in court suing them for production losses.

Issue: Which jurisdiction should the parties turn to for damages from an unlawful strike?

Ratio: An arbitration board is the proper judicial forum to get losses from an unlawful strike or lockout. Courts have no jurisdiction to considers claims arising out of rights created by a CA but can issue an injunction for an unlawful strike (this arise from statute not particular CA).

Held: Arbitration not court.

Reasons: It is arbitration because it is written into the CA (no strike/lockout provision) [s36 of the LRA and s69]. The modern labour law model (wagner act) removes the role of the court in regulating relations between the parties. Furthermore, the statutes have created DR systems. An employer looking to recover losses and damages must be required to seek those damages in front of a labour arbitrator because their decision is final and binding as per the act.

MCGAVEN TOAST MASTER *IMPORTANT

Facts: There was an unlawful strike at a bread maker. The employer said he was going to close the factory for economic purposes and the workers went on strike. The employer refused to pay the employees any severance pay when the factory closed stating by going on an unlawful strike the union repudiated the collective agreement.

Issue: Who has jurisdiction to deal with this issue?

Ratio: The legislatures, in creating the Wagner Act, created a whole new alternative legal regime (LRB and arbitrations) and took most of the power away from courts. Courts have no jurisdiction over claims arising from a collective agreement: those belong in front of an arbitrator (agree in *St Anne*). In labour law, we do rely on principles of contract law, but CA are contracts of a special nature and some contract principles do not go over into law relations, repudiation is one of those principles that do not go over. There is no such thing in labour law as repudiation of a CA. The employers remedy is bring a grievance under the CA to a labour arbitrator and to seek damages for losses caused by the illegal strike.

After the creation of this comprehensive legal system what is left for the courts is judicial deference to the arbitration process. The courts have the right to judicial review but with great deference to those decisions because Labour Arbitrators or LRB chairs are regarded under administrative law as having great expertise.

Held: Should go to arbitration.

ROLE OF ARBITRATORS

RE OIL, CHEMICAL & ATOMIC WORKERS & POLYMER CORPORATION, 1958 OLA

Facts: An unlawful strike occurs during the life of the CA. The employer brings a grievance to arbitration looking to recover damages. The union argues that this belongs before the court.

Issue: Does the arbitrator have jurisdiction and is the union liable?

Ratio: A breach of the CA by way of an unlawful strike during a CA brings the matter entirely within the arbitrator's jurisdiction (not the courts).

Held: The union is liable if they were directly involved.

Reasons: otherwise they would likely escape financial liability.

DISPLINARY ACTIONS BY EMPLOYERS DURING A STRIKE

ROGERS CABLE TV V INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, CLRB 1987

Facts: There was a lawful strike. The employer hired replacement workers. There was violence at the picket line and the employer fired 8 employees. The union brought an action for an unfair labour practice. The union is trying for a hail mary argument (last chance argument) that because there was no CA the employer had no right to impose discipline during a lawful strike.

Ratio: There is nothing that prevents the employer from disciplining workers who engage in violence unless there is anti-union animus or conditions from International Wall Coverings are met.

Held: Disciplinary decisions upheld.

Reasons: The punishment imposed was for alleged misbehaviour on the picket line not for participating in the strike and if employees are fired during a lawful strike there are three avenues for the union to protect those workers jobs:

1. It uses its strength to negotiate back to work protocol which include the employees returning (least favourable for ER most favourable for EE)
2. Can't agree on back to work protocol but agree to send all the disciplined employees to arbitration on the just cause standard
3. The union is not strong enough to get a back to work protocol to return the employees back to work nor is it strong enough to get arbitration, so it sends the issue to LRB. The LRB can only determine is whether the firings were for anti-union animus or not (not just cause standard) (*THESE 3 ARE FROM WALL COVERINGS*)

PICKETING

It is common for a union to have a strike fund from which they will pay their workers a normal salary during the strike if they show up to picket.

If the strike is illegal, then picketing attached to it is illegal as well. If a strike is lawful, the picketing is per se lawful unless it generates into tortious or criminal conduct. In lawful strikes the courts regulate picketing. In an illegal strike, it is the LRB that decides whether a strike is illegal and if it is, then the picketing is also illegal. BC is the only jurisdiction in the country where the LRB regulates lawful

picketing, in Ontario it is the courts. The courts will only reduce or regulate picketing if there is excessive obstruction of traffic or violence/threats of violence on the picket line.

Picketing consists of three related activities:

1. The presence of one or more persons
2. Who are communicating by spoken word, written sign or both
3. Least one of more persons are communicating verbally and or visually with the specific intent of persuading other workers, the public, customers, or suppliers to sympathetically respond to their message.

COMEX PLACER V CANADIAN ASSN OF INDUSTRIAL, MECHANICAL WORKERS, BCLRB 1975

Facts: A lawful strike where employees were blocking entrance to a remote mine and there were threats of violence. The employer applied to have the size of the picket line curbed.

Ratio: There is a broad power for the regulation of legal picketing. S83 of the OLR Act regulates the unlawful strike/lockout and by extension s100 says it is the court.

Held: Must go to the courts – board lacks jurisdiction.

Reasons: Picketing is protected under s2b and should not be unduly limited s1 (*Pepsi*). If there is no violence or threats of violence and the picketers are respectful in opening up after an agreed upon amount of time the employer will typically not have an argument before the court.

TYPES OF PICKETING

There are three types of picketing:

1. PRIMARY PICKETING: employees are doing their own picketing (always per se lawful if it is conducted to a lawful strike)
2. ALLIED PICKETING: When an employee strikes at a store who carries the products (e.g. if Labatt employees strike and they picket at the LCBO who keeps carrying Labatt stores) this is allowed because the carrier is assisting the employer
3. SECONDARY PICKETING: A variation of allied picketing. Any form of picketing outside of the employer's place of production that has a tangential connection to the workplace (e.g. Labatt workers picket the home of their manager)

It used to be that only 1. was lawful. Now all three are lawful if the strike is lawful.

HARRISON V CARSWELL *NO LONGER RELEVANT

Facts: An employee of an employer in a shopping centre wanted to picket in front of the doors in the shopping centre in front of her workplace. The owners of the shopping centre she had to picket on the sidewalk which was far from the Shopping Centre.

Issue: Did the owner have right to remove her?

Ratio: Restricted primary picketing.

Held: The shopping centre owner has the right to remove her from the shopping centre.

CJ Laskin Dissents: Yes it is privately owned property but the public is invited to come on the property. In those sorts of circumstances (where there is no undue obstruction of commerce or the rights of the store owner) the rights of the picketer ought to be allowed. The infringement on s2b is unnecessary.

***Note**: this case changes after Pepsi.*

HERSEY'S *NO LONGER RELEVANT

Facts: The employees of the struck clothing factory went to picket at a store that was selling the employment's clothing (secondary picketing which includes allied picketing).

Ratio: The right to engage in commerce trumps the right to commerce. Restricted secondary and allied picketing.

PEPSI COLA, 2002 SCC

Facts: A lawful strike occurred at Pepsi. The employees picketed at both the plant and retailers who sold pespi.

Issue: Was the secondary picketing lawful?

Ratio: There is no difference between ordinary expression (wide interpretation) and picketing associated with a lawful strike because it always involves expressive activity (protected under s2b). Due to the broad interpretation of s2b, secondary picketing is always allowed unless it involved a tort or criminal act, if it does the court may intervene or to protect the interests of third parties.

Held: Picketing allowed.

Reasons: LRA can regulate picketing but no province has taken this up.

TELUS COMMUNICATIONS, BCCA 2007

Facts: There was an unruly picketing line with findings of molestation, assaulting, obstructing and interference. As a result, using the balance of convince, the lower court issued injunctions which were not obeyed and contempt of court orders which the unions appealed. The union lawyers were likely given this order because of political reasons even though the law was against them. The union argued that you can't have tortious conducted unless it caused individuals to cross the picket – the employer should only have an injunction if the tort is completed by the individual not crossing the picketline.

Ratio: Freedom of expression may be curtailed to protect third parties

Held: Picketing got too violent.

Reasons: The picket line had gone from an expressive purposive to a violent purpose. The employer did not need to show a completed tort otherwise the court would be allowing a wide range of criminal and tortious behaviour.

JOB RIGHTS OF STRIKERS

S1(2) *LRA* ensures that striking workers who are striking lawfully keep their job rights during the strike (can't be punished for exercising a right they have under the act).

S80: S80 used to say that a worker who is lawful on strike or locked out can keep the rights to their job for 6 months (unique in Canada typically it is indefinite), in 2017 Bill 148 joined the other provinces and gave the right to be indefinite. Bill 47 would change it back to 6 months.

If a picketer engages in violent or tortious behaviour during a lawful strike or lockout, the employer can discipline the employee.

CANADIAN PACIFIC RAILWAY CO, 1962 ONT HCJ

Facts: Lawful strike at the Royal York, during that lawful strike, the hotel management sent a letter to the striking worker saying either accept the new wage offer by x date then we will presumed you have resigned. They didn't and the employer fired them. The union stated they had back to work rights.

Ratio: As long as the workers are striking lawful and within the time limits, they could not be fired for exercising their right to strike.

CANADIAN AIR LINE PILOTS ASSOCIATION V EASTERN PROVINCIAL AIRWAYS, CLBR 1983

Facts: During a lawful strike in the 80s, the employers decided to continue the work of the airlines during replacement pilots and the employer was able to continue service. The union realized they would lose and decided to try to make a deal. The only remaining sticking point was that the employer had promised that the 18 replacement workers and the striking pilots would only get their job back as filling vacancy. The union argued this violated their rights and that the temp workers didn't have a right.

Issue: Are replacement workers employees for the purposes for the *LRA*? (No *Oak Mines*) Can the replacement workers keep their job?

Ratio: You can't punish workers for exercising a lawful right under the act. You cannot give preference to replacement workers over striking workers at the end of a strike.

Held: Union wins.

Reasons: This comes under the protection of s80.

SHOULD THERE BE LAWS RESTRICTING REPLACEMENT WORKERS?

The SIMS report argued there should be no general prohibition unless they are being used to undermine the bargaining rights of unions, then replacement workers should be banned (currently in the CLC).

SHOULD WE HAVE STRIKES?

Yes. The strikes in the 1980s were likely caused by inflation. Stabilized inflation reduces the amount of striking. When there are strikes unions are more hesitant to have full blown strikes (Canada Post).

PUBLIC SERVICES: ESSENTIAL SERVICES

Essential services (hospitals, police etc.) are integral to society. There are three options: 1. Allow them full rights to strike (not good) 2. Ban strikes completely (this would mean that if an impasse is reached they must go to interest arbitration either they could take arguments from both sides or packages which the arbitrator would have to accept or decline the whole package) 3. Limited or controlled strikes (e.g. 20% of workers are essential which means that many must continue with the addition of management to continue work and the other 80% go on strike)

COLLECTIVE AGREEMENT AND ABRITRATION

S2d of the Charter accepts the right to organize, the right to strike and the right to collectively bargain. The right to collectively bargain is the most important. Labour is always a tension between industrial production and industrial justice.

LRB is the full time governmentally appointed statutory tribunal that regulates and adjudicates and interpret the LRA. **Labour arbitrator boards** and regulate collective agreements. You are appointed on a one-off basis over and over if you are agreed upon by the employer and union.

S1 LRA: A collective agreement has to be in writing, it has to be agreed upon by an employer and a union and has to focus on the terms and conditions of work. They are contracts of a special and unique nature therefore not all contractual principles apply. There is no repudiation in CA. CA's are continuing agreements that are renegotiated every 2-3 years. The essence of a CA is that it is the sale of human labour in exchange of monetary compensation.

S45: Every CA must have a provision stating the union is the exclusive bargaining agent.

S46 & 79: No strike during the life of the collective agreement

S47: All collective agreements must have a union security clause (automatic deduction from wages of union dues by employer and turned over to union)

S48: All collective agreements must provide for the final and binding settlement by arbitration of all differences between the parties. Final and binding means that courts must show deference because of the LRB and arbitrators expertise. S48(12) covers the powers of the labour arbitrator. They can admit evidence that the courts can't admit. They are entitled to hear hearsay evidence (exception). Labour arbitration has become much more legalistic. S48(12)(j): to interpret and apply human rights and other

employment-related statutes, despite any conflict between those statutes and the terms of the collective agreements S48(14) gives arbitrator the power to mediate differences. S48(17): arbitrators can substitute penalties.

Labour arbitrator had 4 unique qualities post Wagner Act:

1. Cheap
2. Quick and efficient
3. Informal
4. Expert

Only the last really exists. It is not longer cheap (>$4000). It is not quick and efficient because the arbitrators are busy so you book a year out. It is also not informal because lawyers have devoured the purpose it is much more formalistic.

Virtually every collective agreement has a management rights clause which says that all rights that are not specifically negotiated in favour of the union belong to the management (old approach). The new approach is the equal partners approach. Union and employers approach each other on the basis of equality and are to be read in a neutral basis. The arbitrator brings with them the ability to understand that tensions in the workplace.

IMPORTANT POINTS FOR COLLECTIVE AGREEMENTS

1. CA extinguish all individual contracts of employment in the workplace.
2. The CA binds all the members of the bargaining unit whether or not they are union members (the union must represent all members because they pay union dues)
3. Being a union membered covered by a CA radically enhances the range of workplace rights that an employee has. For example:
    a. Unionized members have access to a mandatory grievance and arbitration clause
    b. Unionized members can imposed a fairness requirement upon their employers
    c. The just cause standard for dismissal exists in the unionized world that does not exist in the non-unionized world
    d. There is a wider range of remedies for a unionized workers (non-unionized workers don't typically get reinstated but this is the natural for unionized workers under a CA)
4. It is a collective agreement and gives benefits to the collective.
5. Collective agreements are continuing agreements with statutory recognition that are to be periodically reviewed.
6. There is a mandatory forum for disagreements – arbitration which is to be final and binding)

YOUNG V CANADIAN NORTHERN RAILWAY, [1931] 1 DLR 645 (PC)

Facts: There was a last in first out rule. Young was laid off out of seniority (a more junior worker was kept while the senior worker was laid off). Young didn't get along with the union but he went to the court to try to get the rule enforced.

Issue: Should Young have been laid off?

Ratio: Before the Wagner Act came into force collective agreements had no binding legal authority. They were merely gentleman's understanding and courts did not accept them. The law does not recognize that the union can make agreement for all workers.

Held: The correct remedy was to get the union to strike. If they would not strike then too bad.

Reasons: Unions want their own legal system.

PAUL WEILER (THE ROLE OF LABOUR ARBITRATOR: ALTERNATIVE VERSIONS (1969)) AND DAVID BEATTY (THE ROLE OF THE ARBITRATOR: A LIBERAL VERSION (1984) *KNOW TITLES OF ARTICLES

Formalistic with respect to labour arbitration. Interpret CA within the 4 corners of the writing this is challenged by Beatty. Beatty's view is endorsed and applied by labour arbitrators today. CA's are complex and must be interpreted in this backdrop of union and employers. They are a special and unique type of contracts. They are wholistic, multi-facet and beyond the four corners.

RE UNITED STEELWORKERS & RUSSELSTEEL (1966) (OLA) *RESIDUAL RIGHTS APPROACH

Facts: Three employees filed a grievance because the employer replaced regular truck drivers with people from outside the bargaining unit. The employer had a lease for trucks but when that lease ended they entered into a lease for trucks and drivers. This was contracting out union jobs to non-union members. The old drivers were offered to go to the truck company or stay with the employer as warehouse workers (pay cut).

Issue: Did this contracting out violate the collective agreement?

Ratio: Unless the union has specifically negotiated a no-contracting out approach, the employer is free to so.

Held: Grievance dismissed.

Reasons: Important to see the old approach to labour arbitration (4 corners). The approach no longer prevails but the case is still good law. "reserved rights" school permits contracting out in the absence of some express prohibition in the Collective Agreement. The other view is a wholistic view (Laskin). Boards typically favour management's right to contract out. There is nothing in the contract that says limits management's right to contract out.

Note: Virtually all collective agreements will contain a management rights clause. This is drafted in wide language that says whatever is not negotiated in the collective agreement belongs to management. Management right clauses were previous given a very broad interpretation. They are now read through a different prism (equal partnership approach and read in a much more limited fashion)

COMMUNICATIONS, ENERGY AND PAPERWORKERS V IRVING PULP & PAPER, 2013 SCC

Facts: The employer unilaterally implemented a policy for mandatory random alcohol and drug testing for employees in safety sensitive positions. A positive test would lead to disciplinary action which could include dismissal. The union said random drug and alcohol testing is only justified in infringing privacy rights if the evidence leads to the conclusion the testing is required.

Issue: Did the employer had a right to implement this test?

Ratio: KVP test: Any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union must be consistent with the collective agreement and be reasonable. The interests of the employer and union must be balanced. Only extreme circumstances will justify random testing.

1. This case talks about the common law of labour arbitration jurisprudence. When arbitrators read collective agreements and interpret them it creates common law.

2. /3. *KVP* (1975) decision: If an employer in a unionized workplace is going to create and impose a workplace rule, it is only effective if it doesn't breach or contradict the collective agreement and if the rule is reasonable. The KVP test must also be the rule for random drug testing. It must meet a standard of reasonableness (just and fair) even though the collective agreement was silent on this and there was a broad management right provision. **Management right provisions** must be subject to reasonableness.

4. Abella agreed with the arbitrator that when there is a case of safety on one hand and privacy on the other, the KVP test is fulfilled by a balancing of interest test. The assumption is you are protecting the right to privacy in the workplace (do not surrender rights at a workplace) unless there is a compelling counter reason to do away with the right to privacy in that specific case. (privacy prevails unless there is a pervasive safety problem at the specific workplace).

Held: Appeal allowed.

Reasons: Company did not show sufficient evidence of the danger of drug and alcohol (problem at workplace) usage at the workplace to justify the imposition of the test (didn't meet reasonableness test). The only possible source of a right to implement this would have been found in the management section of the collective agreement. The reports of alcohol abuse were dated, there had been no positive results in two years, and the testing went right to the heart of the employee's privacy interest.

Dissent: The appropriate standard should have been reasonableness. Arbitral jurisprudence stated that there need only be some alcohol problem but the board raised to a significant problem; the boarded added the need to provide evidence that the alcohol problem was causally linked to an accident or injury; and the adverse inference about a lack of risk was unreasonable because the employer tested only those in a safety sensitive position unreasonable.

INTERPRETING COLLECTIVE AGREEMENTS

Arbitrators use two things when interpreting collective agreements:

1. What is the intention of the parties?
2. What is the industrial relations back-drop.

PAUL WEILER: RECONCILABLE DIFFERENCES (1980)

Collective agreements are very different from individual sales transactions or employment contracts. They cover a larger number over people and try to protect future interests as they last for 3 years. Parties don't have time in the negotiation process to address all issues that might arise. Rarely is the answer to a hotly contested dispute within a collective agreement found within the four corners of the document. This means don't just look at the written intentions. Look also at the industrial relations realities (interpret provisions in terms of human rights provisions or accepted industrial relations practices – in other words in terms of labour arbitration common law).

RE NORANDA METAL INDUSTRIES LTD, FERGUS DIVISION V INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, 1983 ONCA

Facts: An arbitrator was appointed to deal with a grievance and was called to interpret a clause that permitted the employer to subcontract as long as it did not affect union members. The union alleged that the employer violated this clause by hiring subcontractors to complete the replacement of an acid-waste line without offering the work to union workers on a voluntary basis at over-time rates. Initially the worked had been performed by skilled tradesmen within the bargaining unit. In determining if the clause had been violated the arbitrator admitted evidence of what happened during negotiations and past practice to interpret the meaning of the provision. The arbitrator relied upon this extrinsic evidence to make a finding that the provision had been violated.

Issue: Was the arbitrator entitled to use extrinsic evidence?

Ratio: Arbitrators have the right to use extrinsic evidence if they made a finding that a particular clause is ambiguous (to determine the true intentions of the parties).

Held: The arbitrator was entitled to use extrinsic evidence.

Reasons: Both the union and the employer's interpretation were plausible thus the clause was void.

INTERNATIONAL ASSOCIATION OF MACHINISTS V JOHN BERTRAM & SONS CO (1967) OLA

Issue: What is the true intention of the parties

Ratio: Labour arbitrators are entitled to use past practice of the parties to determine the intentions of the party if the provision is ambiguous. There should be: 1. No clear preponderance in favour of one meaning stemming from the words and structure of the agreement as seen in their labour relations context; 2. Conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; 3. Acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period of time without objection; 4. Evidence

that members of the union or management hierarchy who have some real responsibility for the meaning for the agreement have acquiesced in the practice.

Held: The parties were allowed to admit examples of past practices to show how the provision was interpreted in the past and determine the meaning of the clause.

ESTOPPEL

NOR-MAN REGIONAL HEALTH ATY V MANITOBA ASSN OF HEALTH CARE PROF, 2011 SCC

Facts: Ms Plaiser was employed by Norman. She argued that her years as a casual worker should count towards her seniority. The labour arbitrator found that although the employer had breached the collective agreement, the Union was estopped from this grievance because of its long-standing acquiescence to the employer's interpretation.

Ratio: Estoppel remains a contractual tool of interpretation available o labour arbitrators. Labour arbitrators are owed a high degree of deference within the standards of review under administrative law. Estoppel is not used to determine the intentions of the parties, it is to determine whether the parties acquiesced to a different reading of the clause.

Held: The employer wins.

Reasons: The union did not enforce their rights and had for a long time "slept" on their rights and could not enforce those rights under the end of the collective agreement. Under s121 of the *LRA* arbitrators must not only consider the collective agreement but also real substance of the matter in dispute.

CANADIAN NATIONAL RAILWAY *OPPOSING CASE OF ESTOPPEL

Facts: The employer wasn't required to pay sick for the first three days under the collective agreement but did anyways. The employer decided to stop and the union argued that the employer was estopped.

Ratio: The use of promissory estoppel as interpretation.

Held: Union wins.

Reasons: The employer by its consistent actions had given the impression to the union that they did not need to raise this issue at negotiations because this practice would continue. This right continues until the next round of bargaining.

ARBITRAL POWER

PARRY SOUND SOCIAL SERVICES ADMINISTRATION V OPSEU, 2003 SCC *IMPORTANT CASE

Facts: OPSEU represented employees at a social services board. This board hired Ms. O'Brien as a probationary social worker. There was a provision that said for the probation period, the employer has

the absolute right to terminate that employee and the union cannot grieve that. Ms. O'Brien went off on maternity leave during probation period and was fired during this period. The allegation is that she was terminated because she was pregnant. This is prohibited under the *ESA* and human rights act. This goes to arbitration and the employer raises a jurisdiction issue. The employer states that probationary employees cannot challenge their dismissal on any grounds to arbitration, they could go to an *ESA* officer or to *HRT*. The union says arbitration has the power under s48(12)(j) of the *LRA* to consider employment statutes when it is deciding human rights complainants in the workplace. The arbitrators said they did have jurisdiction.

Issue: Does a labour arbitration board have the right to decide human rights and discrimination issues involving a probational employee or does the jurisdiction belong to a human rights tribunal (is the *HRC* incorporated into each collective agreement)?

Ratio: This gave a broad jurisdiction to labour arbitrators to hear a decide human rights issues in the workplace. This is part of the confirmation of the high degree of regard and deference that the court display towards labour arbitrators.

Take away points:

1. Labour arbitrators will be given broad deference by the courts because arbitrators are deemed to be experts in industrial relations
2. Arbitrators get their jurisdiction from the collective agreement and s48 of the *LRA*. *S64.5*(1) of the *ESA* provides that it is enforceable against an employer as if it was part of the collective agreement.
3. Arbitrators are to give a broad reading to s48(12)(j). It gives arbitrators jurisdiction over statutes when reading collective agreements – this is a beneficial grant of authority to arbitrators because arbitrators have acquired human rights expertise and should be given deference when reading human rights statute when interpreting collective agreements (Collective agreements must comply with *ESA* and *HRC*).
4. *McLeod v Egan*: The parties cannot contract out of statutory minimums when negotiating a collective agreement. Arbitrators must read collective agreements in light of statutory obligations in Ontario.
5. Collective agreements have two faces: both a public (we bring into the reading of the collective agreement all the employment statutes) and private (an agreement negotiated between two private parties: union and employer) feature, therefore the impact of an award creates precedent for other industrial relations parties across the country.
6. Re-endorsed the point of view that arbitration boards have liberal powers to interpret collective agreements because of their expertise and because they can provide a better form of industrial justice than the courts.
7. The arbitrator has jurisdiction despite the fact that there was a broadly worded management rights clause. Even though this clause existed, it must be read in the context of the employment statutes, in this case, the management rights clause and the no right of probation employees to go to arbitration were overridden by the human rights statute and employment standards act.

8. This did not set new law but reinforced existing rights and clarified them.

Held: The union wins on jurisdictional issue (jurisdiction was found).

Reasons: As per s39(1) of the *LRA* the standard of review is a patently unreasonable error, s48(1) gives arbitrators the final power and prohibits parties from stating that a matter isn't arbitrable. S5(1) of the *HRC* states that probationary employees are entitled to equal treatment without discrimination which is implicit in the collective agreement. Recognizing the authority of arbitrators to enforce an employee's statutory rights substantially advances the dual objectives of

WEBER V ONTARIO HYDRO, [1995] 2 SCR 929

Facts: The employee was off on sick leave because of a bad back. The employer received tips that maybe his back wasn't and as bad as he claimed. The employer hired a private investigate to determine if he had a bad back or not. They had pictures of Weber carrying heavy logs and building a back porch. The PI also tried to gain entry into the house by pretending to be someone else. Weber was dismissed. Weber was also suing the employer in court for violating s7, 8 and nuisance, trespass etc – this was settled. The employer argued that this should not be before court but before arbitration.

Issue: Can arbitrators deal with charter and tort issues?

Ratio: Labour arbitrators can deal with these issues (this widened the scope of their power). Labour arbitrators are a court of competent jurisdiction as per s24 of the *Charter*. This means that when an arbitrator is dealing with a grievance from a governmental employee the arbitrator has the power to read and apply the charter but they only have the remedial authority to issue a declaration of specific invalidity (e.g. this particular law is a violation of the charter, the arbitrator can say for this specific case that law is invalid) where a court has the power to declare general invalidity – can strike down a law).

Reasons: Arbitration should be a one stop forum so that unionized employees can get most of their workplace issues resolved in front of an expert tribunal.

Note: Typically, the only torts that go to arbitration are defamation claims.

DAMAGES

POLYMER 2: RE POLYMER CORP AND OIL, CHEMICAL & ATOMIC WORKERS (1959) OLA

Facts: The union held an illegal strike and the employer brought a grievance seeking damages for the losses cause by the illegal strike. The union argued that the collective agreement did not have a specific clause to award damages therefore the arbitrator did not have jurisdiction to award damages.

Issue: What damages should be awarded for an unlawful strike?

Ratio: There is an implicit authority given to arbitrators to award damages even if there is no express remedial clause. This comes from the accepted common law of labour arbitration.

Held: Union argument dismissed.

Reasons: If an express remedial provision was required to award damages for an unlawful strike, the arbitrator also could not award damages for union members being treated poorly.

WILLIAM SCOTT & COMPANY V CANADIAN FOOD, 1977 BCLRB *IMPORTANT

Ratio: This case set the standard for how arbitrators are to think through the evidence in a dismissal case. s48(17) gives arbitrators the express power to reduce or substitute the penalty imposed on worker misconduct if the arbitrator thinks it is just in all the circumstances. Steps:

1. Has just cause been established by the employ for some kind of discipline? If so:
2. Was the employer's decision to dismiss the employee a proper or excessive response?
3. If the discharge was excessive, what alternative penalty should be substituted as just and reasonable?

Additional 5 factors that the arbitrator should consider if they are determining if the penalty was too severe:

1. What was the seriousness of the misconduct?
2. Was the employees conduct pre-mediated or repetitious or was it spontaneous and impulsive?
3. Did the employee have a long record of service with the company?
4. Was the record clean of prior misconduct?
5. Was the employee subject to harsh discrimination (or consistent with employer policies)?

Reasons: In a non-unionized workplace the best employee could be fired for the worst reason, but the courts will not reinstate the employee – will just award damages. A labour arbitrator in a unionized workplace has the power to reinstate an employee whether or not they committed misconduct and the penalty was not proportional to the misconduct.

Note: See s48(17) *LRA*: Where an employee has been discharged or disciplined for cause, the arbitrator can substitute any other penalty that the arbitrator deems just and reasonable in the circumstances, as long as the collective agreement doesn't specify the penalty for the charge.

NEW DOMINION V WHOLESALE CANADA CANADIAN, (MCCAUL GRIEVANCE) (1997) LAC *REITERATION OF WILLIAM SCOTT

Facts: McCaul was dismissed by her employer, new Dominion Stores. She was alleged to have stolen a half-pint of berries. She claimed for have forgotten they were in her bag. The evidence suggested that she intended to take it without paying for them (arbitrator accepted this). She had 23 years of seniority.

Issue: Did this behaviour led to automatic termination?

Ratio: Professor Arthurs (**CANADIAN BROADCASTING CORPORATION** 1979): The following discipline factors might be considered in mitigating a penalty:

1. *Bona fide* confusion or mistake by the grievor as to whether he was entitled to do the act complained of;
2. The grievor's inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act;
3. The impulsive or non-premediated nature of the act;
4. The relatively trivial nature of the harm done;
5. The drank acknowledgement of his misconduct by the grievor;
6. The existence of a sympathetic, personal motive for dishonesty, such as family need, rather than hardened criminality;
7. The past record of the grievor;
8. The grievor's future prospects for likely good behaviour;
9. The economic impact of discharge in view of the grievor's age, personal circumstances, etc.

Held: 9 months suspended without pay (time from when she was fired to when arbitration issued the award) but also without loss of seniority.

Reasons: Against discharge: McCaul is 55 years old, has 23 years of service with no prior record of discipline, the value of goods taken was nominal ($8.55). For discharge: she did not admit to her wrong. However, given the strong mitigating factors: her long service, good record and the nominal value, she should not have been terminated. The standard is a balance of probabilities and she was entitled to maintain her innocence.

Note: Either CBC or William Scott will be cited in dismissal arbitration

ARBITRATION & CIVIL ACTIONS CONCERNING CHARTER AND COMMON LAW CLAIMS

WEBER V ONTARIO HYDRO, [1995] 2 SCR 929

Facts: See above, employer hired to PI to investigate sick claim.

Issue: To what extent has the arbitral regime ousted the jurisdiction of the courts in civil and *Charter* matters?

Ratio: Arbitrators have exclusive jurisdiction over matters arising under a collective agreement. That means they have jurisdiction over civil law matters (torts – really only defamation) and *Charter* issues that arise in front of them.

When determining the proper forum, the arbitrator or court must consider:

1. The dispute: Does the dispute, in its essential character, arise from the interpretation, application, administration or violation of the collective agreement? (typically yes)
2. The ambit of the collective agreement

Held: Arbitrator has jurisdiction. Weber cannot bring a civil claim forward after an arbitrator decision was released on the same matter.

Reasons: s45(1) of the *LRA* prevents the brining of civil actions which are based solely on the collective agreement. Allowing concurrent actions would undermine the goal of collective bargaining which is to resolve disputes quickly and economically with a minimum of disruption. The dispute relates to the CA because it surrounds sick pay and unfair treatment which were laid out in the CA and therefore relates to the administration of the CA within s45(1). The broad grant of jurisdiction under s48 and the particular facts of this case suggest that the legal character of this dispute between a unionized worker and its employer belong to an arbitration board and therefore the employee cannot go to the courts

BISAILLON V CONCORDIA UNIVERSITY, 2006 SCC 19 757

Facts: A number of unions had gone in a class action to the courts with respect to pension negotiations.

Reasons: The essential character falls within the CA and therefore it belongs with an arbitrator not the courts.

MORIN *EXCEPTION TO WEBBER

Facts: CA signed between teachers' unions and the province (QC). A number of junior teachers felt it was discriminatory towards them. The younger more junior teachers complained to the Quebec *HRC* who it forward to the Quebec *HRT*. It ends up in court because they argued based on *Weber* the essential elements of the case arise out of the CA and therefore a labour arbitrator should decide it.

Issue: What is the essential character of the case?

Ratio: The arbitrator does not have jurisdiction to hear cases between individual employees and its union (even if the union is only a co-defendant). The only parties that can go before an arbitrator are the union and the employer.

Held: The essential character of this case, although it arises out of the workplace and out of a dispute related to the CA, is a discrimination claim it belongs to a *HRT*.

Reasons: This issue is partly between the employees and their union. The arbitrator's jurisdiction is between the union and their employer. If the individual employees have a complainant not only against the employer but also the union it does not go before the arbitrator.

DUNSMUIR V NB, 2008 SCC

Ratio: This case changed the standard of review for when a court is judicially reviewing a tribunal decision. It used to be correctness (least deferential), reasonableness and patently unreasonableness (most). The lower courts had to decide which, if any, it fell under.

This case made two categories: correctness and reasonableness. Within reasonableness the highest standard of deference is still given to labour arbitrators.

Note: The success rate of challenges is very low.

CONSTITUTIONALIZATION OF LABOUR LAW

Freedom of association (2d) and Freedom of expression (2b) are the two basic pillars of a free and democratic society. The court has elaborated upon s2d in three trilogies.

The first trilogy of cases was in 1987: only need to know Alberta reference. These cases three cases where the SCC said there is no meaning given s2d. These decisions are seen to give a sterile definition to freedom of association.

The second trilogy (2001-2011): Dunmore case; BC health services; Fraser Case: the SCC showed its hesitant and confused approach to s2d.

The third trilogy: need all three cases as well (2 two weeks between jan and feb 2015): SCC takes a much liberal, purposive, and coherent approach to freedom of association.

The SCC has set a very low bar for a violation of 2a or 2b. All you had to show was that the interference by the state was more than trivial or insubstantial. The heavy work was done under s1 as to whether it was justified or not. The SCC had had a more difficult time coming up with a purposive, liberal, coherent approach for s2d. The third trilogy moved the approach closer to s2a and s2b.

The international labour organization is the UN organization that has the responsibility to look after labour relations around the globe. It is possibly the most successful UN organization. There are four essential labour rights that have been identified by the ILO:

1. Right to organize
2. Right to collective bargain
3. Right to strike
4. Right to be free from undue government interference (not important in Canadian law because we live in a free and democratic society)

S2d essentially deals with the first three rights. The three trilogies were about these rights.

Delisle: After Delisle labour lawyers in Canada figured s2d was a lost cause.

FIRST TRILOGY

The SCC heard and issued decisions for all three cases on the same day. This was an obituary for s2d.

REFERENCE RE PUBLIC SERVICE EMPLOYEE RELATIONS ACT (ALBERTA REFERENCE)1987 SCC

Facts: There was a challenge by Alberta trade unions to Alberta legislation that removed collective bargaining rights and the right to strike from some public sector works. There were three schools of thought under s2d:

1. Industrial Realist: It is a bad idea for trade unions to go to the courts to seek constitutional protection (charter realist). There is a reason we created labour arbitration. Courts inherently don't understand unions and employers. Courts don't get it right. These individuals said the court will screw it up don't go to the courts.
2. Industrial Relations Cynics: They agreed with #1 that the courts will screw it up. The courts are inherently biased against trade unions (#1 said courts don't understand trade unions). They said don't go to the courts to litigate 2d because the court will never be on your side.
3. Charter Romantics. It is important to go to the courts and to give meaning to s2d. Labour rights are human rights and it is important to educate he courts to get them to give as fulsome a meaning to freedom of association as it is to give meaning to freedom of religion and freedom of expression.

Issue: Does s2d protect the right to strike?

Ratio: The right to strike and the right to collectively bargain are not protected by s2d.

Held: Against the unions.

Reasons (Macintosh): s2d protects the freedom to establish, belong to and maintain an association; it does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; it protects the exercise in association of the constitutional rights and freedoms of individuals; it protects the exercise in association of the lawful rights of individuals.

Freedom of association is one of the most fundamental rights in society. It should be given a narrow and constricted reading because the Charter is a Charter of individual rights not collective rights. It means the right of one individual to join with others to express his or her individual opinion. 2d only protects the exercise in association of rights that have Charter protection when exercised by the individual. The right to collectively bargain is a new statutory right and therefore not protected under the *Charter*. The Courts should be exceptionally cautious about intervening with management union relations because the courts would muck it up.

Ledain: Judges should not interfere in Labour Relations and therefore no particular meaning should be given to s2d (agreed with realist)

Dissent (most important dissent written in the Charter era – Dickson): This dissent has now received majority assent. Dickson takes a rights-based approach (labour rights are human rights). Quotes from Beatty (*Labour is not a commodity* – most influential phrase in international labour – reason by CA is so different then a normal contract): employment provides recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of self-worth.

1. Endorses the idea of interpreting the *Charter* in light of international law, and in particular international labour with respect to s2d. In particular, ILO convention #87 which talks about the fundamental human right to join a union and engage in the lawful activities of a union and has

been interpreted as protecting the right to strike. This satisfies Dickson that 2d protects the right to strike and the right to collectively bargain.

2. Rejects the argument endorsed by LeDain and Macintyre that strikes cannot be constitutionally protected because they are statutory – this does not indicate if they are fundamental rights in a free and democratic society
3. 2d not only protects the right to join an association but also protects some of is core activities
4. Freedom of association is fundamental to a society and is as important as freedom of expression. It protects individuals from state-forced isolation.
5. The Charter protects collective rights as well as individual rights (linguistic rights in s23 – the ability to be able to speak a protected language is meaningless unless they can speak to their community in their protected language – this is a collective right). Freedom of association is a collective right.
6. Collective bargaining is industrial democracy. It is described as a protection of the rule of law in the workplace. Without it, it is the rule of individuals (supervisors).
7. Work is one of the most fundamental aspects in an individual's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of an individual's identity self-worth and emotional well-being.
8. If freedom of association only protects the joining together of persons for common purposes but not the purpose for which that association is formed, the right is truly legalistic and offers no protection.

DELISLE (RCMP 1), 1999 SCC

Facts: RCMP officers were statutorily prohibited from unionizing. By 1999 every other police force in Canada had formed a union. Mr. Delisle challenged the prohibition on the RCMP unionizing.

Ratio/Held: The right to organize is not covered by s2d.

Reasons: RCMP officers are privileged workers. They have other alternatives if they have problems at work. They can sue the government.

SECOND TRILOGY

This rethought the burial of s2d and said there was some life but the decisions were confusing about the breadth of s2d.

DUNMORE V ONTARIO, 2001 SCC 34*BEGINNING OF A NEW CHANGE IN S2D

Facts: Under Ontario legislation agricultural workers did not have the ability to organize under the *LRA* and no other act spoke for their ability to organize. This was challenged under s2d.

Issue: Should the farmers be allowed to unionize?

Ratio: There is a right to join a union.

1. There are some collective rights recognize by the *Charter* including s2d;
2. Necessity of positive statutory intervention: It is impossible for most occupational groups in the workforce to be able to organize collective without statutory intervention, only with the protections provided under the Wagner act were employees able to receive relative equality.
    a. There are positive duties on the state on the *Charter* to take certain actions to protect vulnerable people in society under s2d.
    b. If the *Charter* doesn't protect the most vulnerable employees – agricultural workers – it has no value
3. The right to organize agricultural workers is based on ILO

Held: The provision infringes s2d and could not be saved under s1 (gives ON gov 18 months to fix and give agricultural workers the right to form an association).

Reasons: Distinguished from Delisle. Claims of under inclusion should be grounded in *Charter* freedoms not access to statutory remedies. The appellants claim a freedom of association not general inclusion in *LRA* (non-statutory). The farmers, unlike the RCMP in *Deslisle*, are vulnerable to reprisal by their employer (dangerous and seasonal work) because RCMP officers are professional and have the right to take action against the government under the Charter. The farmers have met the burden of proof, without statutory protection there is no possibly of association. Since the employers are not government, it is more likely they will take the exclusion of their employees from statutory protection as a green light to commit unfair labour practices (unlike *Deslisle*).

Section 1: pressing and substantial objective; not minimally impairing because it denied every aspect of the freedom of association to the agricultural including those that were necessary for the effective formation and maintenance of an employee association.

BC HEALTH SERVICES V BRITISH COLUMBIA, 2007 SCC *RIGHT TO COLLECTIVELY BARGAIN

Facts: The BC government brought in *Health and Social Services Delivery Improvement Act*. Unions were not given an opportunity for consultation (only 20 minutes notice, it was passed within 3 days). Large portions of existing collective agreements were invalidated, precluded collective bargaining for certain issues, and any future CA's that did not comply would be invalidated.

Issue: Does this violate s2d and s15?

Ratio: There is a right to collectively bargain and it is protected under s2d. S2d should be viewed as seriously as s2a and s2b.

1. Rejects the reasoning and logic of the Alberta Trilogy (s902-904 – the reasons do not withstand principled scrutiny and should be rejected) – basically adopts Dickson:
    a. These rights have been around for a long time and elsewhere they are viewed as fundamental rights (not statutory rights around for a limited time)

b. It is wrong to declare a judicial no go zone for an entire right on the ground that it might involve the court in policy matters
c. Charter rights are not only individual rights. There are collective rights anchored in the charter as well as individual rights (e.g. language rights – *Dunmore*).
d. The Charter right to freedom of association is broad enough that it protects not only the right of the association exist but it also protect the core activities of that association (right to collective bargain, associate, organize)

2. acknowledges the fundamental nature of collective bargaining. It is the most significant collective activity under s2d. The procedural right to bargain with employers must be protected. Bargaining outcomes are not protected. That is for the parties to bargain. Fair procedures have best changes of getting fair outcomes.
3. Endorses international labour law as a reliable sturdy tool by which to interpret the *Charter*
4. *Charter* values (dignity, equality, liberty etc.) are reflected in collective bargaining (working people being able to bargain equally with employers) is an important aspect of a free and democratic society.
5. Substantial interference is the test for s2d.

Held: Appeal allowed in part. Certain provisions were found to be unconstitutional.

Reasons: The unilateral action by the BC legislature to invalidate a number of bargaining rights that the health care unions had achieved did substantially interfere with their s2d rights (right to contract out of work, right to lay off and bumping rights, seniority rights). The government may have been facing serious fiscal challenges, but it has to deal with this in a manner consistent with the charter of rights. By disregarding the *Charter* it substantially interfered with the appellant's rights.

FRASER V ONTARIO (AG), 2008 ONCA 760; 2011 SCC 20

Facts: Companion case to *Dunmore*. This case is about the Ontario government's reaction to *Dunmore* which gave agricultural workers the right to organize. The legislation passed was directed at agriculture workers (*Agricultural Workers Protection Act*). It gave AW the right to form associations and to present to their employers changes to workplace conditions and the employer was required by law to listen to them and to read their written requests. There is nothing in this that said the employer had to bargain in good faith, bargain at all or that a collective agreement be achieved – it just had to listen to the workers. It was argued by UFCW that this excludes the essence of modern labour relations.

Issue: Did the ON government comply with the *Dunmore* decision?

Ratio: There is a right to organize but it is unclear what minimum level of evidence is needed to show that legislation does not protect employees s2d rights. The union would have to prove that it was effectively impossible to organize to show a breach of s2d (this raised substantial interference test).

Held: The union had not proved its case that the Act was unconstitutional and that the Act prevented them from collectively bargaining.

Reasons: The union was pre-mature in launching this action. The union should have tried to use mechanisms laid out in the Act and tried to bargain and then shown it was inadequate.

Dissent (Abella): Abella used a quote the Agricultural Minister who said that the proposed legislation does not extend collective bargaining to agricultural workers to show that the legislation violated s2d.

Note: Lynk thinks this decision is incoherent (written by McLachlin & LeBel). It answered concurring but not dissent. The court voted 8-1.

THIRD TRILOGY

Why is s2d so troubling for the SCC in developing a broad approach? It imposes a positive obligation on the state. This trilogy endorsed a broad and liberal interpretation and application of s2d.

Important Points:

1. this is the final burial of the first trilogy. It repudiates the individual rights only interpretation of the charter. It clarified some of the confusion from Dunmore, BC health and Fraser.
2. It re-indorses the use of international labour law and its standards in interpreting the charter.
3. Formal indorsement of all three of the ILO rights (organize, to strike, collectively bargain)
4. Leaves intact the substantial interference test for s2d (this test is different than the lower tests of 2a/2b – more than trivial or insubstantial interference). This cleaned up the confusion from Fraser where the court said the test move from substantial interference to made effectively impossible by government or state action
5. Good faith bargaining is constitutionally protected (in *Fraser* & *BC Health* they said there is no constitutionalization of the Wagner Act)
6. What 2d is trying to protect is the process of collective bargaining not the outcome
7. The SCC in *SFL* and *MP* reindorsed the points from *Dunmore* and *BC Health* that collective bargaining and labour affirm the essential charter values of equality, dignity & democratic voice.
8. Third trilogy buries *Delisle*, *MPO* stands for how far the SCC has come (grievance process wasn't sufficient to meet the minimum content under s2d).
9. The charter of rights and freedoms not only imposes negative duties on government (not to interfere with rights), there are also positive duties that workers will never achieve through individual negotiations with employers bargaining equality – that can only occur through collective negotiations which can only occur through substantial statutory intervention (gov must protect vulnerable workers)

MOUNTED POLICE ASSOCIATION OF ONTARIO V CANADA, 2015 SCC *RIGHT TO ORGANIZE

Facts: This is a re-litigation of *Delisle*. RCMP officers who are still prohibited from unionizing despite the fact that every other police force in Canada has organized and has the right to organize. RCMP officers could elect officials to talk to management about what their employees were feeling (this was done through internal rules). The officers wanted more – the gov argued that *Fraser* says you only have the right to organize and some kind of consultation process.

Issue: Did the RCMP have a right to unionize?

Ratio: This case gave a robust and dynamic definition to the right to organize to employee groups.

The complete exclusion of an occupational group of employees from collective bargaining would require a very high justification from the state. There must be meaningful access to unions and collective bargaining. Employees must have genuine choice and independence with respect to their organizations. Partial exclusion that substantially interferes with collective bargaining and the right to join a union violates 2d (back to substantial interference test).

1. SCC builds and reaffirms *Dunmore* for the right to create employee organizations under s2d.
2. There is no distinction between more and less vulnerable workers (unlike what was said in *Dunmore*), all workers are vulnerable and have the right to organize into a trade union.
3. SCC reinforced the positive duty that governments have a positive duty under the Charter to allow employees to have meaningful access to join a union and be involved in collective bargaining.
4. Endorsed Dickson's dissent that the purpose of labour is to protect individuals from state-sponsored isolation.

Held: Representative system set up by the RCMP did not satisfy s2d.

Reasons (McLachlin and LeBel): This representative system set up by the RCMP allows for some form of employee voice and choice but is inadequate to satisfy the right to association and the right to organize. The RCMP did not enable or allow access to a union or provide meaningful choice and was set up to avoid unionization. It was offensive to the associational right on the grounds it wasn't autonomous or meaningful enough in terms of getting the employer to meet demands and make concessions.

SASKATCHEWAN FEDERATION OF LABOUR V SASKATCHEWAN, 2015 SCC *RIGHT TO STRIKE

Facts: This case is about the right to strike for public employees. The Sask government passed legislation that prevent a number of public sector employees from going on strike (e.g. university employees and casino employees). The SFL challenged this.

Issue: Was this law too broad?

Ratio: *accepted dickson's dissent

1. The strike or possibility of strike helps to equalize power at the bargaining table, the right to strike also advances charter values with respect to equality, dignity, liberty, and democracy (same as *BC Health*). It also allows neighbours at work to band together and protect their interests at work. The right to strike should be interpreted broadly and is protected under s2d. Prohibitions or restrictions on the right to strike should be interpreted narrowly (this endorses Wagner Act model under s2d) particularly with respect to public sector workers have to be measured and calibrated. If there is a good justification under the charter for a group not being

allowed to strike there has to be a fair substitute that will solve issues between the parties (mandatory interest arbitration)

2. Essential services is a broad designation that says that certain types of public sector work are so vital to the public that there can be no strike at all or there can only be a restricted strike (E.g. Police, Fire, Ambulance – not allowed to strike; nursing home – restricted strike to perform essential services for residents). The definition of strike and essential services should follow that of the ILO. Strikes should only be banned where the health, safety, life or security of some or all of the population is threatened (ILO)

Held: Declared unconstitutional.

Reasons (Abella): ILO is a magnetic guide to understanding the charter.

MEREDITH V CANADA 2015 SCC *THE RIGHT TO COLLECTIVELY BARGAIN – ANMOULY

Facts: This involved the RCMP. It was launched by RCMP officers who challenged the arbitrariness of the employer granting wage increases to RCMP officers. Legislation had set up a pay counsel who would hear arguments every couple of years about wage increases. During austerity the pay counsel suggested 3% increase. The gov said no and put a cap of 1.5%. The officers argued that the roll back of the pay counsel's suggestion violated their right to collectively bargain (no collective agreement at the time but treated it as if there was).

Ratio: s2d guarantees a right to a meaningful labour relations process but, it does not guarantee a particular outcome. What is guaranteed is the right of employees to associate in a meaningful way in the pursuit of collective workplace goals.

Reasons: Since the RCMP wage increase mandated by the gov was the same as all other gov workers at the time there was no substantial interference with their right to s2d. The ERA did preclude consultation on other compensation-related issues.

Note: This case is distinguishable. Lynk thinks it has no judicial renounce because other cases are overtaking it.

CONCLUSION: WHAT IS THE CURRENT AND FUTURE LEGAL CONTENT OF S2D?

BCTF V BRITISH COLUMBIA, 2016 SCC *ODDITY

Facts: The government is trying to roll back the power of unions. In order to do this, they are trying to roll back collective agreements in health (*BC Health*) and in education. They argue under Dunmore saying there is a right to collective bargain. They wait until *BC Health* is decided and then active their case at BCSC in 2011. They win. The BSCS says that the stripping of important rights in the education field with no meaningful consultation was a breach of s2d. The BC gov introduced new legislation and readopts most of the old legislation that stripped the teacher's important rights. The teachers go back to the courts and win and BCSC. Lose at the BCCA but win at SCC.

Held: Appeal allowed. The SCC said they agree substantially with the dissenting judges in BCCA. This led to confusion because it is not clear what part they agreed with and what part they did not agree with.

Note: The SCC dissent says they would adopt majority view of the BCCA.

BCTF V BRITISH COLUMBIA, 2015 BCCA DISSENT (DONNEL)

Ratio: Under the current tests with respect to the right to collectively bargain there are two requirements on employers (typically governments):

1. The parties, including the gov, have to engage in good faith bargaining (negotiations). This determines if there was a breach in collective bargaining under s2d. This means there must be meaningful dialogue, an exchange of positions, there must be active listening to what the other side is saying, there cannot be any inflexibility in the positions, there must be honest good faith efforts to reach the middle ground
2. If there has to be back to work legislation, we must always keep in mind that it amounts to reasserting a power imbalance because the government as an employer has the right to enact it and if it is protecting its own purse that is a powerful tool to be using because it cuts off bargaining and interferes with the negotiation process. Did the specific back to work legislation amount to substantial interference with the right to collectively bargain?
    a. Was the back to work legislation premature? Can the gov prove there was significant harm already to the economy or the health and safety of either part or all of the public (ILO)? (*Abella*)
    b. Was the process created to solve the outstanding issues fair and just to both sides or is it tilted to one side? (2011 back to work legislation with respect to a previous strike at Canada Post).

CANADA POST, 2011

The back to work legislation breached s2d because it imposed terms on the union that were worse than what the employers' final offer was and had a skewed arbitration process that favoured the employer.

CANADA POST, 2018

The legislation provided a 90-day mandatory conciliation period and if it is not solved it will be to arbitration to solve any remaining issues. If the union can prove that there was no economic hardship the back to work legislation will likely be found unfair.

OUTSTANDING ISSUES WITH RESPECT TO THIRD LABOUR TRILOGY

1. What is substantial interference? Will the distinct test survive in the future (2a/2b have lower thresholds – will substantial interference survive subsequent argument)
2. Even assuming it does survive will the 2 part test from *BC Health/ BCTF* be the test or will the courts continue to fiddle with it?

3. MP did not expressly strike down *Fraser*. Will *Fraser* remain good law? (Unlikely as there is very little left after *MP*).
4. How broad is the right to strike? What does it protect? What doesn't it protect? There is litigation going on to ban the right to strike for TTC workers (they are the only transit workers in the country without the right to strike – will this withstand charter scrutiny)
5. What about s33 (not withstanding clause)? We assume that it won't be used but Doug Ford (crazy) used it. Stephen Harper never used s33 even after the courts struck down his labour laws

INDIVIDUAL RIGHTS WITHIN A UNION

MCGAVIN TOASTMASTER, 1976 SCC (LASKIN)

Facts: This involved an unlawful strike by workers at a bakery after the company said they were going to close the bakery. While the illegal strike was going on the company moved ahead its decision to close the bakery and refused to pay severance pay under the CA claiming the employees had repudiated it by going on an unlawful strike.

Issue: Should this go to arbitration? Can CA's be repudiated?

Ratio: No repudiation or fundamental breach in labour law.

1. CA are contracts but contracts of a unique nature. The doctrine of repudiation (fundamental breach) does not belong in labour law (employers cannot wiggle out of obligations under CA).
2. The arrival a union extinguishes individual contracts of employment. The only agreement is the CA. Sports are an exception to this rule: CA is a minimum standards agreement and then players can negotiate individual contracts above that.

Held: The CA was not repudiated.

Reasons: The company should have started an unfair labour practice claim when the strike started.

DUTY OF FAIR REPRESENTATION

Every labour relations act in Canada has a Duty of Fair Rep (except NB & PEI where they have a common law duty). This duty sets out a minimum standard (quality of rep) that the union must provide to the employees that it represents. **S74 LRA**: The union shall not act in a manner that is arbitrary, discriminatory or in bad faith in representation of any of the employees in the BU whether or not they are union members.

The duty of fair representation tries to understand the dilemmas unions face when trying to represent the issues faced by their members. Unions are typically given leeway as long as the action is not:

1. **Bad Faith**: motivated by ill-will, malice hostility or dishonesty. If the union made an honest mistake in not bringing a claim forward without malicious intent, no bad faith (*Hargarve* – cited in *Lucyshyn*).

2. **Discriminatory**: Treating an individual or a group of union members in a manner different than other members for no justifiable reason (broader then HR definition) (*Hargarve* – cited in *Lucyshyn*).
3. **Arbitrary**: includes actions that are careless, grossly negligent, lazy or uncaring (*Hargarve* – cited in *Lucyshyn*). 80% of duty of representation complaints before the OLRB are alleging arbitrary treatment by their union. This alleges not that the union is doing something maliciously but thoughtlessly and incompetent.

To meet the duty of fair representation union must show:

1. That the union has actively turned its attention to the issue
2. That they conducted a reasonable investigation into whether I have a strong enough case or not
3. That they have gathered all relevant facts
4. That they have come to an honest conclusion and their decision is based on acceptable labour relations reasons (it can be a mistaken conclusion as long as it was honest without malicious).

NEGOTIATION OF CA

STEELE V LOUISVILLE & NASHVILLE RAILWAY, 1944 USSC

Facts: There was a white dominated railway union that excluded black employees from the right to be members. The union negotiated a CA with the railway that limited the number of black firefighters hired by the railway. The whole point of the negotiation was to benefit the white employees.

Ratio: They must represent all members fairly and with good faith.

Held: The union breached the common law duty of fair representation of all members that they represent. Unions cannot discriminate.

BUKVICH V CANADIAN UNION OF UNITED BREWERY, FLOUR ETC (1982) OLRB

Facts: Union represents truck drivers. The current CA says work must be divided evenly among all drivers. Work is declining. Drivers own their own trucks. This means that each driver is barely able to cover expenses because the number of hours per driver has declined. This term was unusual – typically if the number of hours decreases the least senior employee gets laid off. The senior drivers voted to renegotiate this clause to state that the work will be given to most senior workers. The union sat down to renegotiate this clause with employers amending the CA with the new seniority clause (30% of drivers lost their job but the remaining had enough hours to survive). The junior workers filed a s74 complaint.

Issue: Do unions have a duty to represent its members during negotiations for CA?

Ratio: The union cannot be faulted for making a choice to favour one group over the other if it is an acceptable industrial relations choice (no bad faith, arbitrariness or discrimination). Arbitrators should not ask whether the decision was right or wrong but, whether the decision could be reasonably made in all the circumstances.

Held: There was no breach of s74.

Reasons: Most collective agreements have this clause in it for when there is diminishing work (last hired first fired). There was no bad faith, arbitrariness or discriminatory behavior.

ATKINSON V CLAC, 2003 BCLRB

Facts: There were two separate waste companies being merged. Both were unionized and had seniority clauses. One was small (5 workers), one was large (25 workers). The union for the large company said that the workers for the small company should be entailed (no seniority recognized – all 25 workers will have more seniority than all 5 workers) rather than dovetailed (keep seniority).

Issue: Was entailing a violation of s74?

Ratio: Prior history of a company's conduct can shed light on if there was an industrial relations reason under s74 or if it was arbitrary.

Held: Yes, it was a breach of the duty of fair representation. There was no rational reason to dovetail.

Reasons: There had been a previous history of dovetailing in mergers when other companies were joined with the main companying. It was arbitrary because the company's prior history of dovetailing (therefore not a good industrial relations reason).

Note: Lynk thinks this would have been the same without past practice

ADMINISTRATION OF CA

RAYONIER CANADA (BC) V INTERNATIONAL WOODWORKERS OF AMERICA, 1975 BCLRB

Facts: Anderson had been called into work after a more senior employee declined the position. That same employee later decided he wanted the spot and Anderson was let go. He complained that Rayonier had violated the collective agreement by doing this denying him certain seniority rights, and that the union had breached its duty of fair representation by not carrying thise to arbitration.

Issue:

Ratio: It is important to ensure that unions do not face a too-high standard when LRBs judge their conduct in a duty of fair representation compliant. Unions cannot be expected to take every workplace complaint to the grievance and arbitration process because:

1. They need to be able to allocate their resources wisely
2. They need to be able to have a constructive relationship with the employer, and only advance grievances the union considers to be meritorious, otherwise the working relationship with the employer breaks down and the grievance system bogs down;
3. Unions have to be able to weigh the competing individual and collective interests in an open, political and flexible manner, as long as it is consistent with broad industrial relations policy.

The more serious the workplace issue (dismissal vs 3 hours missed of overtime pay), the higher the onus on the union to satisfy the duty of fair representation standards.

Held: Claim dismissed.

Reasons: The union overrode Anderson's request for the interest of advancing more pressing claims.

LUCYSHYN V AMALGAMATED TRANSIT UNION, 2010 SASK LRB

Facts: A transit driver was reassigned job duties after suffering a work-related injury. He riled a number of grievances against his employer, alleging breaches of the CA. The union did not advance these claims as they were viewed as "hot potatoes". The union gave the drive no reasons as to why it withdrew the grievances and the driver launched this suit.

Issue: Did the union comply with the duty of fair representation?

Ratio: The key industrial policy objectives of the duty of fair representation are:

1. The statutory power given to unions to be the exclusive representative of the employees in any given bargaining unit has to be balanced by a statutory check on this exclusive power. Remember that the union has the exclusive power to decide whether to file or advance a grievance; if it declines to do so for an employee it represents, the employee has no alternative legal forum to go to in order to seek a legal remedy (*St. Anne*) unless the issue is a human rights issue, where the human rights tribunal might take jurisdiction. Thus, s74 LRA compels unions to provide a certain level of quality decision-making when assessing collective agreement negotiations and when deciding on grievances. Unions have to represent every employee it is responsible for fairly, and without being arbitrary, discriminatory and in bad faith, not just employees who are union members.
2. Arbitrariness is the most common of the three headings that unions are likely to breach.
3. Unions may make an honest mistake or act negligently when representing an employee – this won't necessarily be a breach of the duty to fair representation unless it amounts to conduct that is arbitrary, discriminatory, or in bad faith. Gross negligence is the accepted standard.

Held: Union breached its duty.

Reasons: There was no meaningful investigation of the complaint. They maintained no record of grievances. Lastly, they failed to communicate with the applicant why his grievances were denied.

BINGLEY V TEAMSTERS, 2004 CIRB

Facts: A member of the union had skin cancer and required accommodation with respect to the length of her daily shift.

Ratio: Guiding principles for a union's heightened representational obligations in accommodation and human rights cases:

1. Whether the union's intervention was reasonable where the employer failed to implement appropriate accommodation measures;
2. Whether the quality of the process that allowed the union to come to its conclusion was reasonable;
3. Whether the union went beyond its usual procedures and applied an extra measure of care in representing the employee;
4. Whether the union applied an extra measure of assertiveness in dealing with the employer.

Held: The union did not the take extra measure of care to fairly represent the member and did not sufficiently address the human rights concerns (disability).

Reasons: The union had taken the employer's word at face value that the employee was unfit for work. The union should have made a stronger effort.