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# Overview of Canadian Labour Law

* We need to find a balance between the rights and powers of employers and the rights and powers of trade unions, there is also the factor of the rights and powers of employees within the union setting
* Labour law looks at a unionized workplace rather than non-unionized workplace (regulated by employment law)
  + Some of the same workplace statutes apply to both areas
  + *Labour Relations Act*, 1985 is the defining statute for our purposes
* 30% of the workforce in Canada is unionized - down from about 38% from the mid 1980’s
  + in the early 1960’s before most public sector workers could unionize, the 30% of the workforce that was unionized was the private sector
  + This is misleading because unions are powerful and highly represented in private industries such as broadcasting, telecommunications, transportation, steel-making, mining, auto manufacturing
    - Weak in areas like banking, non-existent in areas like retail
  + Well represented in the public services
    - Teachers, police, fire departments, municipal, provincial, and federal employees are all heavily unionized
  + The collective negotiations that go on between employers and unions invariably becomes industry and national standards for non-unionized workers
* Five Assumptions behind labour legislation
  + (1) There is a Natural, reoccurring, inherent tension that our legislation assumes between those who own and manage the workplace and those who work or produce in the workplace
    - When managed properly, it is a reconcilable difference
    - Tension exists naturally in the workplace, labour law did not create the tension
    - Contracts in Canadian labour law, called **collective agreements**, are contracts but they are contracts of a special and unique nature
  + (2) Assumes that there is a natural bargaining inequality between an employer and employee
    - If that inequality is left unregulated, it will lead to unjust and intolerable outcomes in the workplace and to broader unjust results in society
    - Labour law is a form of protective legislation. Labour law tries to mitigate or minimize the bargaining inequality to put workers and employers on an equal playing field
  + (3) The workplace cannot be left lawless. Labour law brings in the rule of law to the workplace to minimize the bargaining differences and to allow employees to have a collective voice
    - What is impossible for an employee to achieve individually can be provided to them through the collective power created in labour law
    - Industrial citizenship: the though is the greater the institutional or democratic voice of workers in the workplace, the less unfair that workplace will be
  + (4) Working people can best achieve individual rights through a collective voice
    - this means that people are better protected when they have an institutional nice in the workplace which the employer must bargain with
    - what this means in any unionized workplace is that you have a mixture of collective rights and individual rights
  + (5) Employment contracts are contracts of a special nature
    - A collective agreement and an employment contract are viewed by the courts and workplace tribunals as unique due to the difference in bargaining power
    - collective agreements generally go for 3 to 4 years terms, but the employer is mandated to work with the union to get a longer contract once that term expires
    - For example, a collective agreement cannot be ended by a breach
      * Employers under labour law cannot get rid of a union, only the union itself can dissolve the union

# Collective Bargaining

* beginnings of Canadian labour movement date back to the establishment of the Canadian Confederation in 1867
* At the beginning of the 19th century, there was a true labour movement
  + Journeymen and craftsmen began to organize for the purpose of mutual aid and protection
  + From 1800-1872, there was no labour law or protection for employees
    - it was an offence under criminal laws to belong to a union
    - no such thing as the ability of workers to organize collectively
* Initial union organizers were subject to prosecution for the crime of conspiracy
* Common law and statute prohibited the association of workers and the organization of them as well
  + Only individual contracts were recognized
  + There was a belief that there was legal and actual bargaining equality between employer and employee
* *Combination Act* (1830’s and 40’s until the 1870’s) criminalized employee organizations and prohibited collective agreements
  + considered to be part of the Criminal Code
* In 1872, even though there were criminal sanctions against belonging to a union or beginning strikes, they were occurring anyways over health and safety issues, wages, hours, the use/abuse of women and children in factories etc.
* In 1873, the Canadian Labour Union was founded and contained 35 representatives from unions throughout Canada
  + This reflected the movement of industrialization within towns and cities in Canada
* Parliament began to amend laws against forming unions to reflect the changing influence of the working class, this started in 1872
  + Trade unions were to register under the *Trade Unions Act* to escape the illegality of unions in the common law
  + *Criminal Law Amendment Act* legalized all strikes except those used to coerce the employer or prevent them from carrying on business
* Amendments in 1875 and 1876 narrowed definition of criminal conspiracy for purposes of trade combinations to the performance of acts expressly punishable by law
* in 1890, the refusal to work with a workman or for an employer was expressly legalized
* Another significant development of the 1870’s was the definition of the permissible limits of picketing or “watching and besetting”. Violent and coercive conduct was outlawed while the peaceful communication of appeals was permitted. But, when the Criminal Code of 1982 was enacted, the peaceful picketing provision was omitted. Unit it was restored in 1934, courts dealt severely with all forms of picketing, no matter how innocuous
* Any progress experienced in the 1870’s was then slowed by the “long depression” from the mid-1870’s to mid-1890’s
  + the long depression and the growth of manufacturing on an industrial scale, created abysmal working conditions and nullified the bargaining power of the individual employee
  + By the end of the 1890’s it was clear that the repeal of criminal prohibitions against unionism did not automatically place labour organizations on an equal footing with employers
* During this second period, unions could only operate through brute force
* Courts did not recognize collective agreements
* *The Conciliation Act*, 1900
  + authorized voluntary third-party conciliation of industrial disputes
* *Railway Labour Disputes Act,* 1903
  + enabled one of the parties to initial conciliation and investigation of the dispute by an ad hoc tripartite board which was required to issue a mortise report
* In 1907, the federal government passed the *Industrial Disputes Settlement Act*
  + Created by William Lyon Mckenzie King (later became 10th Prime Minister of Canada)
  + added a prohibition against industrial action by the disputants during the ad hoc board’s investigation
  + directed at industries considered to be essential for the Canadian economy
  + Required union and employer to have a 30-day cooling off period where a government mediator would come in to try to settle differences between them
    - This would happen before a strike/lock-out
  + dominated until the end of the Second World War
  + provided for the legitimacy of collective bargaining and the propriety of even-handed government intervention to assist in the established of a permanent, bilateral relationship
  + however, this act viewed collective bargaining and it’s outcomes as private matters between employers and employees and did not force employers to bargain with trade unions nor establish the terms and conditions of employment
* union membership swelled from 50, 000 in 1901 to 175, 000 in 1915 and to 250,000 in 1919
* First World War proved to be important for the Canadian trade union as workers exploited their newfound strength by engaging in industrial action. Workers were determined to ensure that employers did not take advantage of the changed economic conditions post war to roll back their collective bargaining gains.
* Winnipeg General Strike of 1919
  + symbolizes the postwar discontent and conflict
  + vast majority of the city’s workers demanded union recognition, collective bargaining and the maintenance of working conditions obtained during the war
  + federal government intervened to break the strike by using its immigration and criminal powers to deport and imprison strike leaders, but it also called in armed mounted police reinforced by federal troops
* In 1925, the Privy Council (final CA at the time) reviewed the ***Toronto Electric Commissioners v Snider*** case
  + **Facts:** Up until this point, it was assumed that labour relations and unionization was solely within the constitutional pursue of the federal government and that the provinces had no role in regulating unions. The issue arose where there was a strike for the streetcar workers working for what is now the TTC and the Industrial Dispute Settlement act was used to try to settle outstanding differences. The employer took the position that Industrial relations were provincial jurisdiction, not federal jurisdiction.
  + **Issue:** did it come under provincial jurisdiction under Trade and Commerce or did it come under s. 92 (13) of BNA under Property and Civil Rights.
  + **Held:** It was the provinces who would regulate the bulk of labour relations in Canada. This decision is still in place
  + **Ratio:** Courts have accepted that legislation respecting labour relations is presumptively a provincial matter since it engages the provinces' authority over property and civil rights
* 90% of the workforce is regulated provincially, and only 10% is regulated federally
* As Canadian industrialism grew, so did the demand for unions or other representation for workers
  + The first and second world wars provided workers with new-found strength which they used to engage in industrial action
    - Greater number of strikes
    - Winnipeg General Strike
      * City workers demanded union recognition, collective bargaining, and the maintenance of working conditions
* Time from 1872 – 1940’s, unions were tolerated but not protected
  + Because collective agreements were still not recognized, individual contracts of employment were all that were recognized and protected
  + Unions continued to have a fragile hold in any workplace
  + At this time, an employer could sue the union if there were monetary damages that resulted from a strike or industrial action
* In 1935, US congress passed the *National Labour Relations Act* (“*Wagner Act”)* which exerted a profound influence on Canadian labour relations policy
  + statute explicitly recognized the right of employees to belong to the trade union of their choice and to participate in the process of collective bargaining through that union
  + statute forbade certain unfair labour practices commonly practiced by employers to thwart unionization and imposed upon employers the duty to bargain in good faith with the union selected by their employees
* elements of the *Wagner Act* did not come into Canada for almost a decade
  + in the meantime, Canadian unionists continued to struggle against the government and employers for the basic rights of association
  + in 1937 for example, the Premier of Ontario threatened to use the provincial police to end a strike at the General Motors plants in Oshawa where the company refused to recognize the newly organized United Automobile Workers. In the end, a compromised emerged where the union gained some of its demands, but not formal recognition
* Between 1935 and 1937, union membership increased from 280,000 to 383, 000 and organized labour began to pressure the federal and provincial governments for legislative protection of the freedom of association
* between 1937 and 1939, several provinces enacted statutes which announced the basic right of association and attempted to protect employees from employer retaliation on the basis of trade union membership
* in 1939, the federal government amended the *Criminal Code* to prohibit discrimination or discharge of workers because of their union membership. But, these statutes were ineffective as they were enforceable only through criminal prosecution
* During the Second World War, there was rapid industrialization and trade union growth
  + trade union membership doubled from 362, 000 in 1940 to 711,000 in 1945
* In 1943, Ontario became the first jurisdiction to adopt a fully-fledged collective bargaining statute
  + Its enforcement was entrusted to the Ontario Labour Court
* in 1944, the federal government enacting P.C. 1003, regulations made under the *War Measures Act*, which covered virtually all significant industry and economic activity
  + established a representative tribunal, the National War Labour Relations Board, to administer a regime of collective bargaining which included bargaining unit determination and certification, unfair labour practices and a ban on industrial action during the currency of the collective bargaining agreement
* Following the repeal of the federal war-time regulations in 1948, virtually all provinces (and the federal government) adopted more progressive labour relations statutes, covering all employees in the private sector similar to the *Wagner Act*

# Workplace Models

#### Collective Voice Model – Unionization Model

* Through the use of a union, the workplace is regulated to ensure the rights of workers
* Allows for workers’ rights to be protected and advocated for within the workplace
* Brings democratic principles down to the level of the workplace
* Saves the government money because those unionized workplaces don’t need to have government inspectors
* Disadvantages
  + Increase in costs
    - Unions almost always result in higher wages, better employee benefits
    - Administering a collective agreement has costs as well
  + Employers lose some degree of control over the completion of work and their workforce
* Results in the greatest employee representation

#### Limited Representation Model

* More common in Europe
* A joint workplace committee made up of employees and managers will regulate certain aspects of the workplace
  + E.g., a health and safety committee

#### Government-Inspection Model

* The Ontario government would hire an army of inspectors who have the power to receive complaints, as well as powers to go into the workplace and make orders or decisions regarding various issues they may be presented with
  + E.g., vacation pay or the use of dangerous machinery
* Primary way in which the Ontario government regulates workplaces where there are no unions
  + Can still be called into a unionized workplace but this is rare because usually unions do their own representation for these issues
* Usually in conservative governments or during budget cuts, these inspectors are the first thing to go

# Direct Statutory Regulation

* Statutory frameworks have been implemented at the provincial and federal levels to establish minimum employment standards and norms governing occupational health and safety and human rights in the workplace
* their evolution is fairly similar across the country with some significant differences
  + for example, in Quebec, minimum standards legislation has been more extensively used to regulate the results of collective bargaining - for example through the prohibition of psychological harassment in the workplace, the prohibition of mandatory retirement at a certain age and the imposition of restrictions on the negotiation of two-tier clauses, which would deprive new hires of the benefit of previously bargained working conditions

# Employment Standards (Labour Standards) Legislation

* Establishes minimum terms and conditions of employment with respect to wage levels, modes of payment, access to leaves (paid and unpaid) and vacation, minimum rest periods and when premium "overtime" rates must be paid for hours worked above daily or weekly thresholds
* Part III of the *Canadian Labour Code* sets employment standards in the federal jurisdiction
* *Wagner Act*
  + *National Labour Relations Act*
  + Adopted in 1935 in United States
  + Similar legislation was enacted in 1944 in Canada under PC 1003 (Privy Council Order 1003) which enacted under emergency legislation the Wagner Act
    - Once WWII ended and the economic powers of the provinces were restored to them, each province enacted its own piece of legislation similar to the *Wagner Act*
    - when the emergency act was lifted and the power was given back to the provinces, every province across the country would pass their own version of the Wagner act
  + in 1938, 18% of the workforce was unionized and by 1948 it was at 28%
* *Labour Relations Act*, 1995
* *Ontario Human Rights Code*
  + This is automatically integrated into all collective agreements regulated by the province of Ontario
* *Occupational Health and Safety Act*
* *Employment Standards Act*
* *Workplace Safety and Insurance Act*
* Pensions legislation
* Pay equity legislation
* Unemployment insurance legislation

#### Features of the Wagner Act

* + 7 fundamental features of the *Wagner Act* (first 6 are pro union and the last one is pro employer)
    - (1) Created statutory labour relations boards
    - (2) Created unfair labour practices (ULP’s) which employers/unions cannot engage in
      * LRB could sanction those engaging in these unfair practices
      * ULP's are statutory guarantees that neither side will use unfair practices during the life of a collective agreement or during the bargaining period after the collective agreement or during a certification attempt
    - (3) Created the duty to bargain in good faith (DBGF)
      * When going to the bargaining table, each party had to bargain with the honest aim of reaching a collective agreement
      * agreement that both parties would use good faith efforts when they are negotiating for a first collective agreement or a new one that they must have an honest intent to enter into a collective agreement
    - (4) Certification process for unions that binds employers to recognize unions that have majority support
      * unions have now been certified by Labour Relations Board to represent the workers in a workplace and in order for that to be done, a union has to win in Ontario a Union Certification Election where the Labour relations Board will supervise and manage a vote of all the members in the workplace/bargaining unit and if the union wins the majority (50% +1) of those who vote, then two things happen: (1) the union wins the right to represent all the workers and (2) the union is the only legal voice to represent those worker
      * once a union is certified, an employer MUST deal with them, this is mandatory
      * Two methods of certification
        + Card check

51% of employees must sign a card

These cards are presented to the board

Then union is automatically certified

* + - * + Majority vote

Once a union has signed up a certain number of cards, there is a vote

If the majority of those voting vote in favour of the union then they are certified

election must happen within 5 working days (very quick)

* + - (5) Gave legal meaning/standing/personality to a collective agreement
      * they are now recognized in law as enforceable contracts (did not exist before 1944)
      * employers must obey the collective agreements, if not then it goes to an arbitrator to decide the differences between the two
    - (6) Created a mandatory grievance and arbitration process
      * This is in substitute of the union right to strike during a collective agreement
      * during the life of a collective agreement, a union cannot strike
      * A new system of alternative dispute resolution
      * This was created to take this away from the courts
        + Arbitration was meant to be fast, inexpensive, binding, and informal
    - (7) Resulted in unions losing their right to strike whenever they pleased. Unions cannot strike during the life of the collective agreement (this is the one feature of the Wagner Act that is pre employer! You cannot strike even after the formal expiry of the collective agreement until you follow the 4 or 5 steps to put you in a lawful position to strike.
      * Now could only strike at the end of a collective agreement and needed to go through a number of procedural steps before they could actually strike
      * Strikes do occur during the collective agreement but it is illegal
        + Called a “wild cat strike”
        + The union will be sanctioned for this
  + This act and its Canadian counterparts have created one of the most stable industrial relations system in the world
  + Two keys terms
    - Majoritarianism - meaning that under the *Wagner Act*, if union wins a majority (50% +1) they represent everyone in the workforce, but if the union lost that vote then they get nothing!
      * A union becomes certified to represent the workers if it can demonstrate that it represents the majority of the workers in that workplace, it is all or nothing
      * If of 100 workers, 80 vote and 41 vote for the union, then the union will exist
      * If the vote is the opposite and 41 vote against the union, then the union cannot exist
      * There can’t be a union for just those who want it
    - Exclusivity- meaning the union and only that particular union represent all workers in the workplace
      * There can only be one union that represents the 100 workers
      * There cannot be multiple unions representing different segments of employees

# Federal Labour Standards Review Commission, *Fairness at Work: Labour Standards for the 21st Century*

* Labour standards reflect widespread public sentiment that no employer should be allowed to impose, and no worker should be obliged to endure, working conditions that fall below the standard that a decent society would tolerate
* they were initially concerned with safety issues and hours of work but ultimately became concerned with wages, leaves, vacations and other benefits
* Part III is still concerned with hours of work, minimum wages, statutory holidays and annual vacations but it also deals with statuary leaves (maternity, parental, compassionate care, bereavement and sick leave), with the termination of employment (mass terminations, termination of injured workers or workers whose pay has been garnished, unjust dismissal) and to a limited extent, with human rights in the workplace (pay equity, sexual harassment)
* Standards need to be enforced across the board in order to be effective
* Employer practices can deviate from statutory regulations so long as they are enhancements or improvements, rather than derogations
  + Maternity leave and paid vacations were initially enlightened management policies that are now labour standards
* Part III requires that legislated labour standards “apply notwithstanding any other law or any custom, contract or arrangement”
* Part III does allow for derogation from some provisions under emergency conditions and from others for good reasons related to the operational realities of particular enterprises or industries

# Human Rights Codes

#### “The Lasting Influence of Legal Origins: Workplace Discrimination, Social Inclusion and the Law in Canada, the United States and the European Union”

* In the early 1960’s and 1970’s, all Canadian jurisdictions enacted human rights laws
  + Ontario was one of the first to do so and Ontario’s legislation and the debate surrounding it were influential elsewhere in Canada
    - The movement for legal protection against discrimination in Ontario was led by a loose coalition of religious, labour, and ethnic community organizations at the center of which were Jewish organizations aiming to change the pervasive anti-Semitic practices of Post-World War II

# Occupational Safety and Health Legislation

* The compensation of workers who are personally injured in the course of their employment was one of the very first issues addressed by labour legislation in Canada
* All provinces have a statute providing for a compensation system under which injured employees receive compensation without having to establish that their employer and fellow employees are at fault
  + This is a no-fault system. Employers share collective liability
  + The compensation available includes lump sum payments to cover non-economic loss and pensions in the case of partial or total permanent impairment
  + Most provincial regimes also provide for the reinstatement of the injured employee in their former job when their functional abilities allow it
    - In return, the injured employee is deprived of their right to sue their employer for damages in court
* Occupational health and safety act establish a set of rights and obligations on employers and employees to achieve a certain degree of safety in the workplace
  + - The employer is made responsible for protecting the health and ensuring the safety of its employees
* In each province, an administrative agency, usually a workers’ compensation board, administers the scheme, calculates the contribution each employer must pay to the system, and determines what compensation each injured employee is entitled too
* This compensation system has done little to prevent work injuries or illnesses from happening. Preventative mechanisms were traditionally left to the private parties and collective bargaining, whereas specific statue impose penalties on breaching standard externally set for dealing with specified pieces of equipment or dangerous working conditions
* Provides employees with three basic rights
  + Right to be informed of known or foreseeable safety hazards in the workplace and to be provided with the proper information and instruction to protect one’s safety and physical well-being
  + Right to be consulted with and participate in identifying and correcting job-related health and safety issues
    - usually done through worker health and safety representatives or joint health and safety committees
    - e.g. Part II of the *Canada Labour Code* requires that such a committee be established in workplaces where there are twenty employees or more, and that a health an safety representative selected by employees must be appointed in workplaces with fewer employees
  + Right to refuse to perform work that they honestly and reasonably believe is dangerous to them
    - they are protected against any disciplinary or retaliatory action against them for a genuine and reasonable refusal of work
* Some jurisdictions give additional rights such as the right to cease to perform a job that the *Canada Labour Code* confers to an employee who is pregnant or nursing, if that employee believes that her job poses a risk to her health or to that of the fetus or child

# Privacy Legislation

* There is no single source of workplace privacy law in Canada
  + the matter is regulated through overlapping provincial and federal laws, mainly aimed at restricting the processing and the sharing of personal information that a governing body or a private employer is allowed to collect
    - e.g. the *Privacy Act* 1985 regulates the processing of personal information by government bodies, including public sector employees, and grants individuals the right to challenge the record-keeping practices of these organizations
  + Both statute and common law
* all Canadian provinces have legislated a privacy protection policy for the personal information detained by government agencies but only Alberta, BC and Quebec have passed legislation similar to the *Personal Information Protection and Electronic Document Act*, 2000 which requires that private sector organizations in the federal domain only collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances
* common law has also evolved in a way in which it could be relied upon by employees to protect their privacy at work
* A right to privacy has been drawn from s.8 of the *Canadian Charter of Rights and Freedoms* which states, “everyone has the right to be secure against any unreasonable search or seizure”. But, since the protection of the Charter applies only to government action, only public sector employees can claim its protection

# The *Canadian Charter of Rights and Freedoms*

* The *Canadian Charter of Rights and Freedoms* was included in the Canadian Constitution in 1982 when Canada, a former British dominion repatriated its constitution so that it would come under Canadian jurisdiction
* The *Charter* guarantees several fundamental rights and freedoms, including the freedom of expression and association, as well as the equality of every individual before and under the law, without discrimination based on individual factors such as sex, colour, religion or other similar factors
* These fundamental rights and freedoms are guaranteed “subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society”
* The *Charter* applies to the state and agencies
  + No private employer is directly subject to its provisions
  + Except where the state acts as the employer, the Constitution is not a source of law operating directly upon the parties like the common law, labour relations statutes or labour standards legislation
* A Charter cases in labour and employment have mostly involved the freedom of association (2(d)), freedom of expression (2(b)), and the right to equality before and under the law (15(1))
* That being said, the freedom of association (s. 2(d)) has had a great impact upon Canadian labour law
  + The freedom of association protects the capacity of members of labour unions to engage in collective bargaining on fundamental issues
    - Also includes the right to strike
* The SCC set aside the legal rules that traditionally severely restricted or prohibited secondary boycotts and picketing in Canada since they were considered to be an unjustified limitation on unions’ freedom of expression (*United Food and Commerce Workers, Local 1518 v Kmart Canada Ltd*, [1999] 2 SCR 1083, *Allsco Building Products Ltd v United Foods and Commerce Workers, Local 1288P*, [1999] 2 SCR 1136; and *Retail, Wholesale and Department State Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, [2002] 1 SCR 156
* labour unions freedom of expression was invoked to shield some union control over the crossing of a picket line against the provisions of the *Personal Information Protection Act of Alberta* (*Alberta (Information and Privacy Commissioner v United Food and Commercial Workers, Local 401*, 2013 SCC 62)
* in 1987, the SCC first held that the right to bargain collectively and the right to strike were not implicitly included in freedom of association protected by 2(d)
  + The Court adopted a narrow definition of freedom of association, the Court stated that neither collective bargaining with respect to working conditions nor the right to strike were fundamental rights in Canada *(Reference Re Public Service Employee Relations Act (Alberta)),* [1987] 1 SCR 313; *PSAC v Canada*, [1987] 1 SCR 424; *RWDSU v Saskatchewan*, [1987] 1 SCR 460)
* in 2007, the SCC held that freedom of association included the right to collective bargaining
* In *Heath Services and Support- Facilities Subsection Bargaining Assn v British Columbia*, [2007] 2 SCR 391, the court invalidated legislation from BC that, for the purpose of addressing the budgetary difficulties of the provincial health system, rendered void any provisions of collective agreements applicable to health sector workers relating to certain sensitive working conditions and prohibiting negotiation on these issues
  + Court decreed that the freedom of association guaranteed by the *Charter* protects the capacity of members of labour unions to engage in collective bargaining on fundamental issues. This means that employees have the right, without any substantial interference, to unite, to present demands to their employer collectively and to engage in discussions in an attempt to achieve workplace-related goals
* In *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, the SCC, overturned it’s 1987 precedent and declared that the right to strike constituted an essential and indispensable component of a meaningful process of collective bargaining and needed to be constitutionalized
  + therefore, any statutory limit on the right to strike that substantially interferes with collective bargaining represents a violation of the freedom of association recognized in 2(d) of the *Charter*

# International Law

* The SCC has drawn upon international law to determine the meaning of rights and freedoms protected by the *Charter*
* The Court has reaffirmed that it seeks to “ensure consistency between its interpretation of the Charter, on the one hand, and Canada’s international obligations and the relevant principles of international law, on the other” and that “the Charter should be presumed to provide at least as great a level of protection as if found in the international human rights documents that Canada has ratified”
* Canada has committed to protecting rights to at least the level agreed to in international charters, if not providing more protection
* in the field of labour and employment law, the relevant international human rights documents include the *International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Charter of the Organization of American States* and the Constitution and Conventions of the International Labour Organization.

#### “The Role and Promise of International Law in Canada’s New Labour Law Constitutionalism”

* Four sources which define Canada’s international commitments
  + Text of the international treaties ratified by Canada
    - they are binding on Canada under international law, and they include ratified [International Labour Organization] (ILO) conventions and the ILO Constitution
  + ILO’s landmark *1998 Declaration on Fundamental Principles and Rights at Work*
    - intercepted member state obligations under the ILO Constitution
    - provide authoritative guidance on the meaning of the treaty
    - offers at least a persuasive and likely a binding interpretation of Canada’s obligations under the ILO Constitution
  + Accumulated decisions of the two committees established by the ILO to advise its Governing Body and Conference on the application of ILO conventions and constitutional principles
    - The Committee on Freedom of Association (CFA)
      * tripartite body with government, worker and employer representatives and an independent chair
      * it examines complaints received directly from worker and employer representatives around the world
      * established in 1951, and has since made recommendations to the Governing Body on more than 2, 800 complaints and has built up a detailed and coherent set of principles on freedom of association and collective bargaining
      * it’s persuasive authority is based on its specialized, impartial, tripartite and experience composition, and on the balance achieved through its consensus-based decision making processes
    - The Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts)
      * submits comments to the Conference on the ILO on reports provided by member states regarding measures taken by those states to implement ratified conventions
      * consists of 20 distinguished jurists, including retired and active judges and legal academics
      * has issued 6 general surveys on freedom of association and the right to bargain collectively
      * owes its persuasive authority to its impartiality and specialization, but its expertise is more judicial than the CFA
    - neither of these are empowered under the ILO Constitution to issue legal binding decisions, but they have emerged as primary vehicles for elaborating on the meaning of ILO conventions on freedom of association
* The committees only have persuasive authority, not binding authority

# The Institutional Distinctiveness of Quebec

#### “The Institutional Specificity of Quebec in the Context of Globalization”

* Quebec’s regulatory framework for work and employment is hybrid because of the interface between French based civil law, which governs individual employment relations and the American and Canadian Model of Collective labour relations
* Individual employment relations and civil law
  + employment relations is usually formed by the negotiation of a contract on an individual basis between the worker and the employer
  + In Quebec, the law of general application is the civil code, where in other provinces, the general law of contract is found in the common law
  + In the *Quebec Act* of 1774, the British Parliament decreed that in private matters, the French civil law would apply thereafter in Quebec
    - this law was systematized and codified in 1866 in the *Civil Code of Lower Canada*
  + The 1866 *Code* was replaced in 1994 by the *Civil Code of Quebec*, which is based on the same civil law tradition
  + The general rules that govern the employment relationship are roughly the same between Quebec and the rest of Canada
    - The difference is that in Quebec, greater weight is given to the legislation as a source of law rather than the application of common law
  + Although Quebec labour law in general is more a part of private than of public law, its content and operation have been coloured by close proximity to the common law
  + in the civil law, the law of general application is enacted by the legislator and written down in a code- a body of rules structured in accordance with a logical and predetermined classification
    - Rather, in the common law tradition, the rules forming the law of general application are not defined and systematized in advance by the legislator, but are inferred from case law. Judges are bound to apply existing case law, to ensure stability and continuity in the legal system
  + Great deference is shown to legislation as a course of law, because it represents the sovereign will of a democratically elected branch of government
* Labour legislation, collective labour relations, and the hybrid Quebec system
  + Quebec’s institutional specificity in the area of labour and employment is mainly due to the blending of a law of general application grounded in the civil law tradition and a body of labour legislation largely based on the American model
  + Quebec’s policy on collective labour relations was radically changed by the adoption of the *Labour Relations Act* in 1944
    - Quebec thus imitated some other Canadian provinces and the federal government, which in the same year adopted Order in- Council PC 1003 under the *War Measures Act*
    - Promoted the collective negotiation of working conditions as their main employment relations policy
  + Although Quebec’s law of general application in private matters continued to be based on the civil law, Quebec emulated the rest of Canada in its collective labour law
  + The act was reformulated into the *Labour Code* in 1964 but it has maintained its core foundations
    - limited to protecting freedom of association, specifying procedures for collective bargaining and dealing with legal effects of collective agreements
  + Quebec’s system of collective labour relations is distinguished by greater state intervention
    - as soon as a union is certified as the bargaining agent in Quebec, it automatically benefits from compulsory dues check off
    - in the event of a deadlock in the negotiation of a first collective agreement after certification, either party can ask the Minister of Labour to appoint an arbitrator who can determine the content of the collective agreement and impose it on the parties for a maximum of 3 years
    - during a legal strike, a Quebec employer can under no circumstances have the strikers’ work done by any other persons except managers at the establishment affected by the strike
  + The regulatory framework of the employment relationship also includes a number of statutes regulating working conditions or imposing other standards on the parties to employment contracts and collective agreements
  + Quebec employment legislation differs from the US and the rest of Canada in that it is broader, more varied and more interventionist. In its early form, it sought only to curb the worst abuses of capitalism, particularly in relation to health and safety and the protection of women and children. Later on, Quebec statues imposed a range of minimum labour standards, especially with respect to wages, hours of work and annual leave, as a response to the commitments made by Canada to the International Labour Organization
  + more recent waves of legislation in Quebec have addressed issues such as equal opportunities and employment equity, occupation health and safety, workforce training, job security and the use of the French language at work
  + *Quebec's Act respecting labour standards* now requires the employer to provide a work environment free from psychological harassment
    - This is a first for North America
  + In Quebec, parental leave is paid for by the public, compulsory Quebec parental insurance plan, which is funded through employee and employer contributions. This plan ensures partial renumeration for up to 18 weeks of maternity leave and 32 weeks of parental leave.
  + Quebec has been in the forefront of the trend of international recognition of human rights

# Market Pressures and the Reorganization of Production

#### Fairness at Work: Labour Standards for the 20th Century

* The deepening and broadening of international economic integration has fostered greater competition for investment and market shares
* Increased pressures in a deregulated market creates new pressures on operating costs, including labour costs
* Firms increasingly rely upon skills and knowledge which creates a greater demand for skilled and knowledge workers
  + This has led to a greater demand for skilled and knowledgeable workers, and to fewer opportunities for the unskilled
  + There is sometimes a shortage of skilled workers which are not easily remedied because of lags in training policy and increased worldwide demand
* Competition has become more time-sensitive. The 24/7 demands of the marketplace has created a need for the workforce to be more flexible, less sociable, and work longer schedules
  + Technology allows workers to be available during their “non-working” hours
  + Through these strategies, employers have been able to not only avoid the cost of hiring and training additional workers, but to lower their labour costs
* Currency, commodity, and product markets are becoming more volatile requiring greater flexibility in the introduction of technology, in acquiring needed supplies and services and in gaining access to new distribution channels and markets
  + Many firms change the size and deployment of their workforce with increasing frequency and rapidity, leading them to experiment with contractual arrangements that allow them to do so
* Firms have reorganized their competitive and operational strategies in order to exploit new technologies and take advantage of gaps in legal regulations that exist at the boundaries of labour law
  + E.g., outsourcing or the use of part-time, agency, and temporary works
* The emergency of this new economy has had important implications for workers:
  + 1)The new economy has transformed working time practices
    - Flexible schedules and longer hours can impact worker’s personal lives, especially if they are required rather than voluntary
    - Long and unpredictable work hours are taking a toll on the health, well-being and productivity of workers, and there is reason to believe the they are having harmful effects on family and civic life
  + 2) The rise of the new economic has coincided with a significant increase in income inequality
    - While the media real household incomes rose, the proportion of low income earners remains the same, about 16 % of the national workforce but their share of GDP declined, while top income earners significantly increased their share
  + 3) The rise of the new economy has been accompanied by a rise in “precarious work”
    - precarious work combines low pay with one or more of the following: an unstable or at-risk source of income, few or no benefits, limited or inaccessible legal protections, and uncertain prospects for future advancement, profit or other compensatory opportunities or advantages
    - this increase is largely accounted for by the significant growth in temporary employment and own-account self-employment
    - as many as 75% of temporary employees would prefer permanent employment, as would about 25% of own-account self-employed workers. About 25% of part time workers would prefer full time work
    - temporary full time workers are much more likely to have low incomes and no access to benefits, own-account self-employed workers are much more likely to have low incomes and no access to benefits; and low income workers generally are far less likely to have insurance or pension benefits to be unionized.
    - Temporary workers have significantly higher rates of employment strain than other workers due to uncertainty of employment and earnings
    - For many people, precarious work is persistent, not transitory. 50% of workers earning less than $10 an hour find themselves in the same situation 5 years later
    - workers experiencing disadvantages are more likely to be young women, recent immigrants, members of visible minorities or a combination
* A seismic shift in the focus of employment
  + Industry leaders have actively shed employment and transferred that employment to a network of smaller business units
  + Lower-level businesses operate in more highly competitive markets than those of the forms that shifted employment to them
  + This creates downward pressure on wages and benefits
    - There is now an increased likelihood that basic labour standards will be violated
  + Fissuring leads to a rise in profitability for the lead companies and increasingly precarious working conditions for workers at lower levels
* Having it both ways
  + The fissured workplace gives rise to a basic contradiction in many industries and in the policies of major businesses
    - In focusing on core competencies, businesses seek to expand their margins and their markets
    - At the same time, by shedding nonessential activities, they seek to push out the activities that would be more costly if maintained within the boundaries of the firm
    - The upper level of the business is not in control of the enforcement of labour standards within the subsidiary groups
      * E.g., management may dictate how a practice is carried out but does not observe the actual workplace practices that are used to meet standards set out by management
    - Employment has been split off, shifted to a range of secondary players that function in more competitive markets and are separated from the locus of value creation
* Twin-edged sword
  + There are positive aspects of the reorganization of production for companies, investors, and consumers, and finding new ways to organize production and enhance social welfare
  + Reorganization can also have real social consequences if the businesses undertaking it do not fully weigh the costs and consequences of their actions
    - High rates of violations of basic labour standards and worsening employment conditions coincide with industries where fissuring is most advanced
      * E.g., the restaurant and hospitality sectors, janitorial services, manufacturing, residential construction, and home health care
    - Fissuring often undermines compliance with basic labour standards
    - Chopping employment into pieces makes product coordination harder and results in externalities that can result in accidents and injuries
    - There are distributional consequences of the fissured workplace, shifting surplus generated by businesses away from the workforce and to investors

# The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It

* Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment are now the result of multiple organizations
* Apple can be our economy’s most highly valued company while directly employing only 63,000 of the more than 750,000 workers globally responsible for designing, selling, manufacturing and assembling its products
* Competitive markets create downward pressure on wages and benefits, murkiness about who bears the responsibility for work conditions, and increased likelihood that basic labour standards will be violated
* Fissuring leads to a rise in profitability for the lead companies who operate at the top of industries and increasingly precarious working conditions for workers at lower levels
* Three reasons to worry about the fissured workplace:
  + 1) It often undermines compliance with basic labor standards
  + 2) Chopping employment into pieces makes production coordination harder and results in externalities that can result in accidents, injuries and fatalities
  + 3) Shifts surplus generated by businesses away from the workforce and to investors

# The Growth of Precarious Work

#### “The Political Economy of Precarious Employment: Will it Be No Work or Precarious Employment”

* The decades after World War II saw the spread of the Standard Employment Relationship which was a relationship involving stable, long-term, full-time employment with one employer as a norm in many parts of the economy. Most workers bargained collectively through trade unions
* In the 1960s and 1970s, the majority of male workers were in permanent full time full year jobs with benefits. For most workers, the terms of employment were set by long-term contractual agreements, many of which were renegotiated by unions
* The percentage of workers employed full time has declined since 1976 when just under 88% of all employees reported working thirty or more hours a week. By 2016, fewer than 81% were employed full time
* As fewer workers find full-time employment, more are employed in part-time jobs, through temporary employment agencies, on short-term contracts, and through self-employment
  + Most of these workers are not represented by unions and must negotiate the terms and conditions of employment as individuals
  + for most, legislated labour standards become a more important determinant of the terms of employment.
  + Part time employment increased from under 13% of all employees in 1976 to almost 20% by 2016
  + The share of women working part time grew from under 24% in 1976 to over 36% in 2016
  + The percentage of men working part-time more than doubled in the same period from around 6% not over 12% in 2016
* The number of Canadians reporting that they are self-employed increased from around 6% of all employment in 1976 to 11% in 2016
* 7% of Chadians aged 15-24 were in temporary or contract employment in 1989. By 2016, Statistics Canada was reporting that over 13$ of employed Canadians were in temporary or short-term contract employment

#### Measuring Precarity

* Researchers have developed an *Employment Precarity Index* to determine insecurity of employment for Canadians. This instrument provides a single measure of employment precocity on a scale of 0-100 by combining 10 different indicators of insecurity
* Survey asked participants to identify the form of their employment relationship including whether they were employed casually, on a short term contract, self employed, in a permanent part time employment, or in a permanent full-time employment
  + In order to be in a Standard Employment Relationship, participants had to state that they were in a permanent full-time position, that they expected that job to last at least 12 months, that they had a single employer and that the employer provided some supplemental benefits beyond a wage.
* Each question was assigned the same weight in the Index. Index scores range from 0 to 95. The mean score was 23.7 and the standard deviation was 21.4
* Includes questions such as
  + Do you usually get paid if you miss a day’s work
  + I have one employer, whom I expect to be working for a year from now, who provides at least 30 hours of work a week and who pays benefits
  + In the last 12 months, how much did your income vary from week to week
  + How likely will your total hours of paid employment be reduced in the next 6 months?
  + In the last three months, how often did you work on an on-call basis?
  + Do you know your work schedule at least 1 week in advance?
  + In the last 3 months, what portion of your employment income was received in cash?
  + What is the form of your employment relationship?
  + Do you receive any other employment benefits from your current employer, such as a drug plan, vision, dental, life insurance, pension?
  + Would your current employment be negatively affected if you raised a health and safety concern or raised an employment rights concern?
* Scores on the index are used to divide the sample into four relatively equal sized employment security categories which are:
  + Secure
  + Stable
  + Vulnerable
  + Precarious
* Just over 70% of participates aged 25-65 reported they were in permanent full-time employment
* The employment relationship characteristics of workers in Standard Employment Relationships (SER) differ from those in other forms of employment:
  + over 80% of workers in SER reported being enrolled in a company pension plan compared to less than 1/3 of those not in an SER
  + All workers in SER received some supplementary benefits compared to less than 1/4 of those not in SER
  + Workers not in SER were 5 times as likely to report their income varies from week to week and 4 times as likely to report their hours might be reduced in the next 6 months
  + Men were marginally more likely than women to be in SER
  + White workers were more likely than racialize workers to be in SER
  + Workers with a university degree were more likely than those without a degree to be in an SER
* Approximately 1 in 4 men and women are in precarious employment. Women were marginally more likely to be secure in employment (25%) compared to men (21%)
* Having a degree impacts employment
  + - Not having a degree resulted with one in three finding themselves in precarious employment
* Those in precarious employment are less likely to have benefits or the protection of a union
* 1 in 4 white workers were in precarious employment while closer to 1 in 3 racialized workers
* Just over 1 in 4 white workers were in Secure employment while fewer than 1 in 5 racialized workers
* Just under 23% of those with a degree were in precarious employment while just over 28% were in Secure employment. Of those without a degree, nearly 1 in 3 were in precarious employment but less than 1 in 5 had found secure employment
* Workers in Precarious employment earned about half of what those in Secure employment earned. In comparing those who work 30 hours a week, those in precarious employment earned about 60% of what those in secure employment earned
* Workers in Precarious employment lived in households with household earnings that were about 2/3 of the household income of a workers in Secure employment.
* All workers in secure employment received at least some supplemental health benefits while less than 10% of those in precarious employment did
* All workers in Secure employment received some sort of employer paid pension plan compared to over 15% of those in Precarious employment
* Over half of those in the Secure employment received training provided by their employer while fewer than 1 in 5 of those in Precarious employment were provided with training from their employer. Fewer than 1 in 10 workers in secure employment had to pay for their own training while more than 1 in 4 in precarious work had to
* 15% of those in precarious work were unionized while 34% of those in secure work were
* None of the workers in secure employment replied that raising an employment standard or H&S issue at worker might affect work prospects while 35% of those in precarious work expressed some concern and over 1 in 5 thought that it was likely that raising such concerns would have a negative effect
* The precarious in our economy are:
  + temporary agency workers (9%) and permanent part-time workers (16%)
  + Own-account self-employed represented 29% of the category and those on short term contracts who represented 22% of the category. These categories capture the growing number of workers who are employed as freelancers or are working as part of the gig company
  + nearly 1 in 4 in the Precarious category reported they were in permanent full-time employment. This captures the changing nature of full-time employment under the conditions of the fissured workplace. They consider themselves as permanent and full time but they work without any benefits beyond a basic wage, or they are uncertain if their employment is likely to last 12 months

# The Persistence of Unequal Opportunity

#### Gender Inequality – Occupational Segregation and Unequal Pay

* Seven provinces have employment equity policies that pertain to provincial public servants: Nova Scotia, New Brunswick, PEI, Quebec. Manitoba, Saskatchewan, and BC (Ontario repealed it's in 1995, 2 years after it was created)
* In 2015, 54% of legislators and senior government managers and officials were women compared to in 1987 when that number was 36.8%
* In 2015, 25.6% of senior managers in the private sector were women, compared to 14.3% in 1987
* Annual earnings are a problematic measure of gender-based pay inequality, as women worker fewer hours on average than men, even on a full time, full-year basis, typically due to family responsibilities
* The hourly wages of full time workers reflect only the price of labour, and they are closer to the issue of gender-based discrimination
* There has been improvement in the gap in pay as a result in women gaining greater education
  + Between 1991 and 2015, the proportion of women with a university degree increased by 21.1%
* The gender pay gap partly owes to the differential allocation of female and male workers across occupations
  + Women are over-represented in low-paying occupations and under-represented in high paying ones
  + in 2015, 21.2% of women who worked full time had occupations with average hourly wages in the bottom 20% of wage distribution compared to 17.3% of males
* Differences in how female-dominated occupations are valued, relative to male-dominated jobs also contribute to the gender based pay inequality
  + female dominated occupations tend to be compensated at lower wage rates than male-dominated occupations - even when they involve the same skill

#### Sexual Harassment

* Women disproportionately bear the brunt of sexual harassment in the workplace
* Sexual harassment is generally not addressed in the workplace
  + in a 2017 online survey by the Department of Employment and Social Development, 30% of respondents indicated that they had experienced sexual harassment at work
  + 65% of those reporting sexual harassment at work also indicated that there was a higher ratio of men in positions of power within the relevant workplace
  + around 75% of those who said they had been sexually harassed took some action by discussing it with a supervisor or some other workplace representative but about half of them said that the matter was not resolved, and 41% said no attempt was made to resolve it
  + 75% of those who experienced harassment said that they experienced obstacles when trying to resolve it
  + Common barriers included: that their supervisor or manager did not take the claim seriously, that their supervisor or manager did not initiate an investigation, and that the employee experiences retaliation from individuals in positions of authority
  + Fears of retaliation or harm to career prospects were high among reasons cited by those who choose not to come forward
* Men place less value on a respectful and inclusive work environment

#### Division and Accommodation of Caregiving Responsibilities

* Family care has only recently been acknowledged as a workplace issue
* While the male breadwinner family has largely vanished along with the idea of the “family wage”; Employers continue to demand an “unencumbered worker,” along with the right to organize work without regard to worker’s care obligations and that gender role within families have been slow to change
* Women still bear most of the practical responsibility for family care while having taken on greater workplace roles
* Women are forced to manage family care without impinging on their work obligations
* The unequal burden of family care creates and reinforces women’s continuing inequality both inside and outside the workplace

# “Workplace Law Without State?”

* Fear that globalization would lead to a “race to the bottom” or, more modestly, to a policy convergence on low labour standards have influenced public policy debate in industrialized countries since the mid-nineteenth century
* This debate rests on four propositions
  + That unit labour costs matter in international competition for jobs and investment
  + That jobs and investment can and do move towards jurisdictions with low unit labour costs
  + That labour and employment laws increase unit labour costs enough to matter in this competition
  + As a result, international economic integration will drive a global market in workplace regulation
* For this logic to work, two conditions must be met
  + The labour and employment laws in question must actually raise unit labour costs
    - this means that they are enforced, and raise employer costs in a way that is not charged back to workers or offset by productivity gains
  + The unit labour cost increases attributable to workplace laws must be significant in relation to other factors affecting decisions to locate jobs and investment
  + Workplace laws often do not raise unit labour costs. Sometimes the costs of legal compliance are simply charged back to workers by lower wages
  + Well-designed laws can improve productivity
  + Canadian government has not had to change their laws to compete internationally

# The Constitutional Division of Powers

#### The Division of Powers Between the Federal and Provincial Governments

* Constitutional issues first emerged early in the 20th century when both the federal and provincial governments were led to regulate some aspects of labour relations and bargaining strikes through legislative action
* Section 96 issues relate to sections 96 - 100 of the *Constitution Act*, 1867, which provides that judges of the courts of superior jurisdiction in each province must be appointed by the federal government, and give those judges security of tenure to protect their independence
* When modern provincial labour and social welfare legislation began, it was interpreted and applied by specially created provincial administrative bodies (including quasi-judicial administrative tribunal with special expertise). Members of these tribunals did not enjoy the protections of section 96 - 100 and it was argued that they had no authority to enforce rights and grant remedies which resembled the rights and remedies traditionally enforced and granted by the superior courts (*Labour Relations Board of Saskatchewan v John East Iron Works Ltd*, [1949])
* s. 91 delineate powers given to federal government and s. 92 delineates powers given to provincial governments
* Courts have decided that, as a general principle, labour relations and working conditions fall within the exclusive jurisdiction of the provinces, as these matters are included in the provincial head of power over “Property and Civil Rights” (s 92(13) of the *Constitution Act*)
  + Approximately 90% of the workforce is covered provincially
* Parliament retains exclusive authority over labour relations and working conditions in the federal undertakings covered by sections 91(29) and 92(10)(a), (b), and (c)
  + E.g., interprovincial/international transportation – trucking, shipping, aviation
  + E.g., banking, telecommunications, broadcasting, nuclear power, coal mines in Cape Breton
* Federal government has exercised its constitutional jurisdiction to establish labour standards for workers in federally regulated private sector industries, and in First Nations governments
* The federal government lacks jurisdiction, except in unusual circumstances, to regulate labour standards in most ordinary enterprises such as manufacturing firms, restaurants and retail stores which come under provincial jurisdiction
* The 2005 Statistics Canada Federal Jurisdiction Workplace Survey found that an estimated 1.132 million workers (about 8.4% of the Canadian workforce) are employed by employers subject to federal jurisdiction.
  + Of these, about 840, 000 are subject to Part III labour standards. Most work for banks (30%), telecommunications or broadcast firms (18%), postal service and pipeline companies (14%), airlines (12%), or road transportations firms (12%)
* Employment is highly concentrated in large enterprises in most federally regulated sectors, with 86% of employees working for employers with 100 or more employees
* While federal jurisdiction employers covered by Part III account for about 6% of employment in Canada, they comprise only about 1% of Canada’s employers
* Workers in enterprises covered by Part III are more likely than other Canadian workers to enjoy working conditions above the national norm
  + in 2004, more than half (52%) were paid more than $20 an hour, versus 37% of all workers in Canada, while only 2% were paid less than $10 per hour, versus 16% nationally
  + Of Part III employers with 100 employees, 83% report offerings some form of pension plan to their staff
* Workers covered by Part III tend to be somewhat older, with fewer workers aged under 25 (8% versus 17%) and more aged 45 to 54 (29% versus 23%)
* Especially notable in rail transportation, road transportation, maritime transportation and postal service and pipelines, where percentage of the workforce aged 45+ ranges from 44 to 56%, compared with the national average of 34%
* Exception is banking (72% female), federal jurisdiction industries all tend to be male dominated to varying degrees
* **Main point:** The demographics of workers and employers in the federal domain differ from those of workers and employers covered by similar legislation elsewhere

##### Tessier Ltee v Quebec (Commission de la sane et de la securite du travaile) - 2012 SCC – federal government has jurisdiction over labour regulations when the employment involves an undertaking within federal legislative power or when the employment relates to an activity that is an integral part of an enterprise that is subject to federal regulation

* **Facts:** Tessier Ltee is a heavy equipment rental company that rents out cranes for a variety of purposes and provides technical, operational, supervisory and consulting services in connection with crane leasing. The company is also engaged in intra-provincial road transportation and maintenance and repair of equipment. In 2005-2006, Tessier had 25 cranes which were used in construction work and industrial maintenance, some were also used for the loading and unloading of ships (known as stevedoring). Stevedoring represented 14% of Tessier’s overall revenue and 20% of the salaries paid to employees. All activities took place within Quebec. Employees worked across the different sectors of the organization. The regulation of ports is generally a federal worker undertaking. Quebec Occupation Health and Safety Agency received complaints from workers of Health and Safety violations. The company said that they do not have any jurisdiction over them because they were federally regulated, not provincially regulated.
* **Issue:** Are Tessier’s employees governed by federal or provincial occupational health and safety legislation?
* **Holding:** Appeal dismissed; health and safety should be regulated provincially. Tessier’s stevedoring services were not performed by a discrete unit and represented only a small part of its overall operation. To the extent that Tessier employee’s perform stevedoring duties, they do so only occasionally. Tessier’s essential operational nature is local, and its stevedoring activities form a relatively minor part of their overall operation.
* **Tessier's claim:** Argued that it is a federal undertaking based on its involvement with activities related to the shipping industry. They argued that this Court concluded in *Stevedores Reference* that stevedoring is an essential part either of “navigation and shipping” under s. 91(10) of the Constitution Act, or “lines of stream or other ships” under s. 92(10)(a) and (b) and is therefore subject to federal jurisdiction. Argued that any company whose employees are engaged in stevedoring is a company whose employees would be federally regulated for the purposes of labour relations.
* **Analysis:**
  + Starts by referring to *Snider* case which held that the bulk of labour relations in Canada are provincially regulated under the Property and Civil Rights
  + Established that the federal government has jurisdiction over labour regulations in two circumstances
    - When the employment involves an undertaking or business within the federal legislative power (banking, telecommunications, aviation, inter and international transportation)
    - When the employment relates to an activity that is an integral part of an enterprise that is subject to federal regulation
  + Courts have held that Parliament was entitled to regulate labour relations when jurisdiction over the under-takings were an integral part of Parliament’s competence under a federal head of power
  + If there is an indivisible, integrated operation, it should not be artificially divided for purposes of constitutional classification
    - Only if its dominant character is integral to a federal undertaking will a local work or undertaking be federally regulated
    - We look at the company as a whole, it will either be all federal or all provincial
  + In the case of direct federal labour jurisdiction, we assess whether the work, business or undertaking’s essential operational nature brings it within a federal head of power. We assess whether that essential operational nature renders the work integral to a federal undertaking.
  + Disagreed with Tessier’s interpretation of *Stevedores Reference* 
    - Parliament will only be justified in regulating these labour relations if the stevedoring activities at issue are an integral part of the extra-provincial transportation by ship
  + Court said that the question to ask was: “To what extent was the effective performance of the federal undertaking dependent on the services provided to the federal undertaking from the exclusive or principal part of the related work’s activities (*Stevedores* *Reference*)
  + Court has also recognized that federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation
  + Even if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees time or is a minor aspect of the essential ongoing nature of the operation
  + At the time, Tessier devoted majority of its effort to non-shipping activities and employees were fully integrated and worked across different sector
  + The court held that the exceptional aspects of an enterprise do not determine its essential operational nature
  + If a minority of the work activities or the work operations of the company falls under or is related to a federal undertaking, then the company itself will not automatically transform from provincial to federal
  + an enterprise is not federal if the work represents “an insignificant part of the employees time” (Paragraph 50). Only if the dominant character is intrical to a federal worker undertaking will it be federal.
  + There is an exception to the rule presented in this case
    - Hydro One provides power to most of the province
      * It’s provincial because it is not involved in a federal undertaking
      * Hydro One also owns several nuclear plants
        + The nuclear plants are a federal undertaking and governed by federal law

##### Reference Re Industrial Relations and Disputes Investigation Act (the Stevedores Reference), [1955] SCR 529

* Court answered two questions:
  + Whether this restricted labour legislation was intra vires Parliament
  + Whether it applied to the Toronto employees of a particular stevedoring company which engaged exclusively in stevedoring and did all the loading and unloading for seven companies engaged in extra-provincial shipping
* **Held:** Eight of nine judges concluded that the federal labour statute applied to the employees in question because the work they did was integral to the federal shipping companies that used them
* Based on the evidence of the services that the stevedores provided to the shipping companies, it was concluded that the employees devoted all of their time to the federally regulated companies, who relied on them exclusively for the loading and unloading of their cargo
* **Ratio:** The federal government has jurisdiction to regulate employment in two circumstances: (1) when the employment relates to a work, undertaking or business within the legislative authority of Parliament or; (2) when it is an integral part of a federally regulated undertaking

##### Canadian Pacific Railway Co v Attorney General of BC [1948] SCR 373

* **Facts:** Hotel workers at Empress Hotels want to unionize. Union sought to organize itself under provincial legislation and the employer said that the railways are regulated federally because they are interprovincial transportation and hotels are integrated into the railways so they must also be under federal legislation. Goes all the way to the Privy Council.
* **Issue:** Are railway hotels under provincial or federal regulation?
* **Held:** Railways hotels are under provincial regulation.
* **Arguments for Canadian Pacific:** hotel business is related to railway business because they share customers
* **Analysis:** The Essence of hotels is accommodation for travelers and that is inherently a provincial form of jurisdiction under s. 92(13) Property and Civil Rights.

# Aboriginal Self-Government

* *R v Van der Peet*, [1996] 2 SCR 507
  + SCC recognized and defined the scope of the inherent right of aboriginal peoples to maintain their traditional and customary practices adapted to contemporary Canadian society
* In *Mississaugas of Scugog Island First Nation v AG Canada and AG Ontario*, a band claimed a legal right to enact its own code of labour law to govern the collective bargaining rights in relation to a commercial undertaking (casino) on reserve lands. A unionization drive was going on and the reserve passed it’s own labour code minus the right to be able to unionize. They claimed to be a third branch of government, not federal or provincial, that had the constitutional power to regulate labour relations.
  + The OLRB rejected the claims, characterizing the right not as one to control access to aboriginal lands, but rather as a right to regulate labour relations on the reserve.
    - They said there is nothing “Indian” about it and so they do not have the jurisdiction to refuse the application of the legislation.
    - There was no ancestral practice, custom or tradition capable of supporting that right, nor was there any established treaty right that would lead to a right to regulate labour relations, nor did it find a broader right to self-government
  + ONCA confirmed this finding, stating that there was no evidence to support the claim that there was an aboriginal right to govern collective bargaining or labour practices
    - This is not part of the distinctive culture of the applicants (following *Van der Peet*)
* Aboriginal private endeavors (e.g., gas station, restaurant) are governed provincially, unlike other band activities that are governed federally
* While the CA recognized that aboriginal rights are “not frozen, but are capable of evolving into modern form provided there is continuity linking the present exercise of the aboriginal claim to the distinctive character and nature of the right in its original form” the court held that the band’s labour law code had no meaningful relationship with pre-contact communal practices. It’s roots are entirely post contact and derived from modern law dealing with contractual relationships between employers and employees in a post-industrialist capitalist economy
* The Code was closely modelled to the Canada Labour Code, except that strikes and lockouts were banned, a union had to pay a fee of $3,000 and obtain permission from the band’s labour relations tribunal to speak to workers on the reserve, and workers had to pay a fee of $12,000 to file an unfair labour practice complaint.

# Equality and Human Rights in Employment

* Historically, the main issue has been diminishing the inequality of bargaining power between employers and employees through trade unions
* The equality provisions of the *Canadian Charter of Rights and Freedoms* apply to labour and employment legislation and to its application by administrative tribunals, as well as to any employment relation that has a nexus with government
* human rights legislation applies to employers, unions, and employees in the public and private sectors, and it may take primacy over other legislation
* 1982- Charter of Rights and Freedoms
  + around the same time, the federal jurisdiction enacted its’ Human rights legislation
  + charter ended up constitutionalizing no discrimination based on gender, race, age etc. but it also gave rise to a rights revolution in Canada
* Abella Report, 1984 – Royal Commission on Employment Equity
  + reported on the issue of employment equity in Canada
  + her jurisdiction was only over the federal workplace but her report was one of the most influential Royal Commission reports ever issued
  + her report looked at 4 groupings in the workplace that has suffered discrimination, she looked at women, persons with disabilities, Aboriginal peoples and visible minorities
  + Year-long study into how to improve employment equity in the federal workplace
  + Influenced the law in both federal and provincial jurisdictions
  + In the report, she recommended two significant changes
    - (1) That Canada should adopt and apply the duty to accommodate into Canadian law
    - (2) Broaden the definition of discrimination to include indirect or non-intentional discrimination, otherwise known as adverse-impact discrimination.
  + Two other important pieces
    - Concept of 373 systemic discrimination
    - Recommendation for employment equity
* 1985, SCC decisions
  + *O’Malley (Simpson Sears v Ontario)*
    - less than a year after the Abella Report
    - **Facts:** Ms. O’Malley was a retail store clerk working for Simpson Sears in Kingston. After being hired, she became a 7th Day Adventist, and among the other precepts of belonging to this denomination it said that you cannot work between sunset on Friday and sunset on Saturday. But the rule at Simpson Sear is that you must be able to work any shift offered. She was working full time and some of her work would involve working Friday evenings or Saturdays. She informed her employer that she could not work sunset Friday to sunset Saturday. They said too bad they could not have an employee who could not work certain shifts. They said they could let her work part time which meant going down to 24 hours a week which was a significant loss of income. Case makes it’s way to the SCC.
    - **Analysis:** SCC adopted both the duty to accommodate and indirect discrimination. SCC said that the employer has a duty under the Human Rights legislation to be able to accommodate an employee who comes under one of the prohibited grounds of discrimination in the Human Rights Code. In adopting the indirect discrimination recommendation, the SCC said that up until now in order to find someone in violation of HR code we had to find that they intended to discriminate but we are now widening the law to include indirect discrimination. You do not necessarily need to show intention in order to have a finding of discrimination in violation of the HR Code. SCC said that employer has a duty to accommodate her on basis of the HR code and the fact that they have a neutral rule which had an adverse impact on someone based on an HR ground is sufficient to find a violation.
    - **Sear's Argument:** They did not discriminate, they were applying a neutral non-discriminatory rule.
    - **Ratio:** SCC adopted the duty to accommodate and indirect discrimination. Employer has a duty under the Human Rights legislation to accommodate an employee who comes under one of the prohibited grounds of discrimination in the Human Rights Code.
  + *Bhinder v CNR*
    - **Facts:** Bhinder had been hired as a construction technologist for Canadian National Railway and most of his work was in the office and involved overseeing construction work. Bhinder occasionally had to go to construction sites to ensure the work was being completed properly. Bhinder is an observant Sikh and wears a turban and does not wear anything over his turban. When he told his employer that he cannot wear a hard hat, the employer said that under Occupation Health and Safety law he must and so he was terminated.
    - **Held:** SCC ruled in favour of CNR and turned him down.
  + *Central Alberta Dairy Pool* (1980) SCC
    - **Facts:** Mr. Christie was employed by Central Alberta Dairy Pool in RedDeer Alberta. He was of a specific Christian sect, a minority religious faith, who’s religious day was Monday. The dairy pool was run by a company who had a religious affiliation and they did not do work on Sunday’s. The dairy plant shut down on Sundays and was very busy on Mondays, often getting twice the load of milk. He asked to take a Monday off to celebrate a religious holiday, he was told no but he took the day off anyways and so he was subsequently fired.
    - **Issue:** Duty to accommodate was accepted in 1985 in O’Malley but the SCC in that case never gave it any structure or detail.
    - **Held:** SCC ruled in Christie’s favour.
    - **Ratio:** Employer has to take every reasonable step to accommodate an employee under a HR protected ground unless it would cause the employer undue hardship. This case gave flesh and blood to the duty to accommodate and developed the concept of undue hardship factors.
    - SCC clarified the rules of human rights in the workplace and said that they would decide the *Bhinder* case differently if they were to do it again. They said there are a list of undue hardships factors which an employer can defend its decision not to accommodate, one of them is safety. There has to be a tolerable range of risk allowed in order to accommodate. They say that him not wearing a hard hat at the construction site would fall within the tolerable range of risk and so CNR should have accommodated Mr. Bhinder.
* Since 1914, there is a no-fault system called Worker’s Compensation. If someone is insured at work, then it is no fault unless the employer is grossly negligent.
* Supreme Court of Canada Rulings
  + Human rights are quasi-constitutional rights
  + Discrimination, even if unintentional, is unlawful
  + Accommodation is a significant human rights obligation
  + Accommodation rests on the shoulders of
    - Employers
    - Unions
    - Employees seeking accommodation
    - Fellow employees
  + Human rights are to be interpreted broadly while the exceptions should be interpreted narrowly

# The Concept of Equality

#### Theoretical Development of the Concept

* Our contemporary understanding of social equality has roots in commitment to political and legal equality
* 70-85% of human rights claims are based on employment
* Examples of formal equality are "one person, one vote", and equal treatment before the law – the capacity to enjoy these and use them effectively is often dependent on social or economic status
* Taking commitment to equality one step further leads to idea that people should be judged on individual merit and not be excluded from pursuing opportunities/receiving benefits because of particular characteristics such as class, race, sex, religion and disability
* This idea of equality of opportunity was a step forward from earlier status-based concept to a liberal concept of equality based on right of each individual to achieve whatever can be achieved through that person's own effort (now we take into account privilege)
* Anti-discrimination law initially stressed "sameness" – all human beings are the same and overlooked ways people can be treated unequally under a veil of equal treatment
* The gradual realization of this shortcoming led to the development of concept of **substantive equality** or equality of outcome – key is the distinction between direct and indirect (or adverse effect) discrimination and the development of the legal duty to accommodate
* The diasctintion between direct and indirect discrimination was based on the recognition that there can be discrimination without an intention to discriminate
* Human rights legislation imposes a duty to accommodate if it can be done without undue hardship to the employer/other employees
* Facially neutral rules (ex. job requirement to life heavy weights) will not be upheld as "bona fide occupational requirements" if the employee can be accommodated without undue hardship pursuant to human rights law
* Human rights legislation now recognizes a much wider variety of grounds, which may include family status, marital status, sexual orientation and criminal record. This is in accord with the broadening view of the concept of equality and the acceptance of the idea that individual cases of discrimination and unequal treatment in employment do not exist in isolation from broader social conditions

#### Application of the Concept of Equality by the Crown

* Main sources of equality law in the labour relations context found in s 15 of *Charter* and in human right statutes and the interpretation of all of this in appellate courts
* Until enactment of human rights legislation there was no way to challenge inequality directly
  + Provincial legislation prohibiting Chinese from working in mines was successfully challenged 100+ years ago on division of powers grounds, it was held to trespass on federal authority over “neutralization and aliens” under s. 91(25) of the *Constitution Act*
  + Then a provincial statue prohibiting Chinese employers from hiring white women was within provincial authority because its primary purpose was found to be protective (*Union Colliery Co v Bryden* and *Quong-Wing v R*)
* First detailed statute codifying equality in employment as a basic human right was the SK *Bill of Rights Act* – quasi criminal legislation that required proof of an invidious intent and had penal sanctions, focusing on fines and imprisonment. However, attacking discrimination by punishing the perpetrators of discrimination proved ineffective and other provincial legislatures passed statues designed to give victims compensation and relief
* In 1951 ON passed first human rights statute – the *Fair Employment Practices Act*
* Over next two decades other provinces and federal government enacted similar legislation. Over the years, the prohibited grounds of discrimination under those statues were expanded, as were the areas of activity to which they applied, the administrative machinery for their enforcement and the range of remedies available
* *Seneca College of Applied Arts and Technology v Bhadauria –* a civil action cannot be brought to vindicate equality rights set out in human rights statutes because those statues themselves provided a comprehensive administrative and adjudicative regime for the protection of such rights
* Human rights legislation was major source of equality law until section 15 of the *Charter* came into effect in 1985
* first case decided under s. 15 is *Andrews v Law Society of British Columbia*

##### Andrews v Law Society of BC (SCC 1989) – first case under s 15, sought guidance from contemporary jurisprudence under human rights legislation; test for the proof of discrimination

* The idea that intention is not required for a finding of discrimination, the idea that discrimination need not be overt or direct but may result from an adverse effect on a particular group, and the idea that attaining equality may require treating people differently were all imported into the interpretation of s. 15
* Rejected the formal equality approach it had developed under the Bill of Rights and rejected the "similarly situated" test under which "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness"
* **Held:** s 15 of the *Charter* guaranteed substantive and not merely formal equality and in holding this, the court said “Consideration must be given to the content of the law, to its purpose and its impact upon those to whom it applies, and also upon those whom it excludes from its application”
* **Ratio:** Three stage test for determining whether breach of subsection 15(1):
  + To prove a 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 15(1) or an "analogous" ground – a personal attribute which is immutable and which is characteristic of a disadvantaged group
* **Held:** Citizenship, which was a qualification for being called to the Bar of British Columbia, was held to be an analogous ground

##### Vriend v Alberta (1988) SCC – Discrimination can arise from under-inclusive legislation.

* **Facts:** DelwinVriend was employed at King's College in AB as a laboratory coordinator and his work had always been evaluated positively. He disclosed that he was gay to the president of college in 1990, in response to an inquiry and a year later college adopted policy disapproving of homosexuality. They had policies against hiring or maintaining employment with anyone who was gay. Vriend was dismissed for non-compliance of policy. Vriend tried to file complaint with the Alberta HRC under the Individual’s Rights Protection Act, RSA 1980 but was unable because the Individual's Rights Protection Act did not include sexual orientation as a protected ground in the Alberta legislation. Mr. Vriend sued for a declaration that the commission of sexual orientation form the IRPA contravened s. 15 of *Charter*. Sexual orientation had been read into s. 15 of the *Charter* as an analogous ground.
* **Prior Proceedings:** He won at trial, lost at the Alberta Court of Appeal and appealed to the SCC
* **Appellant’s Argument:** Challenging the *IRPA* as unconstitutional because of its failure to protect Charter rights, its under inclusiveness
* **Respondents Argument:** Contend that a deliberate choice not to legislate should not be considered government action and thus does not attract *Charter* scrutiny. They assert that there must be some “exercise” of “s. 32 authority” to bring the decision of the legislature within the purview of the *Charter*. Also argued that because the *IRPA* merely omits any reference to sexual orientation, this “neutral silence” cannot be understood as creating a distinction. They argue that the *IRPA* extends full protection on the grounds contained within it to heterosexuals and homosexuals alike, and therefore there is no distinction and hence no discrimination. It is their position that if any distinction is made on the basis of sexual orientation that distinction exists because it is present in society and not because of the *IRPA*
* **Issue:** Could a legislature not include a commonly accepted ground into its Human Rights legislation?
* **Held:** SCC read the words “sexual orientation” into the relevant sections of the *IRPA*
* **Ratio:** Identical treatment will not always constitute equal treatment – discrimination can arise from under-inclusive legislation. It is not necessary to find the legislation creates the discrimination existing in society in order to determine it creates a potentially discriminatory distinction. The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection
* **Reasons:** The mere fact that the challenged aspect of the Act is its under inclusiveness should not necessarily render the Charter inapplicable. If the mere silence of the legislation was enough to remove it from s. 15 scrutiny than any legislature could easily avoid the objects of s. 15(1) simply by drafting laws which omitted reference to excluded groups. The exclusion of sexual orientation from the *IRPA* which is the government’s primary statement of policy against discrimination suggests discrimination on grounds of sex orientation is not as serious – this is discrimination
  + Court held that the language of s**.** 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority
  + S. 32(1)(b) states that the *Charter* applies to “the legislature and government of each province.” There is nothing in this wording to suggest that a positive act encroaching on rights is required
  + It could also be possible to say that the deliberate decision to omit sexual orientation from the provisions of the *IRPA* is an “act” of the Legislature to which the *Charter* should apply
  + Has been repeatedly held that identical treatment will not always constitute equal treatment (*Andrews*) and that the way in which an exclusion is worded should not disguise the nature of the exclusion so as to allow differently drafted exclusions to be treated differently
  + It is clear that gay and lesbian individuals are not being completely excluded from the *IRPA.* They can claim protection on some grounds but that does not mean that no discrimination is present
  + Under inclusion may be simply a backhanded way of permitting discrimination (*Brooks v Canada Safeway Ltd*., [1989] 1 SCR 1219)
  + Respondent’s contention that the distinction is not created by the law, but rather exists independently of the IRPA cannot be accepted. It is not necessary to find that the legislation creates the discrimination existing in society in order to determine that it created a potentially discriminatory distinction
  + The obvious effect of the exclusion of sexual orientation is that lesbians or gay men who experience discrimination on the basis of their sexual orientation are denied recourse to the mechanisms to make a formal complaint and seek a legal remedy. Therefore, the Alberta Human Rights Commission could not hear Vriend’s complaint and cannot consider a complaint or take any action on behalf of any person who has suffered discrimination on the ground of sexual orientation. This is exacerbated by the lack of success that gay and lesbian individuals have had in arguing discrimination on other grounds including sex and marital status
  + In *Haig*, the ONCA based its finding of discrimination on both the “failure to provide an avenue for redress for prejudicial treatment of homosexual members of society” and “the possible interference from the omission that such treatment is acceptable”
  + Psychological harm: fear of discrimination will lead to concealment of true identity which is harmful to personal confidence and self-esteem
  + Excluding sexual orientation from the *IRPA’s* protection sends a message that all individual are equal except gays and lesbians and the denial to individuals of any effective legal recourse in the event they are discrimination against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the *IRPA* constitutes discrimination
* **Takeaway:** The under inclusion of certain prohibited grounds is unconstitutional. This decision requires that sexual orientation must be read into *HR Code* in Alberta.

#### Establishing Discrimination Under Human Rights Laws

##### O’Malley v Simpson- Sears (1985)- SCC- Introduction of duty to accommodate and broadening of discrimination to include non-intentional discrimination

* **Facts:** A department store employee objected to working on Friday nights and Saturday mornings on religious grounds. The employer did have legitimate reasons for requiring employees to work at those times and did not intend to discriminate against O’Malley
* **Held:** SCC held the requirement to be discriminatory because it had an adverse effect on anyone of her religion. The court ordered the employer to accommodate O’Malley by scheduling her time differently as long as the rescheduling did not impose an undue hardship on the employer. Held that the courts below were in error in finding an intent to discriminate to be a necessary element of proof
* **Ratio:** Established that intention was not required for a finding of discrimination, and it also introduced the idea of the duty to accommodate
* **Analysis:** The proof of intent should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.
  + Also provided an explanation of the distinction between discrimination and adverse effect discrimination and the burden of proof required in each case:
    - **Direct discrimination**: employer adopts a practice or rule which on its face discriminates on a prohibited ground such as “No Catholics or no women or no blacks employed here”
    - **Adverse effect discrimination:** Arises where an employer for genuine business reasons adopts a rule or standards which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restriction conditions not impose on other members of the workforce
  + The complainant in proceedings before human rights tribunals must show a prime facie case of discrimination which is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complaint’s favor in the absence of an answer from the respondent-employer.
  + Where adverse discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job, then the employer is required to show that he has taken such reasonable steps toward accommodation of the employee’s position as are open to him without undue hardship
  + In this case, the onus should rest on the employer because it is the employer who will be in possession of the necessary information to show undue hardship and the employee will rarely be in a position to show its absence
  + The conventional HR code analysis treats as discriminatory any differential treatment connected to a prohibited ground unless it passes both an efficacy and necessity test. Charter test requires claimants to show substantive discrimination and this burden exempts some cases from a necessity assessment that the code test has conventionally imposes on respondents.
  + Conventional accounts requires that the applicant must establish a prima facie case of discrimination, after which the burden shifts to the respondent to demonstrate that the exclusionary requirement is a bona fide requirement, provided that such an exemption from the prohibition on discrimination is provided by the code on the facts
  + Showing a prima facie case tends to be a low bar, typically only need to show that there was been discrimination in effect or in a factual sense
  + In adverse effect cases, the applicant must establish, either as a matter of logic, or common sense or through actual evidence, the rule’s tendency to have a worse effect on people in one group than others. If the applicant cannot make out this differential effect, then they have not established the prima facie case and the respondent has nothing to defend

##### Moore v British Columbia (Education), 2012 SCC 61

* **Held:** Court held that 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. The burden then shifts to the respondent to justify the conduct or practice. If they cannot justify, discrimination will be found to have occurred.

##### Quebec v Bombardier Inc (Bombardier AeroSpace Training Centre) 2015 SCC 39

* Clarified that the connection between the differential treatment or effect and one of the enumerated grounds does not have to be close or casually determinative
* “The plaintiff has the burden of showing that there is a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a factor in the distinction, exclusion or preference.”

# The “Unified Approach” to Discrimination

* Once a prima facie case of discrimination under HR laws is established, the burden shifts to the respondent to explain its action
* Important statutory defence for respondent is the bona fide occupational requirement (BFOR)
* In 1999 in *Meiorin*, SCC tried to simplify the relationship between direct and indirect discrimination, BFORs and duty to accommodate – introduced new three stage test for deciding whether a standard is in fact a BFOR

##### British Columbia (Public Service Employee Relations Commission) v BCGSEU (SCC 1999) “Meiorin” - Three step test for determining whether a discriminatory standard is a bona fide occupational requirement; combined tests for direct and indirect discrimination into one test. Modern leading HR case on duty to accommodate in Canada. ALWAYS ALWAYS start with this test.

* **Facts:** Ms. Meiorin employed by BC Ministry of Forests for 3 or 4 years, had to put out forest fires. She was employed as a member of a three-person Initial Attack Forest Firefighting crew in the Golden Forest District. Crew’s job was to attack and suppress forest fires while they were small and could be contained. Her supervisors found her work to be satisfactory. Small minority of women were employed as forest fire fighters. She was not asked to take a physical fitness test until 1994, when she was required to pass the Government’s “Bona Fide Occupational Fitness Tests and Standards for BC Forest Service Wildland Firefighters”. These tests required that forest fighters weigh less than 200lbs with equipment and complete a shuttle run, an upright rowing exercise and a pump carrying/hose dragging exercise within stipulated times. Running test was designed to test their aerobic fitness and was based on the view that forest fighters must have a minimum aerobic standard. Just before she began working, there was a small forest fire where a lot of fire fighters died and when the investigation was done, they determined that one of the reasons was because the fighters were not physically fit to run away from the fire. The Tests were in response to a 1991 Coroner’s Inquest Report that recommended that only physically fit employees be assigned as front-line forest fighters for safety reasons. Government commissioned a team of researchers to undertake review of its existing fitness standards with a view to protecting the safety of firefighters while meeting human rights norms. Tests were developed by identifying the essential components of forest fire fighting, measuring the psychological demands, selecting fitness tests to measure those demands. After 4 attempts, Meiorin failed to meet aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. She was laid off. The union brought a grievance on her behalf and the arbitrator was required to determine whether she had been improperly dismissed. Evidence showed that most women have lower aerobic capacity than most men and even with training, women cannot increase their aerobic capacity to the level required. Arbitrator also heard evidence than 65 to 70% of male applicants pass the Tests on their initial attempts, while only 35% of female applicants had similar successes.
* **Prior Proceedings:** Arbitrator found Meiorin established *prima facie* case of adverse effect discrimination by showing the aerobic standard has a disproportionately negative effect on women as a group. He further found that the Government had presented no credible evidence that her inability to meet the aerobic standard meant she constituted a safety risk to herself, her colleagues, or the public, and hence had not discharged its burden of showing that it had accommodated her to the point of undue hardship. Ordered she be reinstated to former position and compensated for lost wages. Court of Appeal held so long as the standard is *necessary* to the safe and efficient performance and applied through individual testing there is no discrimination. (They fucked up and read the arbitrator's reasons as finding the aerobic standard was necessary to safe and efficient performance). Allowed the appeal and dismissed her claim. CA said that to permit Ms. Meiorin to succeed would create “reverse discrimination”, i.e. setting a lower standard for women than for men would discriminate against those men who failed to meet the men’s standard but could meet the women’s standard
* **Issues:**

1. Is the test applicable to s. 13(1) and (4) of the BC Human Rights Code?
2. Whether, on this test, Ms. Meiorin has established that the Government violated the code?

* SCC judge proceeded on the view that the arbitrator did not find that an applicant’s ability to meet the aerobic standard is necessary to their ability to perform the tasks safely and efficiently. Therefore, held that the only issue to face was whether the aerobic standard is unjustifiably discriminatory within the meaning of the Code.
* **Test:** Conventional approach requires tribunal to decide at outset if the case is direct or adverse effect discrimination. In the case of direct discrimination, employer may establish that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies. In adverse effect discrimination claims, the BFOR defense does not apply and the employer needs to only show (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship. New approach is required to simplify the guidelines that structure the interpretation of human rights legislation in Canada. Under conventional, if standard is "natural" the legitimacy is never questioned and focus shifts to whether the claimant can be accommodated and the standard stays intact. Employers must build equality into workplace practices. There is an onus on employers to take initiative to ensure that their practices are compliant with demanding human rights standards.
* New unified approach (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives
* **3 Step Test** for whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on BOP that:
  + 1) The employer adopted the standard for a purpose rationally connected to the performance of the job
    - First step is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of a job.
    - Employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job.
    - The focus here is on the validity of the impugned standard’s more general purpose.
    - If no rational connection, then there is no need to continue to assess the legitimacy of the particular standard. Without a legitimate general purpose underlying it, the standard cannot be a BFOR.
  + 2) The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legit work-related purpose (government was found to honestly believe that the rule would increase safety in the job); and
    - Employer must now take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant.
    - If imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory animus, then it cannot be BFOR
    - Note: Analysis shifts at this staged from the general purpose of the standard to the particular standard itself. Not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job
  + 3) The standard is reasonably necessary to the accomplishment of that legit 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. (No because it did not prove that the aerobic test could determine sufficient fitness to fight forest fires had to be set at that level where there was clearly a higher rate of male fire fighters passing than female) (Must show it is impossible to accommodate employees without undue hardship)
    - Employer must now demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which has been demonstrated to be rationally connected to the performance of the job
    - Employer must establish that it cannot accommodate the claimant without experiencing undue hardship
    - “some hardship is acceptable, it is only ‘undue’ hardship that satisfied

Should also consider whether the person has the aptitude or qualification necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer’s work related purpose

* + - Seven factors to undue hardship (in order of validity)
      * Safety
      * Impact on collective agreement
      * Legitimate operational requirements of workplace
      * Size
      * Interchangeability of workforce
      * Employee morale
      * Cost
    - Important questions to ask:
      * Has the employer investigated alternative approaches that do not have a discriminatory effect?
      * If alternative standards were investigated and found to be capable of fulfilling the employer’s purpose, why were they not implemented?
      * Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
      * Is there a way to do the job that is less discriminatory while still accomplishing the employer’s legitimate purpose?
      * Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
      * Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?
    - If individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR
    - If the general purpose of the standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is BFOR
* Application to the Case:
  + Meiorin has established a prima facie case of discrimination, the burden now shifts to the Government to demonstrate that the aerobic standard is a BFOR
  + Steps 1 and 2 have been fulfilled
  + Step 3: employer must establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose
    - It must be demonstrated that it is impossible to accommodate individual employees sharing the characteristic of the claimant without imposing undue hardship upon the employer
    - Issue is whether the Government demonstrated that the aerobic standard is reasonably necessary in order to identify those persons who are able to perform the tasks of a forest firefighter safely and efficiently
    - The aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter. Government has also not established that it would experience undue hardship if a different standard were used
    - Court decided that no evidence was given that the government attempted to accommodate Ms. Meorin or looked into the aerobic standard’s discriminatory effect on women at all
* **Held:** Steps 1 and 2 were fulfilled, but 3 fails –government did not demonstrate this aerobic standard is reasonably necessary for safe and efficient performance of work, so the Government could not rely on the BFOR defense. Judge restored the order of the arbitrator reinstating Ms. Meorin to her former position and compensating her for lost wages and benefits. Also shut down the argument about reverse discrimination (that it would be discriminatory to men who could meet the female aerobic standard but not the male). They said that while safety is the most important undue hardship factor, the evidence was that 2/3 of the men taking the test wound up passing it but only 1/3 of the women would pass it and there was no proof that the aerobics standards set at that particular level were in fact at the level of safety that would guarantee that everyone who passed it would be safe in the woods. Employer failed on the safety undue hardship requirement. Held that the Government failed to discharge this burden and cannot rely on the defense provided by s. 13(4) of the Code.
* **Ratio:** Equality informs all of their policies and all of their workplace practices

# Major Employment-Related Equality Issues

#### Sex Discrimination

* *Bliss v Attorney General of Canada (SCC 1979)*: SCC held discrimination on basis of pregnancy was not discrimination on the basis of sex
* *Brooks v Canada Safeway (SCC 1989)*: Revisited issue; discrimination on basis of pregnancy is sex discrimination
  + **Facts:** Canada Safeway's accident and sickness plan excluded pregnant women from benefits during the period prior to birth and seventeen weeks after
  + **Ratio:** Applied test under s 15 of the *Charter* in the *Andrews* case (above)
  + **Held:** Plan treated pregnant women less favorably than non-pregnant women and was discriminatory based on pregnancy. Pregnancy itself was not a prohibited ground of discrimination under the applicable human rights statue but sex was. Discrimination on the basis of pregnancy was held to be a form of sex discrimination because of the biological fact only women can become pregnant
* *Canada Safeway Ltd v Manitoba Food and Comemrcial Workers Union, Local 832*
  + Court restored an arbitration award which found Safeway’s “no beards” rule to be a “reasonable” rule.
  + **Safeway’s argument:** Discrimination because of pregnancy is not discrimination because of sex
  + **Held:** “no beards” rule was “definitively not a matter of sexual discrimination”
* Human Rights Statutes were then amended to include this principle after *Brooks*
* *Carewest v Health Sciences Association of Albera (2001)*
  + **Facts:** Employer's refusal to extend maternity leave of a woman who wanted to breast-feed her baby was held by an arbitrator to be sex discrimination
* *Quintette Operating Corp v United Steelworkers of America (1997)*: sex discrimination claims may have to be reconciled with claims on other grounds
  + **Facts:** Union and employer agreed that temporarily disabled employees would be given preference for light work that was available within their own department. A pregnant employee grieved unsuccessfully that it was discriminatory not to include her in the scheme.
  + **Held:** Arbitrator held scheme was **not** discriminatory –grievor was being treated not as a pregnant woman but as an employee who could do only office work when no such work was available in her department

# Sexual Harassment

#### Sexual Harassment as Sex Discrimination

* Workplace harassment on the ground of sex, race, disability, or any other ground specified in human rights legislation is now recognized in law as a form of discrimination in employment, however legal recognition of it was not immediate
* Some courts and tribunals considered sexual harassment not to be a form of sex discrimination, because not every woman in a given workplace was subjected to it or because it was considered to be an expression of personal attraction which with the law should not interfere

##### Janzen v Platy Enterprises (1989) – SCC – sexual harassment is a form of sex discrimination. This case gives a working definition of sexual harassment.

* **Facts:** Two complainants were waitresses; male co-worker kissed/touched/made sexual advances despite their objections. Complained to manager, sexual conduct stopped but they were subjected to verbal criticism from co-worker and manager. Quit their jobs and filed complains of sex discrimination with MB HR Commission
* At the time, MB HRC did not mention sexual harassment but prohibited sex discrimination
* **Prior Proceedings**: Human rights adjudicator and trial court upheld the complaint. Manitoba Court of Appeal reversed it, finding that the sexual harassment experienced by the complainants was not sexual discrimination. They appealed to the SCC.
  + Court of Appeal drew a link between sexual harassment and sexual attraction. Sexual harassment stemmed from personal characteristics of the victim, rather than from the victim’s gender
  + Court of Appeal was of the view that the prohibition of sex discrimination in the Human Rights Act was designed to eradicate only generic or categorical discrimination. Therefore, a claim of sex discrimination could not be made out unless all women were subjected to a form of treatment to which all men were not. If only some female employees were sexually harassed in the workplace, the harasser could not be said to be discrimination on the basis of sex.
* **Ratio:** Employers are required to have **ZERO TOLERANCE** for harassment in the workplace.
* SCC held that sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex
  + The argument that discrimination requires identical treatment of all members of the affected group was dismissed in *Brooks* (just because some women don't become pregnant is no defense – crucial fact is all those who become pregnant are women)
* **Analysis:**
  + Sexual harassment in the workplace is unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job related consequences for the victims of harassment
  + Disagreed with the CA that all members of the group must be being harassed for it to constitute harassment based on sex. Discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual
  + The argument that discrimination requires identical treatment of all members of the affected group has been dismissed in *Brooks v Canada Safeway Ltd*
    - Held that the claim that pregnancy related discrimination could not be sex discrimination because not all women become pregnant was dismissed because pregnancy cannot be separated from gender. All pregnant people are women.
    - Held that the benefits plan of the employer, while it did not explicitly mention women, was held to discriminate on the basis of sex because the plan’s discriminatory effects fell entirely upon women
  + That some women do not become pregnant was no defense in *Brooks* just as it is no defense that not all female employees were subject to harassment
  + Crucial fact is that only female employees ran the risk of sexual harassment, no male employee would have been subjected to this treatment

#### Defining Sexual Harassment

* 4 provinces including ON and federal jurisdiction have legislative prohibition against sexual harassment
* Other provinces rely on general prohibition against discrimination in employment
* Only the federal jurisdiction refers to sexual harassment in both human rights and labor legislation.

##### Shaw v Levac Supply Ltd (1991) – OHRB – verbal conduct of a sexual nature is sexual harassment if it is repetitive and creates an offensive working environment. Sexual harassment is not limited to unwanted sexual advances

* **Facts:** Shaw worked as bookkeeper for Levac for 14 years, frequently teased by male co-worker Robertson and complaints to management went unanswered. Conduct included mimicking her speech, suggesting that she was incompetent, and making derogatory comments about her weight, saying things like “waddle, waddle”.
* **Employer argument:** It may have been rude or unpleasant but it is not against the law because it is not sexual harassment, it is harassment based on her weight.
* **Ratio:** Sexual harassment is not limited to unwanted sexual advances. Verbal conduct of a sexual nature is sexual harassment if it is repetitive and creates an offensive working environment
* OHRB dismissed this argument and said this was harassment on the basis of sex broadly defined.
* Also found that there was repeated sabotage by male employees of a female co-worker's safety equipment due to resentment of women in the workplace
  + In such cases, complainant must prove link between the harassing conduct and her sex
* **Analysis:**
  + Said that the respondent knew or ought to have known that the comments were a “sexual putdown”

# Racial Discrimination

##### McKinnon v Ontario (Ministry of Correctional Services) (1998) – OHRBID – leading case on racial discrimination in Canada; there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment

* **Facts:** McKinnon was a First Nations man who worked for the Ministry of Correctional Services at the Metro Toronto East Detention Centre for several years. Claimed he was subjected to racial harassment, slurs, taunts, including the imitating of Native war cries when he entered a room and claimed he and his wife had been denied promotions. Filed complaints alleging employer failed to prevent discrimination in workplace contrary to ON HR law. In 1998, found in his favour.
* **Holding:** The Board Inquiry found that there had been harassment which had been condoned and indeed participated in by managers at the ministry. McKinnon and his wife had also been subjected to reprisals, including the assignment of undesirable work to him and the improper calculation of job competition test scores for her. Board also held that other employees had been targeted in racial incidents. Ministry has infringed the complainant's right to equal treatment without discrimination because of race, ancestry or ethnic origin through permitting a poisoned workplace environment as a condition of his employment
  + Awarded general damages against various individuals for the discriminatory conduct and reprisals and ordered ministry to compensate other losses including the difference between his salary and the pay he received while on “sick leave” for work-related stress; to promote the complainant and his wife, to pay them the difference between their current salaries and what they would have received had they been promoted earlier, to move one of the respondents who had harassed McKinnon and ensure that neither he nor another respondent would work in the same facility as the complainant in the future, to amend its records to ensure that the complainants stress-related absences would not be used against him in the future and to give the Ontario HR Commission access to the complainant’s and his wife’s personnel files
* **Analysis:** 
  + Obvious from a review of the evidence that the workplace environment was poisoned by racial harassment and discrimination, and that such efforts undertaken to address it were inadequate and begrudged
  + The “race relations committee” was ineffectual and scorned by its ostensible beneficiaries and nothing was achieved by the commissioning of a report to review the entire “labor relations situations” at the Centre
  + Awarded damages for mental anguish because each of the respondents acted in full knowledge of the unwelcome character of their conduct so it follows that such conduct was “engaged in willfully
  + *Ghosh v Domglas Inc*
    - Necessary to assess general damages as objectively as possibly having regard to the unique circumstances of the case to reflect not only the mental anguish that willful or reckless conduct may cause, but elements of pain and suffering and injury to the complainant’s dignity and self-worth
    - Factors to take into account:
      * 1) the nature of the harassment, that is, was it simply verbal or physical
      * 2) the degree of aggressiveness and physical contact in the harassment
      * 3) the ongoing nature, that is, the time period of the harassment
      * 4) the frequency of the harassment
      * 5) the age of the victim
      * 6) the vulnerability of the victim
      * 7) the psychological impact of the harassment upon the victim
* **Ratio**
  + From *Hinds v Canada*, there is a duty upon an employer to take prompt and effectual action when it knows or should know of co-employees' conduct in the workplace amounting to racial harassment
    - The employers response should bear some relationship to the seriousness of the incident itself and the employer is obliged to take reasonable steps to alleviate the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial discrimination

# Discrimination on the Basis of Disability

* Collective bargaining can only offer a limited response to the problem of disability discrimination because it focuses on people who are employed, usually on full time employees
* People with disabilities often have a high rate of unemployment
* Disability (both mental and physical) is listed among prohibited grounds of discrimination in human rights legislation across the country

#### Michael Lynk, Disability and the Duty to Accommodate

* Disability
  + Any previous or existing mental or physical disability, and includes disfigurement and previous or existing dependence on alcohol or a drug
* Persons with a disability are characterized by a greater heterogeneity than any other group
* Disability, as a prohibited ground, differs from other enumerated grounds such as race or sex because there is no individual variation with respect to these grounds
* The condition of disability is potentially quite mutable – person may recover entirely, condition may stabilize, or medicine/tech can permit the employee to work with few limitations
  + Or it may deteriorate dramatically thus making work more difficult/impossible
* Modes of accommodation required to extend equality to persons with disabilities are broader and more complex than those required by other protected grounds. In the case of most protected grounds, accommodations can be accomplished through a change in policies or programs, together with a campaign to reform social attitudes.
* Accommodation will require more creativity and co-operation, and greater number of long-lasting alterations and commitments. These accommodations will frequently be more diverse, more individually tailored, more reliant upon technology, and probably more costly
* *Meiorin* 
  + SCC set out a demanding three part test to evaluate whether workplace standard conform to HR legislation. Under this test, employer must meet a very high standard in order to satisfy its duty to accommodate a worker with a disability to the point of undue hardship

##### Shuswap Lake General Hospital v BC Nurses' Union (Lockie Grievance) (2002) - BCHRT – Application of the Meiorin test for mental disability. One of the first cases to deal with mental illness in the workplace.

* **Facts:** Sharon Lockie (grievor) was employed as a registered nurse at Shuswap Lake General Hospital since May 1994. In April 1997, she was diagnosed with bipolar mood disorder. She has experienced several episodes of “mania” since then. Over an 18-month period she had several people close to her die. She was compliant with taking her medication and seeking treatment from her treating physician. During a manic episode work, she made some medication errors with some of her clients by forgetting to give them medication, but it was noticed by other nurses and fixed before any harm was done, she took time off. She went on sick leave in December 1999. Dr. Gibson diagnosed her “decompensations” and adjusted her medications to help her cope with certain events in her life. She returned to work in February 2000 pursuant to an agreement between the employer and union and worked without incident in her regular rotation until April, when she became overly stressed and upset at a patient. The employer sought assurances from Dr. Gibson that she would consistently meet the required standards of practice. There was no dispute that the grievor is not fit to practice as a nurse when she is unwell. Grievor had been treated by her psychiatrist for several weeks, and in his opinion, she was fit to return to work, but employer wanted assurance she would not relapse (or at least that any relapse could be accurately predicted) but bipolar episodes cannot be predicted. The employer concluded that it could not accommodate the grievor in her position, given the impossibility of predicting further relapses, and said that it could not accommodate her in any other nursing positions because they all involved direct patient care. She filed a grievance and a human rights complaint.
* **Union’s position:** That by suspending the grievor from her nursing position due to the possibility of a relapse, the Employer is discriminating against her by reason of her mental disability contrary to Article 31 of the collective agreement and has not discharged its duty to accommodate the grievor to the point of undue hardship.
* **Employers Arguments:**(1) It could not continue to accommodate the grievor in her position without incurring undue hardship; (2) it canvassed and could not find any nursing position that would not similarly result in undue hardship and; (3) offered to canvass the possibility of positions in the other two bargaining units in its facility, but the Union and the grievor were “not interested” in doing so
* **Issue:** Would the continued employment of the grievor as a nurse at the hospital would impose undue hardship on the employer?
* **Holding:** Employer has failed to satisfy the third test outlined in *Meiorin*. Employer did not establish a serious/unacceptable risk to patient safety or the impossibility of reducing that risk to an acceptable level through reasonable accommodative measures. The evidence fails to establish that the magnitude and of the risk to patient safety is serious or unacceptable. There is no direct evidence of any specific loss or injury to any patient due to the grievor’s medication errors, and no direct evidence related to seriousness of the loss or injury that may result. Employer fails BFOR Test and grievor should be returned to work on some conditions (therapy, advise co-workers on disorder, etc). Arbitrator found that the employer insisted on too high of a standard to allow her to come back to work.
* **Ratio:** There has to be a reasonable range of risk when evaluating safety.
* **Analysis:**
  + Court acknowledged that the Employer had accommodated Ms. Lockie several times in the past
  + Applied *Meiroin* principles to find that *prima facie* case of discrimination has been made out
  + The reason the Employer has refused to continue to employ the grievor as a nurse is her inability to assure management she will be able to accurately predict future relapses therefore it is inextricably linked to her mental disability and is prima facie discriminatory.
  + Onus thus shifts to employer to establish on balance of probabilities that its standard constitutes a BFOR. Employers standard for the purposes of the BFOR analysis was summed up in Ms. Thomson’s evidence where she said she would only permit a nurse with BMD to return to work in a position involving patient care if the nurse was “well controlled and no risk to patient safety and does not require other nurses to monitor closely”. In their opinion, the grievor did not meet this standard
  + Union only challenged the third part of the BFOR Test – whether Employer established its standard is reasonably necessary and that it was impossible to accommodate grievor without undue hardship
  + Found that the Employer’s standard is one of absolute safety or perfection, not one of reasonably safety
  + *PSERC* SCC
    - Employer’s test of “no” risk to patient safety set an “uncompromisingly stringent standard”
  + Accepted Union’s contention that Employer focuses too narrowly on whether the relapse could be accurately predicted and the Employer ought to have acknowledged the fact that relapse cannot be accurately predicted, and ought to have engaged in a search for reasonable accommodative measures that would reduce any risk to patient safety to an acceptable level
  + Found that evidence fails to demonstrate that it is impossible to reduce the identified risks to an acceptable level through reasonable accommodation
  + Would not be a reasonable accommodative measure to impose on grievor’s co-workers an obligation to closely monitor her behavior
  + Found that the Employer’s willingness to engage in a meaningful search for reasonable accommodative measures enabling the grievor to return to her position as a nurse ceased when Dr. Gibson confirmed the impossibility of accurately predicting relapses. Therefore, Employer’s focus on relapse prediction was too narrow and its standard of “no” risk was too stringent

##### Hydro-Quebec v Syndicat des employees… (SCFP-FTQ) (2008) – SCC – The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future; employer has a reasonable expectation of productivity from their employees.

* Court had to take another look at the rules protecting employees in the event of non-culpable absenteeism and the results governing contracts of employment. Court had to consider interaction between the employer's duty to accommodate a sick employee and the employee's duty to do their work
* **Leading case for reasonable operation requirements undue hardship factor!**
* **Facts:** Complainant employed with Hydro-Quebec and had numerous physical and mental problems. She suffered from tendinitis, epicondylitis and bursitis, had undergone a number of surgical procedures for various problems, took medication for various other physical problems and had episodes of reactive depression and a mixed personality disorder with borderline and dependent character traits. Missed 960 days of work over a 7-and-a-half-year period between January 1994 and July 2001. One of the main problems was that her personality disorder resulted in deficient coping mechanisms and that her relationships with supervisors and coworkers were difficult. Employer adjusted her working conditions in light of limitations for a long period of time before they had enough and thought they exhausted their duty to accommodate. In addition, following an administrative reorganization in which the complainant’s position was abolished and she became surplus, the employer assigned her to a position she was not owed. Employer dismissed employee on July 19, 2001, after she was absent under physician orders for 5 months (since February) and psych said complainant would not be able to work without having an absentee problem. Employer letter of termination referred to her absenteeism, her inability to work on a “regular and reasonable” basis and the fact that no improvement in her attendance at work was expected. Complainant filed a grievance, alleging that her dismissal was not justified.
* **Prior Proceedings (Arbitrator):** Arbitrator dismissed the grievance as he was of the opinion that the employer could terminate its contract of employment with the complainant if it could prove that, at the time that it made that administrative decision, the complainant was unable to work steadily and regularly as provided for in the contract. Concluded that the employer would not be able to eliminate stressors related to the complainant’s family environment. Found that the conditions suggested by the Union’s expert would constitute undue hardship and, in his view, the employer did act properly. Union then applied for judicial review of the.
* **Prior Proceedings (Superior Court):** Noted that the complainant’s illness was a handicap and the decision to terminate her employment was based on her inability to work regularly and steadily because of her health. Judge rejected Union’s argument that the employer had to show that the complainant’s absences would have “insurmountable consequences”. Found that arbitrator’s findings on the duty to accommodate were correct and that the employer did not discriminate. Union responded by appealing.
* **Prior Proceedings (Court of Appeal):** Expressed that complainant was not totally unable to work and that the arbitrator misapplied the approach adopted in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999]. Employer had to prove that it was impossible to accommodate the complainant’s characteristics. Arbitrator should have not taken only the absences into account, since duty to accommodate must be assessed as of the time the decision to terminate the employment was made
  + Hydro Quebec did not establish that the complainant’s assessment revealed that it was impossible to accommodate her characteristic and in actual fact, certain measures were possible and even recommended by the experts
  + Found that the employer did not know the nature of the complainant’s mental disorders and therefore could not have taken action in regard to accessing her prior medical files. They concluded that a gradual return to work was a possible accommodation.
* **Issue:** The interpretation and application of the undue hardship standard
* **Appellant’s Argument:** Argued no prima facie discrimination and that the rules on accommodation did not apply
* **Respondent’s Argument:** Employer had not shown that its attendance standard was necessary for the business to be able to meet its objectives.
* **Holding:** Appeal allowed and affirmed the Superior Court’s judgement dismissing the application for judicial review of the arbitration award in issue.
  + Found that CA’s decision contains two errors of law: (1) relating to the standard for assessing undue hardship and (2) relating to the time that is relevant to the determination of whether the employer has fulfilled its duty to accommodate.
  + Found that arbitrator did not err in law
* **Analysis:**
  + Two problems:
    - (1) The standard that court applied to determine whether the employer had fulfilled its duty to accommodate was whether it was impossible to accommodate the complainant’s characteristics
    - (2) According to the court, the duty of accommodation must be assessed as of the time of the decision to dismiss
  + In the employment context, the duty to accommodate implies that the employer must be flexible in applying its standard if such flexibility enables the employee in question to work and does not cause the employer undue hardship
  + Goal of accommodation is to ensure that an employee who is able to work can do so. Purpose of duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship
    - But, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, the employee’s duty to perform work in exchange for renumeration.
  + Test is not whether it was impossible for the employer to accommodate the employee’s characteristics. Employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee’s duties to enable them to work
  + Test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate them, the employer will have satisfied the test
  + Arbitrator said that the employer was justified if they could prove the complainant would be unable for the reasonably foreseeable future to work steadily and regularly as provided for in the contract
  + Experts said no medication can effectively treat her condition and only alleviate symptoms slightly
  + Arbitrator found accommodation would cause undue hardship on employer. Found that griever would not be able to fulfill the basic obligations.
  + Found that CA erred in finding that the duty to accommodate must be assessed as of the time of the decision of dismissal but a decision to dismiss an employee because the employee will be unable to work in the reasonably foreseeable future must be based on an assessment of the entire situation.
* **Ratio:** In a case of chronic absenteeism, if employer shows that despite measures to accommodate employee, the employee will be unable to resume his/her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future
  + There is a new, seventh undue hardship standard
    - Legitimate operational requirements of the workplace
      * An employer can expect to get productive work back from an employee following accommodation

# Who is under a duty to accommodate?

* Employer and union share the duty to accommodate
* SCC *Central Okanagan School District No 23 v Renaud –* the union may be liable for failure to accommodate not only if it has been involved in developing the impugned rule or practice but also if it impedes the employer's efforts to accommodate

##### Central Okanagan School District No 23 v Renaud (SCC)

* **Facts:** Renaud was employed by the Board of school Trustees, School District No. 23 and was a member of the Canadian Union of Public Employees (CUPE) as a janitor and needed a different shift because of his religious beliefs and could not work from sunset on Friday to sunset on Saturday. He had been employed since 1981 and in 1984 used his seniority to secure a Monday to Friday job at Spring Valley Elementary School. The gym at SVE was rented out to a community group on Fridays and a custodian was required to be present for security and emergency purposes. The employer’s work schedule involved an afternoon shift from 3pm until 11pm where one custodian was on duty, this was also provided for in the collective agreement. As a Seventh-day Adventist, the appellant’s religion forbade him from working on the church’s Sabbath, which is from sundown Friday to sundown Saturday. He was represented by a union. The school board agreed to accommodate but said that they needed the union’s consent if any accommodation involved an exception to the collective agreement. Many of the accommodations involved transfer to “prime” positions which the appellant did not have enough seniority to secure and the appellant was unwilling to take another alternative which was that he work a 4 day week. As a junior employee, he wanted to trade a shift with someone who worked mornings on that day. Union said he didn’t have seniority to pick his shifts first and seniority is an important part of their agreement. Employer decided that the only practice alternative was to create a Sunday to Thursday shift for the appellant which did not require the union’s consent. The Union discussed making an exception but instead passed the following motion in which they rescinded the proposal of placing an employee on a Sunday to Thursday shift and if the employer chose to do so it would severely violate the Collective Agreement. Appellant was informed of this rejection and his requirement to work Friday nights but also that the school board intended to continue to try to find a way to accommodate him. After further unsuccessful attempts to accommodate the appellant, the school board terminated his employment as a result of his refusal to complete his regular Friday night shift. Appellant filed a complaint under s. 8 of the BC Human Rights Act against the school board and pursuant to s. 9 against the Union.
* **Prior Proceedings:** Member of the BC Council of Human Rights upheld the complaints against both the respondent employer and the respondent union. Member found that the union was involved in the conduct which resulted in adverse effect discrimination and that its duty to accommodate arose from this. BC courts reversed that decision and the complainant appealed to the SCC
* **Issue:** Scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union. Is a trade union liable for discrimination if it refuses to relax the provisions of a collective agreement and thereby blocks the employer’s attempt to accommodate? Must the employer act unilaterally in these circumstances?
  + Is an employer or a labor union representing him under any duty to effect a reasonable accommodation where, for reasons of religious belief, the employee is unable to work a particular shift?
* **Union’s Argument:** Insists that the focus must be on interference with the rights of employees rather than on interference with the union’s business. Further submits that a union cannot eb required to adopt measures which conflict with the collective agreement until the employer has exhausted all reasonable accommodations that do not affect the collective rights of employees.
* **Held:** The duty to accommodate should supersede the collective agreement. Decision of the member must be upheld unless the respondents are correct that there was an error in law on her part with respect to the complainant’s duty to facilitate accommodation of his religious beliefs. Member did not err in applying the *O’Malley* definition of the duty to accommodate to the respondent union. Therefore, the respondent union did owe a duty to accommodate jointly with the employer.
* **Ratio:** Where the provisions of a collective agreement are found to discriminate against some members of the bargaining unit on a prohibited ground, the union may be held to be in breach of its duty to accommodate even though it had tried (and failed) to persuade the employer to accept non-discriminatory terms (*United Food and Commercial Workers, Local 401 v Alberta Human Rights and Citizenship Commission* [2003])
* **Analysis:** Not only do employers have a duty to accommodate, so do unions as well. Unions are required, when necessary to waive a provision in a collective agreement in order to allow someone to be accommodated in a particular case.
  + Justice Sopinka rejected the employer’s argument that the Court should hold that no accommodation requiring more than a de minimis cost could be required of an employer. He said that the use of the term “undue” implies that some hardship may be required.
  + Also rejected the employer’s argument that no accommodation should be required which interfered at all with the rights of other employees. Impact on other employees is a factor to be considered in determining whether the interference with the employer’s business would be undue
  + Stated that more than a minor inconvenience must be shown before the complainant’s right to accommodation can be defeated. Employer must establish that actual interference with the rights of other employees, which is substantial, will result from the adoption of the accommodating measure.
  + Duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by adopting a work rule
  + In order to avoid imposing absolute liability, a union must have the same rights as an employer to justify the discrimination and in doing so, it must discharge its duty to accommodate. Respondent union does not contest that it had a duty to accommodate, but rather that the limitations on that duty were not properly applied by the member
  + The union’s duty to accommodate only arises if a union is a party to discrimination which can happen in two ways:
    - (1) it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant, generally if the rule is a provision in the collective agreement
      * If this happens, the union is liable as a co-discriminator with the employer and shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done, both are equally liable. However, the employer can be expected to initiate the process. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or the rights of other employees then it will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonable in refusing consent.
      * Union may not be absolved of its duty if it failed to put forward alternative measures
      * In this situation, union share obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect
    - (2) May be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. If reasonable accommodation is only possible with the union’s co-operation and the union blocks the employer’s efforts then it becomes a party to the discrimination. In this situation, the union incurs a duty not to contribute to the continuation of discrimination.
      * Employer must canvass other accommodations before the union can be expected to assist in finding or implementing a solution
      * Union’s duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonable have been found
    - The duty to accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect.
  + Duty to accommodate rests on a number of individuals
    - Employee can expect reasonable accommodation but they can’t expect a perfect accommodation
    - Unions must be flexible in granting accommodation and have to be prepared to waive other rights in collective agreement to accommodate
      * If there is a conflict between statute and human rights law, human rights wins
      * Human rights will prevail over collective agreements
        + Should still choose the accommodation that would not breach the collective agreement. Collective agreement can only be breached if no other reasonable accommodation is possible

So seniority would trump unless there are no other ways to reach accommodation

* + Has been criticized because it treats employer and union as equal partners in collective bargaining
* Court found that the Member found that the shift proposal was not only reasonable but the most reasonable
* There is also a duty on the complainant to assist in securing an appropriate accommodation but this does not mean it is up to them to come up with a solution, that is still on the employer as they will be the ones who know how to best do that without undue hardship to their business. The complainant does have a duty to facilitate the implementation of a proposal once the employer initiates it.
  + If failure to take reasonable steps on the part of the complainant, complaint may be dismissed
  + Complainant also has a duty to accept a reasonable accommodation. If a proposal that would be reasonable in all the circumstances is turned down, the employer’s duty is discharged
  + Member did not err in holding that complainant did everything that was expected of him with respect of the proposal put forward and the only reason the proposal failed was because the union refused consent and the employer refused to proceed unilaterally. Appellant had no obligation to suggest measures.
* Where the provisions of a collective agreement are found to discriminate against some members of the bargaining unit on a prohibited ground, the union may be held to be in breach of duty to accommodate even though it tried to persuade the employer to accept non-discriminatory terms (*United Food and Commercial Workers v Alberta Human Rights and Citizenship Commission)*
* Four important investigative steps
  + Modify and re-bundle positions
    - Can EE do all aspects of current job?
    - Can EE do core modified aspects of current job?
    - Can EE do all aspects of some other job?
    - Can EE do core modified aspects of some other job?
* Proof and onus (from *Moore*, 2012 and *Bombardier*, 2015)
  + Initially, the burden rests with the employee and the union to show
    - Proof of differential treatment
    - Proof of disability/human rights ground
    - Proof of link between disability and need for accommodation
  + Then the burden shifts to the employer
    - Three steps from *Meiorin*
* Balance
  + Between employee’s right to accommodation and employer’s right to a productive workplace

# Systemic Discrimination

* Refers to the operation of a web of factors which lead to the under-representation of particular groups in the workforce, or over-representation in low-level jobs
  + Factors that include the recruitment, hiring, and maintaining under-represented groups in the workplace

#### “Earnings and Incomes of Canadians over the Past Quarter Century, 2006 Census”

* Immigrants
  + As they integrate into the Canadian labor market, many recent immigrants initially face difficulties finding full-time full-year employment as well as locating jobs that pay relatively high wages
* Earning gap between recent immigrants and Canadian-born larger amount university graduates.
  + larger earnings disparities among university graduates were observed as many recent immigrants with a university degree were employed in low-skilled occupations
  + Recent immigrant women with a university degree were more likely to work in low-skilled occupations than their Canadian-born counterparts
  + The high propensity of recent immigrant university graduates being employed in low-skilled occupations partly explains why the relative return to a university degree was smaller among recent immigrants than among Canadian-born workers
  + Recent immigrant university graduates had lower median earnings than Canadian born individuals of comparable age with no university degree.

#### “Revisiting Equity and Labour: Immigration, Gender, Minority Status, and Income Differentials in Canada”

* Visible minorities are a designated disadvantaged group under federal employment equity legislation.
* For others, it is predominantly among immigrants that the question of wage differentials for visible minority status arises
  + Two of every three new immigrants to Canada claim membership in a visible minority group
  + As such, many conflate disadvantage due to colour with disadvantage arising from immigration circumstances
* SCC’s approach to equality under s. 15 of the *Charter* does not see the prohibited grounds of discrimination as including economic grounds
* ONCA has held that s. 15 does not require the provincial government to institute employment equity legislation (*Ferrell v Ontario (AG)* [1998])
  + Court indicated that the *Charter* did not appear to impose a positive obligation on legislatures to enact measures to combat systemic discrimination
* However, s. 15(2) of the *Charter* expressly allows laws and practices that single out particular groups in order to help them overcome historic inequities.

##### Canadian National Railway v Canada (Human Rights Commission) (1987) – SCC – high water mark in the invocation of systemic remedies in human rights cases; definition of systemic discrimination. Leading case on employment equity. Leading precedent case on systemic discrimination. SCC gave an affirmative action remedy for systemic discrimination.

* **Facts:** A human rights tribunal under the *Canadian Human Rights Act* found CNR guilty of discrimination based on sex in its hiring practices for certain unskilled blue-collar jobs. By the end of 1981, there were only 57 women in “blue collared positions” in the St. Lawrence region, being a mere 0.7% of the blue collar labor force in that region. There were 276 women occupying unskilled jobs in all the regions where CN operation, which amounted to only 0.7% of the unskilled workforce. At the time, women represented 40.7% of the total Canadian labor force but constituted only 6.11% of the total workforce of CN. Among blue collar workers in Canada, 13% were women during January to May 1982, yet female applications for blue collar jobs at CN constitutes only 5% of the total applicant pool. Evidence before the Tribunal found that the recruitment, hiring and promotion policies at CN prevented and discouraged women from working on blue collar jobs. Tribunal held that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company, for example their recruitment process for trades peoples was sending recruitments to technical schools where no women attended. Women were encouraged to apply only for secretary positions and were never told the qualifications they would need for the blue collar jobs. Tribunal ordered the company to cease certain discriminatory hiring and employment practices and to alter others. Company was also required to file periodic reports with the commission.
* **Prior Proceedings:** Tribunal ordered that CA was to hire at least one woman for every 4 non-traditional positions until the goal of 13% female participation in the workplace was met. The FCA set aside the measures dealing with hiring. In the FCA dissenting opinion, it was held that s. 41(2)(a) was designed to allow human rights tribunals to prevent future discrimination against identifiable protection grounds but he held that prevention is a broad term and that it is often necessary to refer to historical patterns of discrimination in order to design appropriate strategies for the future. The matter was then appealed to the SCC.
* **Holding:** Appeal allowed
* **Analysis:**
  + Abella Report
    - Inquired into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis
  + Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. Discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief. To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged
  + **S. 41(2)** of *Canadian Human Rights Act* lists the orders that a Tribunal may make if it determines that a person has engaged in a discriminatory practice.
  + SCC overturns decision of the Federal Court, ruling that the Tribunal was within its jurisdiction under s. **41(2)(a)** of the *Act* in making the order it did
  + Under **s.41(2)(A),** Tribunal may order the adoption of a special program designed "to prevent the same or similar practice occurring in the future."
    - This program is designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to sex
    - Sole purpose for the order is prevention and that the text does not allow restitution for past wrongs. The program would be limited to a mechanism designed to prevent the same or a similar practice occurring in the future
    - Remedy here is directed towards a group and is therefore not merely compensatory but is itself prospective. Benefit is always designed to improve the situation for the group in the future so that a successful employment equity programmed will render itself otiose.
  + Systemic discrimination results from the application of established practices and policies that have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and coworkers who accept stereotyped visions
  + Goal is not to compensate past inactions or provide new opportunities for specific individuals who have been treated unfairly in the past
    - Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears
  + When confronted with systemic discrimination, the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met
  + An employment equity program is designed to work in three ways
    - 1) By countering the cumulative effects of systemic discrimination
    - 2) By placing members of that group that had previously been excluded into the heart of the workplace and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping
    - 3) Helps to create “critical mass” of previously excluded group in the workplace. The presence of a significant number of individuals from the targeted group eliminates the problems of “tokenism”: it is no longer the case that one or two women will be seen to represent all women
  + Systemic discrimination is the exclusion of disadvantaged groups by fostering the belief that there are natural forces in society and in the workforce that prevent certain people from doing certain jobs
    - Endorsing the *Abella Report* from 1984
* **SCC ruled :** (i) CNR did nothing or very little in order to ensure that barriers were lowered and that doors were open for women to work in nontraditional jobs within its workplace and (ii) when you have a significant mass of women in the workplace, it challenges traditional stereotypes that men have about what women are and are not capable of doing, (iii) you have a substantial amount of women in the workplace then you can dampen the amount of discrimination occurring in the workplace
* **Takeaway:** A brand new, liberal approach to human rights was adopted by the courts in 1987, it enriches the docket of systemic discrimination and it promised that there would be a number of cases that would take on the systemic discrimination of historically disadvantaged groups
* **Notes:**
  + *Moore v British Columbia* SCC interpreted remedial authority of HR tribunal in a restrictive manner, holding that the remedy must flow from the claim
    - Since the claim was made by one individual complainant, the remedy should be tied specifically to that individual
    - BC Human Rights Tribunal concluded that systemic remedies were necessary to hold the province and school district accountable for making public education accessible to students with learning disabilities
    - SCC found that the school district had discrimination against Jeffrey Moore
  + Pothier
    - *Action Travail des Femmes*
      * SCC seemed to have assumed that systemic remedies would be an effective response to systemic discrimination
      * Developments since this have not made the enforcement of systemic remedies in human rights cases any easier
      * Decision in this case represented a high-water mark in the invocation of systemic remedies in human rights cases
      * It held out the promise that systemic remedies could be realistically counted upon to redress discrimination
    - There were insurmountable barriers to enforcing the hiring quote on CNR
    - The enforcement of human rights legislation in relation to fundamental public policy and budgetary allocations raises difficult questions about institutional roles
* cases can either be an accommodation discrimination human rights case or a non-accommodation discrimination human rights case

#### Pay Equity – Equal pay for work of equal value

* young women working full time earn about 85 cents for each dollar earned by their male counterparts, despite a rise in the educational achievements of women
* the extent of the gap is due to many factors, including education, age, race, training, labor market experience, length of service, disability, marital status, and geographical region. It is also influenced by sex discrimination in the labor market and in society at large
* prior to the earliest pay equity legislation, it was not uncommon for employment to maintain two wage rates for the same position on the basis of sex, partly because men need more money because they were the family breadwinners
* in the early 1950s, statutes began to forbid employers from paying women less when they did the same work as men but it did not address a more significant contributor which was that women were overrepresented in lower paying jobs which led to a campaign to go beyond equal pay for the same work and to require equal pay for work of equal value – “pay equity”
* some provinces have enacted legislation that obliges some or all employers to take measures to attain equity between male and female job categories. In Ontario, private sector employers with less than 10 employees are exempt. Legislation requires employers to submit a pay equity plan in accordance with the specified calculation methods
* in 1995, Conservative government repealed a portion of the *Pay Equity Act* that deal with broader public sector workplaces, which were mostly female as implementing pay equity in these workplaces was difficult since there was no obvious male dominated job category that could serve as a comparator
* a 1996 legislative amendment, Schedule J, capped existing proxy pay equity adjustments at 3% of the employers 1993 payroll and prohibited any further use of the proxy comparison method
* A union representing 5,200 Ontario broader public sector workers argued that Schedule J violated s. 15 of the *Charter*. Their application for invalidity declaration was granted in the case below

##### Service Employees International Union, Local 204 v Ontario (AG) (1997)

* **Facts:** Applicants were members of the disadvantaged group the *Pay Equity Act* was designed to benefit and argued that they have been excluded from its reach by the Schedule J Amendment. Their claim of discrimination must succeed unless the government can justify the exclusion under s.1 of the *Charter*
* **Held**: Schedule J of the *Savings and Restructuring Act*, 1996 which amended the *Pay Equity Act* is unconstitutional and of no force and effect. Ontario Government failed to provide an adequate justification under s. 1 of the Charter for its legislative action. He rejected its expert evidence that the proxy method was not a valid way of quantifying gender based systemic wage discrimination in the game dominated broader public sector. Government did not have a pressing and substantial objective
* No attempt by the respondent to establish that in order to live within the cap the government placed on pay equity spending, the government had to remove the proxy method and throw the full weight of the funding reduction on those working in the proxy sector
* Government must ensure that the legislation applies fairly and equally to all within the group or government itself is guilty of discriminating
* The *Pay Equity Act*, because of Schedule J, discriminated against proxy sector women by denying them the opportunity of quantifying and correcting the systemic gender-based wage inequity from which they suffer, a benefit the Act grants to other women working in the broader public sector
* The discrimination has not been justified under s. 1 because the objective of Schedule J does not warrant overriding the constitutional right of equal benefit of the law. The stated objective of restoring the *Pay Equity Act* to true pay equity principles was mistaken.

##### Walden v Canada (Social Development) (2007) – CHRT – The appropriate comparator group for a case of discrimination is that performing the same or substantially similar work

* **Facts:** The Complainants are a group of predominantly female nurses who work as medical adjudicators in the CPP Disability Benefits Program. The Complainants, for 35 years, worked alongside doctors, a predominantly male group of workers, to determine CPP disability benefits. The nurses are designated as program administrators while the doctors are classified as health professionals. The complainants say that the doctors and nurses do the same work: they apply their medical knowledge to determine eligibility for CPP disability benefits. When the medical advisors (doctors) perform this work, they are classified as health professionals but when the medical adjudicators perform this work they are classified as program administrators. As a result of this classification, medical advisors receive better compensation, benefits, training, professional recognition and opportunities for advancement that medical adjudicators.
* **Complainant’s Position:** Complainants assert that it is discriminatory to treat a female dominated group of workers differently from a male dominated group when they are performing the same or substantially similar work. They want to be treated the same as medical advisors.
* **Issues:** Did the Respondents discriminate against the complainants on the basis of their gender by: (1) treating them differently from the medical advisors contrary to s. 7 of the *Canadian Human Rights Act* and/or (2) pursuing a practice that deprives the complainants of employment opportunities contrary to s. 10 of the *Act*?
* **Holding:** Complainants did establish that the respondents refusal to recognize the professional nature of the work performed by medical adjudicators in a manner proportionate to the professional recognition accorded to medical advisors is a discriminatory practice within s. 7 and 10. The effects of this practice has been to deprive adjudicators of the professional recognition and renumeration, to deprive them of payment of their licensing fees and training and career advancement opportunities. S. 52(2)(a) of the *CHRA* allows the Tribunal to order the respondents to cease the discriminatory practice and to take measures to redress the practice or prevent the same or similar practice from occurring. Complainants asked for an order for the discriminatory practice to be ceased but that no specifications be made as to the measures that should be taken to redress the practice as they asked for the opportunity to negotiate. Court agreed with this.
* **Analysis:**
  + A discriminatory practice is defined under s. 7 of the Act as “adverse differentiation on the basis of a prohibited ground of discrimination”
  + To establish a *prima facie* case under s. 7, the Complainants must present evidence they are being adversely differentiated on the basis of their gender
  + In terms of a s. 10(a) claim, evidence must be presented of a policy or practice that deprives, or tends to deprive, the complainants of an employment opportunity based on a prohibited ground of discrimination
    - Statistical evidence that apparently neutral conduct negatively affects a disproportionate number of members of a protected group is sufficient to establish a *prima facie* case
  + Appropriate comparator group: the group of predominantly male workers who are performing the same or substantially similar work
  + Tribunal found that the Complainants established a *prima facie* case that the work they have done since March 1978 is the same or substantially similar to the work of the medical advisors. They were and are still treated differently from the medical advisors.
    - 95% of nurses are women
      * Prior to being hired, medical adjudicators are required to prove that they are licensed to practice as a Registered Nurse. The predominance of women in nursing and the requirement to produce a nursing license before being hired as an adjudicator results in an overwhelmingly large number of women in this profession
    - 95% of all medical adjudicators are women
    - 80% of medical advisors are men
    - Groups receive different professional recognition, salary/benefits, payment of fees, continuing education, and career advancement
  + The advisors bring a different kind of knowledge to the program, perform some different tasks and are given different responsibilities which provides a reasonable and non-discriminatory explanation for some of the differences in salary and benefits. But, the differences in the work responsibilities are not extensive enough to explain the wide disparity in treatment between the advisors and adjudicators.
  + Respondents argument that the male medical adjudicator’s work should be compared to that of the female medical adjudicators is unreasonable. They are part of the same group and therefore are subject to any potential discriminatory difference in treatment.
  + Next, the burden shifts to the Respondent to show that the differential treatment is a bona fide occupational requirement. S. 15(1)(a) and 15(2) of the *Human Rights Act* provides a defense to discriminatory practices where it is established that they are based on a bona fide occupational requirement
    - Must establish that accommodating the needs of the individuals would case them undue hardship having regard to health, safety, and cost
  + In this case, the only factor that applies is cost
    - Respondents did not provide evidence that the costs of treating the adjudicators the same as the advisors with respect to professional recognition, the payment of licensing fees and the provision od training and educational opportunities would cause them undue hardship
    - In this case, the cost was not so high as to cause the Respondent undue financial hardship

##### Newfoundland (Treasury Board) v Newfoundland and Labrador Assn of Public and Private Employees (NAPE), 2004 SCC

* **Facts:** the SCC considered a s. 15(1) *Charter* challenge to a provincial statute that delayed the implementation of a pay equity award already granted to female workers in the Newfoundland public sector
* **Held:** The statute did violate section 15(1) of the *Charter* which states that sex is a prohibited ground for discrimination and that the differential treatment did not arise merely because of the type of job but rather because the job is one that is generally held by women. However, Court upheld the statute under section 1 because the government was in the midst of a severe fiscal crisis which may mean that the government has to take remedial measures, even if measures have an adverse impact.
* **Analysis:** The fiscal crisis was severe and the cost of putting into effect pay equity according to the original timetable was a large expenditure. Other options were also considered and rejected including a hiring freeze, layoffs and cuts to other programs.
  + However, in this s.1 analysis the court did not address the argument that the partial denial of the pay equity award meant that female workers but not male workers were required to subsidize the provincial debt

# The Fundamentals of the Duty to Accommodate

#### Accommodation at Work

* most significant human rights employment development in the past 3 decades
* the accommodation can be in three different areas:
  + (1) change in policies
  + (2) accommodating by changing parts of the physical layout of work (widening the aisles or adding a ramp to accommodate someone with wheelchair)
  + (3) in attitudes, employers changing their attitudes and other employee’s attitudes towards the accommodation
* covers all protected human rights grounds:
  + gender
  + age
  + religious beliefs
  + family status
* Greatest impact- disability cases

#### Disability

* why does disability attract the greatest number of complaints?
  + (1) Greater range of differences
  + (2) Disabilities are much more mutable. Some aspects of a disability may not change but some may get better or worse such as a bad back and so it requires greater creativity and flexibility from employees and employers
  + (3) Accommodations required are more complex and individually tailored
* **disability** means: any previous or existing mental or physical disability and INCLUDES disfigurement and previous or existing dependence on alcohol or a drug.”
  + anxio-depressive state
  + depression
  + tobacco edition
  + chronic fatigue syndrome
  + insomnia
  + dental condition
  + migraines

# The Duty to Accommodate

* part of Canadian law since 1985
* full application in 1990 through Central Albert Dairy Pool
* Applicable in every workplace through:
  + human right statutes;
  + collective agreements; and
  + SCC rulings
* principles clarified and expanded in court, arbitration and tribunal rulings

#### Supreme Court of Canada Rulings

1. Human rights are quasi-constitutional rights
2. Discrimination, even if unintentional, is unlawful
3. Accommodation is a significant human rights obligation
4. Rests on the shoulders of: employers, unions, employee seeking accommodation (they must cooperate and may not get their preference) and fellow employees
5. Human Rights: interpreted broadly and exceptions must be interpreted narrowly and precisely

#### Definition of Accommodation

* Employers & unions must make every reasonable effort, short of undue hardship, to accommodate an employee who falls under a protected ground of discrimination
* *Meiorin* (SCC, 1999): New statement of accommodation standard to test policies, practices, agreements, etc:
  + 1) Rationally connected?
  + 2) Devised in good faith?
  + 3) Is it possible to accommodate an individual employee, short of undue hardship? (This is the key part of the *Meiorin* test!!)

#### Undue Hardship

* undue hardship is the key employer defence to an argument that you have not accommodated
* Seven Factors (from *Meiorin*) (in order of importance):
  + 1) Safety
    - *Bhinder* decision (hard hat)
    - most successful ground generally
  + 2) Impact on collective agreement
    - *Reneau* decision, employee needing union to waive the seniority provision to allow him to work on day rather than night shift
    - union can raise this defense
  + 3) Legitimate operational requirements of workplace
    - an employer does not have to turn the workplace upside down in order to accommodate (often seen with addictions)
    - there comes a point where an employer is not expected to tolerate someone who cannot achieve sobriety
  + 4) Size
  + 5) Interchangeability of workforce
  + 6) Employee morale
  + 7) Cost

##### Gohm v Domtar Inc. (1990)

* **Facts:** Gohm was a lab technician employed in Northern Ontario and looking for work. Domtar had 6 lab technician positions, 5 hired and was looking for one more. The ordinary shift for lab technicians was a Monday to Friday shift with an added requirement that each lab technician would work a Saturday on a rotational basis. Job ad said occasional Saturday work will be required. Gohm applied and was interviewed. They asked if she had any problems with the job description and she said no. She was offered and accepted the job. During her 12 weeks of probation, she worked Monday to Friday and the other 5 technicians worked on a rotational Saturday schedule. 10 weeks into the probationary period, they told her they wanted to keep her and gave her the fall schedule which meant she would be working 1 in every 6 Saturdays. She now says that she is a 7th day Adventists and said she cannot work from sunset Friday to sunset Saturday. She asks to be accommodated. Domtar was a unionized plant and the lab technicians were unionized so there was a collective agreement and a seniority issue. Domtar said they have 3 options, (i) keep same as before (Gohm works Monday to Friday and other 5 technicians rotate the Saturdays but the other lab technicians didn't like that and employee morale was raised as an issue here), (ii) Gohm works on Sundays at straight time, in the collective agreement there is overtime paid for Sunday work (not for Saturday) but not to pay her time and a half but the union would not be happy with these or (iii) to allow Gohm to work on the Sunday one weekend in 6 but to pay her time and a half (issues here are employee morale and cost). Any of these issues raised an issue. Union said that if she works Sunday they have to pay her time and a half. Domtar determined that it would cost about $155 a year to pay her for the 8 times a year she would work overtime on a Sunday. They fire her, and she files a claim under the Human Rights Act, she sues both Domtar and the union.
* Option 1:
  + employee morale argument would likely not work
* Option 2:
  + union would object
  + union has a duty to accommodate even if it goes against the collective agreement
* Option 3:
  + employer says that paying her overtime would cause them an undue hardship ($155), that will not meet the standard of undue hardship with relation to costs
* **Employer’s Argument:** argued that she misled the employer by not bringing it up at the interview that she could not work Saturdays.
* **Held:** Tribunal said that the only difference here would have been when discrimination would have occurred. If they refused to hire her because of her religious beliefs, then they would have discriminated against her then, so therefore it doesn't matter when the discrimination occurred point is that it would have at some point.

# Four Important Investigative Steps

* modify and re-bundle positions:
  + Can EE do all aspects of current job?
    - if yes - accommodate
    - if no - go to step 2
  + Can EE do core modified aspects of current job?
    - if yes- accommodate it
    - if no- go to step 3
  + Can EE do all aspects of some other job?
    - if yes- accommodate it
    - if no- go to step 4
  + Can EE do core modified aspects of some other job?
    - if yes- accommodate
    - if no- employer has probably exhausted their duty to accommodate and made all reasonable efforts in trying to accommodate the employee

#### Seniority

* **Rule:** Seniority trumps, unless no other way to reach accommodation
* “Significant impact” on rights of other employees - *Renaud* (SCC, 1992)

#### Proof and Onus

* initially rests with employee and union
  + (i) Proof of differential treatment
  + (ii) Proof of disability/human rights grounds
  + (iii) Proof of link between disability and need for accommodation
* onus then shifts to employer where you apply the three steps from *Meiorin*

#### Addictions

##### Sunnybrook Health Sciences (2016) - OLAB – example of how drug addiction as disability is treated by the arbitration boards

* **Facts:** Nurse stole narcotics at work for over 2 years. She was terminated. At arbitration, she acknowledged her addition and sought treatment. Addiction is a disability under the OHR Code therefore a protected ground
* **Held:** Hospital failed to accommodate the nurse. She was reinstated but without any back pay
* “It is trite that attending at work under the influence of drugs and alcohol is a serious offence. But when the employee suffers from addition to those substances, the Employer will be required to accommodate such an employee to the point of undue hardship and will be prohibited from disciplining such an employee…..”
* “However, where the addicted employee is in remission, is fully cooperative in accepting recommended treatment and acknowledges the extent of addiction and the improper behaviors that have occurred as a result, efforts can then be made to determine whether accommodation of the employee’s disability can be accommodated”

#### Mental Health

##### Lane v ADGA Group Consultants (2007)

* **Facts:** Tech worker hired by IT Firm in Ottawa. Bi-polar condition not revealed at hiring. 5 days into work, he tells supervisor about his condition. He was terminated several days later because of concern over impact of workplace stress
* **Held:** Employer took no steps to accommodate did not even ask their legal counsel and it was a “rush to judgement”
* **Award:** $800, 000 in damages

#### Gender

##### City of Calgary (2013) Arbitrator Smith

* **Facts:** female employee sexually assaulted on numerous occasions by supervisor
* “total failure” -harassment free workplace
* mental health severely compromised
* $125, 000 (general damages)

#### Religion

##### Toronto School Board (2016)

* **Facts:** school board caretaker and a Jehovah’s Witness. He had religious obligations on Thursdays and so the board accommodated him working 4 days/week. School board denied him a promotion to Shift leader because of 4 day week
* **Held:** Arbitrator ruled in favour of griever, saying that “undue hardship” was not proven by the board

#### Denie Reaume "Defending the Human Rights Codes from the Charter"

* Conventional human rights code analysis treats as discriminatory any differential treatment connected to a prohibited ground unless it passes both an efficacy and necessity test
* *Charter* test requires claimants to show substantive discrimination, in some sense, and this burden exempts some cases from a necessity assessment that the code test has conventionally imposed on respondents
* Former conception of discrimination is wider in scope and makes the best sense of their human rights codes
* Conventional account of the structure of a HRC complaint holds the applicant must establish a *prima facie* case of discrimination 🡪 then burden shifts to the respondent to demonstrate the exclusionary requirement is a bona fide requirement
* Traditionally the burden to make out a prima facie case has been light – largely factual
  + ex. if members of a group identified by reference to a ground in the code have been treated differently than others so as to deny full enjoyment of activities
* This is not enough to establish liability yet but enough for us to ask respondent for explanation
* Determination of liability brings normative issues into the analysis

# The Future of Equality

#### Economic Inequality

* Canadian courts have repeatedly held that equality rights are concerned with the protection of human dignity
* The courts have frequently excluded economic equality claims either on the basis that the *Charter* is not a guarantor of economic rights or because of the view that such claims engage matters of social and economic policy rather than individual rights
* Occupational status or membership in a particular socio-economic group, such as low-income wage earners, have not been found to be analogous grounds
* In *Delisle v Canada (Deputy Attorney General)* the SCC reiterated its reluctance to consider occupational status as an analogous ground for the purposes of section 15 of the *Charter*. The case involved the statutory exclusion of Royal Canadian Mounted Police officers from eligibility for collective bargaining. Court rejected the argument of the appellant RCMP officers that the exclusion violated their equality rights under s. 15 because they were not able to establish that the professional status or employment of RCMP members are analogous grounds.
* Laws ordering collective bargaining were initially introduced to address the economic reality but it is clear under the *Wagner Act* that collective bargaining is not available to all workers, nor it is equally advantageous when it is available

##### Symes v Canada, [1993] 4 SCR 695

* **Facts:** A female lawyer incurred high childcare costs in order to have time to practice her profession. The Income Tax Act did not allow her to deduct all of those costs as a professional expense, but allowed only the much smaller childcare deduction.
* **Held:** SCC rejected her s. 15 claim that this discriminated against women workers.
* **Analysis:** Although women disproportionately bear the burden of childcare, it is not established that they disproportionately paid the costs of such care.

#### Equality in the Interface Between Welfare and Work

##### “Gosselin v Quebec: Back to the Poorhouse”

* **Facts:** Louise Gosselin challenged Quebec’s social assistance regulations. Under s. 29(a) of the Regulation, social assistance recipients were treated differently because of age and employability. Single individuals under 30 who were considered employable were given approximately 1/3 the assistance of their counterparts who were thirty years of age or order which amounted to only $170 a month. The regulation made it possible for those under 30 to increase their payments to the level paid to those who were over 30 if they participated in one of three programs: On the Job Training, Community Work or Remedial Education. Gosselin brought the case as a class action on behalf of all social assistance recipients arguing that the regime violates s. 15 and 7 of the *Charter* and s. 45 of the *Quebec Charter*.
* **Held:** Claim failed on all three grounds at all levels of the court, social welfare program was not contrary to the Charter. The main issue for dispute between the majority and the dissent was the application of the Law section 15(1) test, in particular the 4 contextual factors considered under the 3rd branch
* **Analysis:** 
  + 1) young people as a group had not suffered historical disadvantage and age distinctions were common and necessary for ordering society
  + 2) there was a correspondence between the scheme and the actual circumstances of the recipients: the provision of education and training provided incentives for young people to work and affirmed their potential and did not undermine their dignity
  + 3) the ameliorative purpose factor was neutral since the Regulation was not designed to improve the conditions of another firm
  + The law did not adversely affect the appellant’s dignity and any adverse effects were outweighed by the legislation’s attempt to improve the self-reliance and dignity of the group
  + Found to be justified under s.1 because facilitating the integration of youth into the workforce and avoiding attracting them to social assistance were found to be pressing and substantial and it was also found that there was a rational connection between those objectives and some differential treatment of the under 30 recipients

# Gender and Economic Discrimination

#### “Labour Markets as Gendered Institutions: Equality, Efficiency, and Empowerment Issues”

* Two economies
  + Productive economy
    - Activities which make a living
  + Reproductive economy
    - Unpaid caring activities that are also critical for the functioning of the “productive economy”
* Labour markets are a point of intersection of these two economies
  + Labour markets operate in ways that fail to acknowledge the contributions of the reproductive economy: women
  + They are structured to only represent the costs to employers of the time that employees spend on unpaid caring for others and so employees parenting duties are represented as liabilities and not assets
  + Instead they disadvantage those who carry out most of the work – women
* Labour markets are the bearers of gender and also reinforce gender inequality

#### Economic Analysis of Law – Richard Posner

* The woman who allocates a substantial part of her working life to household production will obtain a substantially lower return on her market human capital than a man who allocates much less time to such production. She will therefore invest less in her human market capital
* Women will therefore be attracted to occupations that don’t require much human capital such as nurses rather than doctors and secretaries rather thane executives
* The existence of sex discrimination by employers is a necessary rather than a sufficient condition for a law prohibiting such discrimination to confer a net economic benefit on society as a whole
  + Not all employment discrimination on grounds of sex is inefficient (i.e. paying pregnancy disability benefits)
* Argues that anti-discrimination pushes employers to discriminate more
  + The cost of paying a protected individual more is higher than just not hiring a protected individual so the employer will chose not to hire the protected individual

# Evolving Boundaries of Discrimination

#### Family Status and Caregiving Responsibilities

* The SCC has yet to comment what the test for a *prima facie* case of discrimination on the basis of family status is
* BCCA states that the case is established when “a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty”
  + Other courts follow the below case

##### Canada (Attorney General) v Johnstone (2014) - FCA- test for establish a claim of discrimination on the basis of family status. Leading case for family status accommodation.

* **Facts:** Fiona Johnstone worked for the Canada Border Services Agency (CBSA) since 1998. Her husband also works there as a supervisor and they have 2 children. She requested that the CBSA allow her to work full-time hours over a three-day week so that she could balance her work with her caregiving responsibilities. At the time, the work schedule for full-time CBSA employees was built around a rotating shift plan in which they rotated through 6 different start times with no predictable pattern and they worked different days of the week. Employees were given 15 days’ notice of each new shift schedule, subject to employer’s discretion to change the schedule on 5 days’ notice. Full time workers were required to work 37.5 schedule hours per week on the basis of an 8 hour day that included one half hour meal break. Any individual working less than 37.5 hours was considered part time and had fewer employment benefits than full time employees. Her situation was further complicated by the fact that her husband also worked irregular shifts and often travelled for business. The Tribunal concluded that they were both facing the same work scheduling problems, and neither could provide necessary childcare on a regular basis.  CBSA refused to accommodate her request on the grounds that they had no legal duty to do so. Instead, they had a policy which allowed an employee with childcare obligations to work fixed schedule but only if the employee agreed to be treated as part time with a maximum work schedule of 34 hours a week. When her first child was born, she asked CBDA to provide her with static shifts on a full time basis so she could work 3 days a week 13 hours a day with a half hour paid meal break. However, because of the unwritten policy, CBSA only offered her static shifts for 34 hours per week resulting in her being treated as a part time employee. They did not refuse to provide her with this request on the ground that it would cause them undue hardship, rather, it refused on the ground that it had no legal duty to accommodate childcare responsibilities. She filed a discrimination complaint with the Canadian Human Rights Commission. She alleged the CBSA was discriminating against her on the basis of family status contrary to s. 7 and 10 of the *HR Act*.
* **Prior Proceedings:** In 2010, the Canadian Human Rights Tribunal ruled that the CBSA had discriminated against Ms. Johnstone.  They held that the prohibited ground of discrimination on family status includes family and parental obligations. Tribunal held that she made out a prima facie case of discrimination and that the CBSA did engage in a discriminatory practice by establishing and pursuing the unwritten policy. Also held that the CBSA did not establish a defense based on a bona fide occupational requirement which would justify its refusal to accommodate nor had it developed a sufficient undue hardship argument to discharge it.
* **Holding:** Appeal dismissed; there was discrimination. Tribunal reasonably concluded that family status includes childcare responsibilities and that the test used was appropriate.
* **Analysis:**
  + Test to prove whether there is discrimination on the prohibited ground of family status has two parts:
    - 1) a prima facie case of discrimination must be made out by the complainant
      * Requires complainants to show that they have a characteristic protected from discrimination, that they experienced an adverse impact with respect to employment and that the protected characteristic was a factor in the adverse impact
      * Appellant argued that the parental obligation cannot be delegated to a third party, that the claimant has tried unsuccessfully to reconcile the non-delegable parental obligation within the employment duties and that it is still a substantial issue
    - 2) Once this is made out, the analysis moves to a second stage where the employer must show that the practice is a bona fide occupation requirement and that those affected cannot be accommodated without undue hardship
  + To establish a *prima facie* test, the individual advancing the claim must show:
    - That a child is under his/her care and supervision
      * Requires complainant to demonstrate that a child is under their care and supervision which requires them to show that they stand in such a relationship to the child and that their failure to meet the child’s needs will engage their legal responsibility.
      * In the case of parents, it is easy but in the case of defacto parents, it will require them to show that the child is such that they have assumed the legal obligations with which a parent would have
      * **Yes, she had children under her care so this was satisfied**
    - That the childcare obligation at issue engages the individual’s legal responsibility for that child
      * Requires complainant to show that the child has not yet reached an age where they can be reasonably expected to care for themselves during the parent’s work hours.
      * Requires demonstrating that the childcare need flows from a legal obligation, not personal choices
      * **Yes, both children were toddlers and therefore could not be left on their own. They were legally required to provide their children with some form of childcare arrangement, so this was also satisfied.**
    - 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
      * Complainant will have to show that neither them or their spouse can meet their obligations while continuing to work and that an available childcare service or alternative arrangement is not reasonable accessible to the, so as to meet their work needs.
      * **Yes, she made serious but unsuccessful efforts to secure reasonable alternative arrangements but none of them would accommodate her work schedule. Therefore, she satisfied this leg as well.**
    - That the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation
      * **Tribunal found that her regular work schedule interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligations**
  + Take a broad approach towards family status as is done with all other protected grounds

##### Cambell River

* **Facts:** Concerned an arbitration award under a collective agreement where the legal issue was the meaning and scope of the expression family status. Complainant was a mother of a boy aged 13 who had severe behavior problems requiring specific parental and professional attention. Employer charged her work schedule from an 8-3 to an 11:30-6 shift which prevented her from attending to the needs of her son after school. Arbitrator denied the grievance brought by the complainant to challenge the work schedule.
* **Prior Proceedings:** Arbitrator found that the circumstances involving childcare arrangements did not raise an issue of discrimination based on the prohibited ground of family status.
* **Held:** BCCA overturned arbitrator and remitted the grievance for a new determination. They held that a prime facie case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation

##### Misetich v Value Village Stores Inc, 2016 HRTO 1229

* To establish family status discrimination the employee will have to do more than simply establish a negative impact on a family need which must result in real disadvantage to the parent/child relationship and the responsibilities that flow from that relationship and the employees work.
* Applicant bears the onus of finding a solution to the family/work conflict; it is only when they cannot that discrimination is established
* Once applicant proves the discrimination, the onus shifts to the respondent to establish that the applicant cannot be accommodated to the point of undue hardship

#### Gender Identity and Gender Expression

* SCC has held that sexual orientation constituted an analogous prohibited ground under section 15 of the *Charter (Egan v Canada,* [1995] 2 SCR 513). It ordered that the government of Alberta’s read into its protection against discrimination the ground of sexual orientation
* Some Canadian jurisdictions have also added sexual identity and expression to their human rights act
* Still, discrimination against members of the LGBTQ+ community has been increasingly documented in the literature

#### Accommodation of Age-Related Needs

* Mandatory retirement has been abolished across Canada
* Labour force participation rate of older workers has increased
* Issues around unequal treatment on the basis of age will become more acute

#### Intersectionality

* There is a growing recognition of the complexities of discrimination experienced by individuals who belong to more than one historically disadvantaged group which have led to calls to develop an intersectional approach to discrimination which takes into account the lives realities of individuals and the social context of discrimination

#### Questions of Scope, Coverage, and Classifications

* There is a question of who is protected under human rights acts and whether employment is limited to the traditional contractual relationship between an employer and an employee

##### Robichaud v Canada (Treasury Board) (1987) – SCC – Employers are liable for all acts of their employees in the course of employment, meaning any action that is some way related or associated with employment

* **Facts:** Mrs. Bonnie Robichaud worked for the Department of National Defence and she was endlessly harassed by a supervisor working for her employer. Mrs. Robichaud filed a complaint with the Canadian Human Rights Commission that she had been sexually harassed, discriminated against and intimidated by her employer, the Department of National Defence, and that her supervisor, Brennan was the person who sexually harassed her.
* **Government Argument:** We did not harass her, the supervisor did and we did speak to him every so often.
* **Her Argument:** Employer bore responsibility because it did little or nothing effective to bring it to an end.
* **Prior Proceedings:** Tribunal found that a number of encounters of a sexual nature had occurred between her and Brennan, but dismissed the complaint against Brennan and against the employer. An appeal to the Review Tribunal was allowed and the Review Tribunal found that Brenan had sexually harassed Robichaud and that the Department of National Defence was strictly liable for the actions of its supervisory personnel. Brennan and the Queen filed applications requesting the Federal Court of Appeal to review and set aside the decision of the Review Tribunal. Brennan’s application was dismissed but that of the Queen was allowed. Court set aside the decision of the Review Tribunal, and referred the matter back to it on the basis that Robichaud’s complaint against the Crown was not sustainable.
* **Issue:** Whether such actions attributed to the employer, the Crown, to which the Act applies by virtue of s, 63(1).
* **Holding:** SCC found in favour of Mrs. Robichaud. SCC ruled that employers are responsible for unauthorized discriminatory acts of their employees conducted in the course of employment because the purpose of the *HR Act* is to remove discrimination and harassment regardless of motive or intention, and because the employer is in the best position to take effective remedial action to remove undesirable conditions
* **Ratio:** Since this decision, employers have a legal obligation to conduct a harassment free workplace. There is zero tolerance for harassment in the workplace. This also applies to psychological harassment. If the employer does not take every reasonable step to end harassment in the workplace by retraining, disciplining or firing a supervisor, it may be held liable for damages under either the collective agreement or the Human Rights Code.
* SCC Says:
  + 1) Zero Harassment
  + 2) The employer bears the ultimate liability in harassment cases because it is the employer who controls, manages and supervises the workplace. They have the ability to change the working environment. They can control and eliminate harassment therefore the liability is placed on them
  + 3) Human rights are quasi-constitutional. If there is tensions between human rights legislation and other statutes, human rights will prevail
* **Analysis:**
  + The Act is concerned with the effects of discrimination rather than its motivations/causes
    - Only an employer can remedy undesirable effects
  + The legislative emphasis on prevention and elimination of undesirable conditions rather than on fault, moral responsibility, and punishment, argues for making the Act’s carefully crafted remedies effective
    - Intention of the employer is irrelevant although a further section provides additional remedies if the circumstances where the discrimination was reckless or willful
    - If the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment
  + The statute contemplates the imposition of liability on employers for all acts of their employees “in the course of employment,” and this should be interpreted in the purposive fashion as in being in some way related or associated with employment

##### United Steelworkers obo others v Tim Hortons and others (No 2) (2015) – BCHRT – the test for whether a franchisor is liable for a franchisee’s actions is whether the franchisor exercises sufficient control over the franchisee to influence its behavior and reasonably failed to exercise that control in circumstances where the Code was being violated

* **Facts:** The United Steelworkers has filed a representative complaint on behalf of a group described as “all workers from the Philippines currently and formerly employed through the temporary foreign worker program.” The Respondents are the franchisees who operated the Tim Hortons. The complaint was also brought against Tim Hortons Inc. The complaint alleges that the Respondents discriminated against the Complainant Group in their employment contrary to section 13 of the *Human Rights Code* because of the Complainants’ race, colour, ancestry, and place of origin. The Complainant Group alleges that its members were denied overtime premiums, given less desirable shifts, and threatened with being returned to the Philippines.
* **Holding:** Application to dismiss the complaint is denied. BC Human Rights Tribunal denied an application to dismiss a human rights complaint against Tim Hortons.
* **Analysis:**
  + Discrimination under s. 13 of the *Code* is not limited to employers or persons who attract vicarious liability
  + The test in this case is whether the franchisor exercises sufficient control over the franchisee to influence its behavior and reasonably failed to exercise that control in circumstances where the *Code* was being violated
  + The question of the liability of a franchisor for the conduct of its franchisee will typically be fact-based

##### McCormick v Faskin Martineau DuMoulin LLP (2014) – SCC – The test for whether someone is an employee is how much control is exercised by the employer and the corresponding dependency on the part of the worker

* **Facts:** Mr. McCormick became an equity partner at Fasken Martineau in 1979. In the 1980s, the equity partners voted to adopt a provision in their Partnership Agreement whereby equity partners were to retire as equity partners and divest ownership at the end of the year in which they turned 65, unless they were invited to continue to work after that age. He turns 65 but is not asked to continue, he requests to continue but it is refused. A partner could make individual arrangements to continue working as an employee or “regular” partner. In 2009, when he was 64, Mr. McCormick brought a claim alleging that this provision of the partnership agreement constituted age discrimination. Fasken’s raises an interesting jurisdictional issue.
* **Fasten argument:** McCormick is not an employee and only employee can file a human rights claim.
* **Holding:** The Tribunal erred in concluding it had jurisdiction over this relationship; Mr. McCormick was not an employee. McCormick, as one employee is in a position of power, different than the definition of an ordinary employee. McCormick is not in a position of dependency because he was a partner. He could not be an employee because as a partner he had a voice in the firm. SCC found that he was a partner and therefore, not an employee. SCC dismissed the complaint, holding that in most cases the BC Human Rights Code would not apply to the relationship between a partner and a law firm.
* **Analysis:**
  + The issue before the Court was how to characterize Mr. McCormick’s relationship with his firm in order to determine if it comes within the jurisdiction of the *Code* over employment
  + Requires examination of essential character of the relationship and extent to which it is dependent
  + Deciding who is in an employment relationship for purposes of the *Code* means examining how two synergetic aspects function in an employment relationship
    - Control exercised by an employer over working conditions and remuneration
    - Corresponding dependency on the part of a worker
  + In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations
  + The more the work life of individuals is controlled, the greater their dependency and the greater their economic, social, and psychological vulnerability in the workplace
    - SCC lays out the test for whether someone is an employee or not:
      * Utilization
        + Did the alleged employer utilize or gain some benefit from the employee?
      * Control
        + Did the alleged employer exercise control over the employee?
      * Financial burden
        + Did the alleged employer bear the burden of remuneration of the employee?
      * Remedial purpose
        + Does the ability to remedy any discrimination lie with the alleged employer?
  + In the current case, Mr. McCormick was part of the group that controlled the partnership, he was not dependent or subordinate, and he had the right to participate in management
    - He could have voted against the policy he is now challenging

# Some Other Human Rights Issues in the Workplace

#### Drug Testing

##### Entrop v Imperial Oil Ltd (2000) – ONCA – Employers have a duty to accommodate alcohol and drug dependencies in a way that is tailored to the individual up to the point of undue hardship. Accommodation Case.

* **Facts:** There was a major oil spill in April 1989 off the coast of Alaska, millions of gallons of crude oil spilt. It was determined that the captain of the boat had been in his cabin drinking at the time when the boat went too close to shore and the bottom got ripped out. The employer introduced a rigorous drug and alcohol testing policy in the wake of the disaster. Part of the policy required anyone who had now gained sobriety and was abstaining from a prior dependency on drugs and alcohol had to be sober for 7 or 8 years. The rule was you had to spend 2 years in rehab, and 5 years of sobriety after that. Entrop worked in a safety sensitive position in Sarnia. The complainant employee was a recovered alcoholic, he had been sober and alcohol free for 4 years. When he disclosed his recovering alcoholic status, he was transferred from a safety-sensitive position to a less desirable one in accordance with the employer’s policy. He filed an HR claim. Board of Inquiry found in Entrop's favour.
* **Holding:** Policy was unlawful and cannot be upheld. CA struck down the rule and told them to make it less broad, less inflexible and more accommodating.
* **Analysis:**
  + Court found that the long-term ban of employees who had drug or alcohol abuse was too strict, too severe and did not properly accommodate him
  + For employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement
  + However, random alcohol testing will not satisfy the 3rd step of *Meiorin* test unless employer has met duty to accommodate needs of those who test positive
  + The Policy’s Guidelines provide for dismissal from employment following a single positive test
    - Dismissal in all cases is inconsistent with Imperial Oil’s duty to accommodate
    - To maintain random alcohol testing as a BFOR, employer is required to accommodate individual differences to the point of undue hardship
  + Applied *Meiorin* decision:
    - was the policy rationally connect to a legitimate workplace purpose? - YES to safety
    - was the policy introduced in good faith? - YES
    - accommodation test? Were all reasonable measures taken to try to accommodate him up to undue hardship? - CA found NO
  + The policy in question fails the third step in the *Meiorin* test for four reasons
    - Requiring an employee to disclose a past substance abuse problem is an unreasonable requirement
    - Automatic reassignment from safety-sensitive position following disclosure of a substance abuse problem is not reasonably necessary either
      * Fails to accommodate individual differences and capabilities
    - The requirement of two years’ rehabilitation followed by five years’ abstinence is overly broad
    - Mandatory conditions and undertakings for reinstatement are unlawful since evidence shows this is more than is necessary in some instances
  + Drug testing must be more flexibly used and more narrowly calibrated than was done in this case

##### CEP Local 30 v Irving Pulp and Paper Co (2012) – SCC – an employer must show that there is a substantial safety problem due to the use of drugs/alcohol in order to implement mandatory, sweeping drug and alcohol testing

* **Facts:** Irving Pulp & Paper is one of largest industrial employers in NB. In their plant they initiated a random alcohol-testing program. There had been eight documented instances of employees coming to work impaired in the past fifteen years. All employees were to be subject to random and mandatory alcohol testing which means they could take a blood or breath sample at any time from their employees. Union (CEP) brought a grievance through arbitration system under collective agreement. Arbitrator determines that random alcohol testing program is overly broad and strikes it down. Irving seeks judicial review; Queen’s Bench quashes the decision of the arbitrator. NBCA upholds lower court decision.
* **Irving Argument:** They run a pulp and paper plant which is inherently dangerous, therefore a safety sensitive workplace and over the last 15 years there were 8 reported incidents where someone reported to work impaired. Irving justified their imposition of random drug testing by saying that because they had incidents, they should not have to wait until someone, because of an impairment, has committed an accident that injures or kills themselves or others.
* **Holding:** SCC overturns NBCA decision, restores decision of labour arbitrator. SCC rules that the random drug test imposed by Irving is over broad. There were too few instances of use of drugs or alcohol or impairment over the past 15 years to justify the use of random drug and alcohol testing. Random drug and alcohol testing is a highly intrusive form into someone’s privacy. Privacy has a quasi-constitutional status.
* **Analysis:**
  + The appropriate approach is to recognize both legitimate interests, the interests of employer/employees to have a safe workplace, and the employees’ right to privacy. A proportional approach is required.
  + Signal of how highly courts respect the decisions of labour arbitrators
  + An employer must show *actual evidence of a substantial safety problem* through the use and abuse of drugs/alcohol in order to implement such rules
    - Privacy rights trump proactive measure
  + From a management lawyer’s POV
    - Irving lacking sufficient documentation of alcohol use and impairment within their workplace
    - In the face of this lack of documentation, employer could have attempted to negotiate with the union
  + Recognizes the application of balancing test for bringing in random and mandatory alcohol, testing, and recognition of importance of privacy rights
    - An employer can only breach these rights by providing proof of a significant safety concern

##### Stewart v Elk Valley (2017) – SCC

* **Facts:** Ian Stewart worked in a safety-sensitive mine operated by the Elk Valley Coal Corporation, Cardinal River Operations (“Elk Valley”). The employer implemented an alcohol and drug policy, which required employees to disclose addiction issues before any alcohol or drug-related incident occurred. Employees who self-disclosed would be offered treatment. Employees who failed to self-disclose in advance of an incident and subsequently tested positive could be terminated.
* **Holding:** SCC has affirmed employers’ rights to take proactive measures to prevent workplace incidents by implementing and enforcing alcohol and drug policies. Employers can require employees to self-disclose substance abuse issues prior to workplace incidents and may be able to impose discipline for a failure to comply. Employers do not have to give employees multiple chances to comply with a workplace policy even if an employee suffers a disability
* Simply having a disability and being subject to a workplace policy or disciplinary action cannot be assumed to constitute discrimination
* If expert evidence demonstrates that an employee has the capacity to control their behavior notwithstanding the disability, an employer may be able to impose discipline on that employee
* More broadly, the decision recognizes the unique nature of safety-sensitive workplaces and the critical need to deter alcohol and drug use in such environments
* Employers may impose sanctions for breach of safety policies, even when employee suffers from disability because to do otherwise would undermine the deterrent effects of the policy
* Reaffirms the importance of considering workplace safety in a BFOR analysis of an employer’s standard or policy

# The Right to Privacy at Work

* Employers inevitably gather sensitive information about their workers
* In the last decade, both federal and provincial governments have passed legislation that limits the use of information in the workplace
  + *Personal Information Protection and Electronic Documents* (*PIPEDA*)
    - Governs information management within federally regulated entities
    - Also applies to private sector organizations in the course of their employment unless province has enacted “substantially similar” legislation
    - Employees who believe that their employer has contravened their rights under PIPEDA may bring complaints to the Privacy Commissioner
* A number of provinces have also passed statutes that bear on workplace privacy
* Privacy has now achieved a quasi-constitutional status, up there with human rights law.

##### R v Cole (2012) – SCC – Whether an employee has a reasonable expectation to privacy depends on the “totality of the circumstances” and this is a test of substance, not form

* **Facts:** A high school teacher was charged with possession of child pornography and unauthorized use of a high school supplied computer. He was permitted to use his work-issued laptop computer for incidental and personal purposes. A technician, asked to do some repair work on the laptop, found a hidden folder containing nude photographs of an under-age female student. The technician notified the principal who called the police. The principal seized the laptop and school board technicians copied the temporary Internet files onto a second disc. The police reviewed the laptop contents without a warrant.
* **Issue:** What evidence was allowable in his criminal trial? What was the reasonableness of an employee’s protection of privacy?
* **Holding:** Mr. Cole had a reasonable expectation to privacy in the use of his work laptop.
* **Analysis:**
  + While workplace policies and practices may diminish an individual’s expectations of privacy in a work computer, these sorts of operational realities do not themselves remove the expectation entirely
  + Whether Mr. Cole had a reasonable expectation to privacy depends on the “totality of the circumstances”
  + This is a test of substance, not form
  + paragraph 58: “The nature of the information heavily favours recognition of constitutionally protected privacy rights…..”
  + Four lines of inquiry guide this test (paragraph 40): whether the person claiming privacy had a reasonable subjective expectation of privacy in the matter
    - An examination of the subject matter of the alleged search
    - A determination as to whether the claimant had a direct interest in the subject matter
    - An inquiry into whether the claimant had a subjective expectation of privacy in the subject matter
    - An assessment as to whether this subjective expectation of privacy was objectively reasonable, having regard the circumstances

##### Jones v Tsige (2012) – ONCA – there is a tort of intrusion on seclusion in Ontario common law

* **Facts:** Ms. Jones discovered that the respondent, Ms. Tsige, had been looking at Jones’ banking records, not authorized. The two worked at the same bank and Tsige formed a common-law relationship with Jones’ former husband. Tsige had full access to Jones’ banking information and looked into Jones’ records at least 174 times over a period of four years. The central issue of the appeal is whether the motion judge erred by granting summary judgment and dismissing Jones’ claim for damages on the ground that Ontario law does not recognize the tort of breach of privacy. She was suing in the tort of intrusion upon seclusion.
* **Holding:** Tsige committed the tort of intrusion on seclusion and Tsige owed damages in the amount of $10, 000 to Ms. Jones
* **Analysis:**
  + If Jones has a right of action, it falls into Prosser’s category of intrusion upon seclusion
    - **Test:** Plaintiff must show: unauthorized intrusion, that the intrusion was highly offensive to the reasonable person, the matter intruded upon was private, and the intrusion caused anguish and suffering
  + Ontario has already accepted the existence of a tort claim for appropriation of personality and remains open to the proposition that a tort action will lie for a intrusion upon seclusion
  + There are several Ontario cases in which the trial judge refused to strike pleadings alleging the tort of invasion of privacy as disclosing no cause of action
  + There are three distinct privacy interests under the *Charter*
    - Personal privacy
    - Territorial privacy
    - Informational privacy
      * At issue here
  + “One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subjective to liability to the other person for invasion of his privacy if the invasion would be highly offensive to the reasonable person”
  + In the current case, Tsige committed the tort of intrusion upon seclusion
    - The intrusion was intentional, it amounted to an unlawful invasion of Jones’ private affairs, it would be viewed as highly offensive to the reasonable person, and caused distress, humiliation, or anguish

# Off-Duty Conduct on Social Media

* Employers must balance the privacy and freedom of expression interests of the employee against the employer’s interest in maintaining productivity and its reputation
* *Toronto v Toronto Professional Fire Fighters’ Association* a firefighter was terminated for his two-year-long series of sexist, misogynistic, and racist tweets in which he was identified as a Toronto firefighter with a picture in uniform
* Test for whether off-duty conduct warrants termination comes from *Millhaven Fibres Ltd v OCAW, Local 9-670*
  + The conduct harms the employer’s reputation or product
  + The griever’s conduct renders them unable to perform their duties
  + The griever’s conduct leads to refusal, reluctance, or inability of other employees to work with them
  + The grievor has been guilty of serious breach of the *CC* or the applicable HR code injurious to the general reputation of the company and employees
  + The conduct places difficulty in the way of the company properly carrying out its functions of efficiently managing its works and directing its workforce
* The courts have held that employee’s expectation of privacy when engaging in social media is low and that employers can use employee’s activity on social media as evidence of misconduct

# Freedom from Bullying and Psychological Harassment

* Workplace abuse and harassment constitutes bad faith (*TTC v ATU*)
* Quebec has been the first Canadian jurisdiction to introduce legislation on psychological harassment in the workplace in 2002

# The Employment Relationship at Common Law

* Five employment law principles
  + Employment statutes apply equally to all workplaces in Ontario but are particularly important in non-unionized workplaces and those at the end of the employment totem pole
    - Employment Standards Act, Pension Act, Occupational Health and Safety Act, Workers Safety and Insurance Act, and Human Rights Code
  + The law has stepped in in some fashion to try to limit the fundamental inequalities in the employment relationship
    - Employment law acknowledges that there is inequality in the bargaining relationship between the employee and employer and so the common law has developed to assist the employee
  + There is a difference in law between a contract of services and a contract for services
    - A contract of services is an employment contract between one employer and an employee
      * it is an exchange of labour for wages in an employment circumstance
      * Between unequal parties
    - A contract for services is between a company and an independent contractor
      * a straight monetary contract
      * Between equal parties
  + What are the principled legal obligations that an employer has to an employee?
    - Employer is required to remunerate the employee
    - Employer is responsible for the employees conduct
    - Employer is responsible for providing a safe working environment
    - Employer has a general duty of reasonableness in how it treats the employee
      * Extending to how the employee is dismissed
  + What are the legal obligations that an employee has to an employer?
    - Duty to obey but it is not absolute
      * Exceptions
        + If the command requires something dangerous or unsafe
        + If the command is illegal
    - Duty to exercise care and skill in fulfilling work duties
    - Duty to act in good faith and fidelity, duty of loyalty that employee has to show towards employer such as not disclosing confidential secrets, cannot use employers time to do personal duties, can’t rubbish the employer
    - Duty not to engage in willful misconduct
* definition of employee in labour law is narrower because the purpose of labour law is to be able to draw distinctive boundaries around those who are employees and those who are in a managerial capacity

#### Differences between employment and labour law

1. Employment law is basically the law of the non-unionized employee/workplace while labour law is the law of the unionized employee/ workplace (all employment statues apply to both unionized and non-unionized workplaces)
2. Employment law has the central contractual feature of the individual contract of employment (negotiated between employer and employee and courts will pay special attention as to whether it was an equally bargained contract or if the terms favour the employer and it was a contract of adhesion) while in labour law the central contractual feature is the collective agreement (in labour law there is no individual employment agreement, the collective agreement extinguishes all individual contracts of employment)
   1. Some of the principles of contract law generally do not apply to a collective agreement or a contract of employment because the contracts in labour and employment are for human labour
3. Employment law rarely has a built in grievance and arbitration process to settle a difference between employer and employee (if there is a breach of the contract of employment then it would go to court) while in labour law this would exist in the collective agreement (in labour law there is a mandatory grievance and arbitration procedure)
4. Employment law- no individual right to strike while in labour law- limited right to strike within certain time restrictions
5. Employment law does not give one their job back if they win in a suit of wrongful dismissal (no right of reinstatement) while in labour law reinstatement is a remedy and is quite commonly awarded by arbitrators (used all the time in labour law context but hardly in the employment context because usually people who have filed an HR complaint generally do not want to go back to that workplace, in a unionized workplace you have a union that is there to protect your rights so it is easier to go back if you are being reinstated into a workplace where there is a union to protect you after returning after being fired)
   1. Exception in employment law is that HRT might order a non-unionized employee back to work in a case of discrimination but this rarely happens
6. Employment law affords a wide range of financial damages available to an employee dismissed without just cause (usually if you are successful in a wrongful dismissal suit, you get severance per month for every year that you had been there and if there was bad behavior by the employer in its treatment of you or humiliating way in which they fire you there may be aggravated or punitive damages awarded as well) while in labour law, there is no such thing as aggravated or punitive damages awarded by an arbitrator (you are usually put back to work and get your backpay in benefits but usually no additional damages that go there unless in some cases if you were fired and there was a human rights cause you might get some human rights damages in the form of back pay- not very common but not unheard of)

#### Aspects of a contract of employment

* + Contract of employment in Canada is always a personal service contract
    - Employer is paying the employee for personal work
    - Employer is in a position of control with respect to how work is done and what work is done and discipline
    - Common law judge will not grant an order of specific performance within employment contract disputes
    - Some employment contracts will contain restrictive covenants
  + The assumption in employment contracts is that they are always drafted by the employer
    - There is rarely genuine negotiations as to what is included in the contract
    - Judges will read employment contracts against the employer
  + An employment contract is for an indefinite period of time unless there is a provision stating otherwise
  + There are many examples of employment contracts that haven’t been reduced to writing
    - This would be supplemented with implied terms that the court believes are reasonable
  + Cannot contract out of any employment legislation
    - Can contract out of the common law
  + There are implied terms within employment contracts
    - The court would read these into the contract if not expressly contained
* if you are unionized employee, you CANNOT go to court to enforce rights, primary method of remedy is labour arbitration

##### Christie v York Corp (1940) – SCC – any merchant is free to deal as he may choose with any individual member of the public

* **Facts:** Black appellant entered tavern owned and operated by respondent, ordered a beer, waiters refused on sole reason they were instructed not to serve "coloured persons". He sued them. Respondent says he was in his rights and a business = just a private enterprise for gain. Went to the SCC.
* SCC turned the case down saying there is an inherent freedom of contract, that a tavern or restaurant owner was able to exercise, they could discern who they wanted to serve and who they did not want to serve,
* **Held:** Falls under general principle of the freedom of commerce in Quebec – any merchant is free to deal as he may choose with any individual member of the public. There is no specific law to the contrary.

# Who is an Employee?

#### Otto Kahn Freund, "Servants and Independent Contractors" (1951) 14 Modern Law Review 504

* Traditional test: person working for another was regarded as a servant if he was "subject to the command of the master as to the manner in which he shall do his work"
* If the "master" only directed *what* to do, not *how* to do it, the person working is an independent contractor
  + This was essentially the Control Test
  + Made sense given the context of the mainly agricultural society and beginning of Industrial Revolution
* Control test had to be transformed 🡪 transforming into an "organization" test. Did the alleged servant form part of the master's organization?

#### Brian A Langille & Guy Davidov "Beyond Employees and Independent Contractors: A View from Canada" (1999) 21 Comparative Labor Law & Policy Journal 7

* The concept of "employee" is the gateway to most employment protections at common law and under employment-related legislation
* Labor relations acts, ESA and common law rights and obligations generally apply only to employees
* The distinction between employee/independent contractor is becoming significant to more workers with the shift from manufacturing to services and changes in organization of work
  + Temp, part-time, causal, multiple job holders are more susceptible to employers trying to ignore their rights
  + independent contractor would have a fair amount of independence on how the work is to be done
  + independent contractor is not an employee. No severance pay, no statutory deduction for benefits during the course of their economic relationship
  + dependent contractor has some of the outward attributes of an independent contractor, but what makes them a dependent contractor (considered to be employees) is the volume of work for which they are doing this work, and the particular control that the company or person engaging them has. The greater control the more likely they are a dependent contractor
* One common idea though – the protection of workers and the underlying assumption is the existence of an employer that can and should take responsibility for these workers (employees)
* The basic purpose of the employee/independent contractor distinction in labour law can be understood as distinguishing those workers from those in need of a particular sort of protection and those in a position to protect themselves
* Today – Canadian courts rarely just look at control over worker's activities
* Quebec – Main criterion for an "employee" is "legal subordination" of employee to employer – general control over the regularity work is done and its quality
* It's problematic that there are non-self-dependent contractors that don't get employee protection
  + Unclear how many there are in Canada, but evident in media and entertainment industries and trucking industry

##### Montreal v Montreal Locomotive Works, 1947

* + Four part test to determine if there is a true dependency in law between a person who is working for another person and that employer: (1) control (2) ownership of the tools (3) chance of profit (4) risk of loss
  + Examine the whole of the various elements which constitute the relationship between the parties (control in itself is not always conclusive)
* These boil down to two questions:
  + Whether the worker is controlled by the employer/client; and (i.e. who is directing that person in terms of the day to day work they perform)
  + Whether the worker is economically independent or dependent on the person directing them on what is to be done (e.g. chance of loss or profit, ownership of tools, etc. different for each case)

##### Carter v Bell & Sons (Canada) (1936) – ONCA

* **Facts:** Sales agent who was classified as the employer. Independent contractors were paid entirely on commission as opposed to wages or salary. Therefore, the more work he would bring in the more money he would make. When he was let go the questions were: 1) was he an independent contractor and the contract had come to an end or 2) was he a dependent contractor meaning he was an employee and deserved reasonable notice?
* **Ratio:** There are cases of an intermediate nature where the relationship of master and servant does not exist but where an agreement to terminate the arrangement upon reasonable notice may be implied
* **Reasons:**
  + Mode of remuneration pointed to a mercantile agency but the duties to be performed were more permanent
  + The permanency of the position was an important factor in determining the relationship
* **Held:** Even though there was no contract that would make employer liable for agent's acts, it was nonetheless one, which the judge said could only be terminated upon reasonable notice. He was entitled to reasonable notice. Court said he was not a classic employee but because of the nature of his dependency, this was his sole work and the companies control over his actions he was much more of a dependent contractor than an independent contractor.

##### McKee v Reid's Heritage Homes Ltd (2009) – ONCA

* **Facts:** Owner of RHH and Mckee signed a sales & advertising agreement to sell and advertise homes for a fee, RHH would supply homes and pay a fee for McKee to sell them. Contained exclusivity clause – McKee would only work for RHH – and a termination provision requiring notice. The contract completed and McKee kept working for RHH without a contract, but sold homes for a lesser fee once she hit the original 69 under the contract. McKee was promoted. After 20 years, RHH restructures and fires McKee who sues RHH for constructive dismissal. Constructive dismissal is when the employer unilaterally changes a fundamental term of your employment relationship, they haven’t per say fired you, but they changed a key aspect to your employment with them unilaterally, and you did not agree to it.
* **Issue:** Was McKee an employee or an independent contractor?
* **Ratio:** "Dependent Contractors": An intermediate category, which consists, at least, of those non-employment work relationships that exhibit a certain minimum economic dependency, which may be demonstrated by complete or near-complete exclusivity. They are a "carve-out" from the non-employment category not affecting the employment category
* CA looks at *Sagaz* and *Belton* and says these two cases together have come up with a series of factors. This is the current test for determine whether someone is an independent contractor or has an employment relationship.
  + **TEST:** 
    - Is worker a contractor or an employee? (Apply *Sagaz/Belton* analysis - exclusivity is a factor)
      * Look at the degree to which the work was generated and controlled by the employer
    - If step (1) results in a contractor, determine whether the contractor is independent or dependent – exclusivity is *determinative* here
      * No factor is always determinative, it is a weighting of the entirety of the factors to determine the character of the relationship
    - Five Factors to look at:
      * 1) Look at the degree to which the work was generated and controlled by the employer
        + Limited exclusively to the principal – only working for a particular company at the exclusion of everyone else. Sole source, more likely to be defendant
      * 2) Control of the principal – not just products sold but the how, when or where. How much control do they have over their ability to perform the work. Greater the direction, the more likely you are an employee
      * 3) Own your own tools or are they supplied to you.
      * 4) Risk and expectation of profit.
      * 5) Is the activity part of the business organization (how crucial to the operation of the business is the work that you’re doing)? Who's business is it?
* This case takes the traditional control dependency test from *Montreal Locomotive* and gives it a modern shine. It restated it into a 5 point test.

# Who is an Employer?

* Recently this has been more challenging as subcontracting is more prevalent – managerial functions are divided up and identifying a single entity is complex

##### Downtown Eatery (1993) v Her Majesty the Queen in Right of Ontario (2001) - Doctrine of the "common employer" – an employee may be employed by more than one company at the same time

* **Facts:** Respondents "Grad" and "Grossman" were in nightclub business in Toronto. Grad offered Alouche a job as manger at one of the clubs, called For Your Eyes Only. Alouche received pay cheques from Best Beaver Management, a company controlled by G and G. Alouche was disciplined in May and then wrongfully dismissed in June. Alouche brought action against Best Beaver in October. Best Beaver ceased to do business after a reorganization of the companies, right before the start of the trial. Trial judge found in favour of Alouche but Best Beaver never paid him. Sheriffs purported execution of the judgment went to the club and seized some cash. Downtown Eatrery Ltd claimed the money belonged to it, and commenced an action against Alouche, who counterclaimed against all companies controlled by G and G and them personally.
* **Issue:** Who was his employer and did the sheriffs seize money from the right person?
* **Note:** Common employer doctrine: employee may be employed by more than one company at the same time. If companies are controlled and managed by the same owner, and there is overlapping activities they are involved in, then as long as there was sufficient degree of interrelationship between the companies, then the law will treat them as one entity for the purposes of employment and labour relations. The law will not be estopped by corporate veils.
* **Held:** for Alouche
* **Ratio:** Relies on leading case *Sinclair v Dover Engineering* (1982 BCSC) - if there is a sufficient degree of relationship (determined by control) between the entities who may be employer, ought to all be regarded as one for determining liability owed to employees who have served all
* **Ratio:** The definition of employer in the simple and common scenario, should be one that on the one hand recognizes the complexity of modern corporate structures but does not permit that complexity to defeat legitimate entitlements of wrongfully dismissed employees. The complex structure will not deter the court from discovering who the core employer is.
* **Analysis:** 
  + Although an employer is entitled to establish complex corporate structures and relationships, the law should ensure it does not cause injustice in an employment law context
  + Alouche was wrongfully dismissed and couldn't become compensated because the company he sued was asset-less – the doctrine should support him
  + Because the group of companies ran all aspects of the nightclubs, they were deemed to be a common employer for the purposes of seizing money

# Express Terms

* Interpretational approach
* *Contra proferentem* rule: ambiguities in the written terms of a contract are to be strictly interpreted against the interests of the drafter
* Courts often sensitive to the idea that a written contract may not represent the true, or complete, intentions of the parties to an employment relationship

##### Ceccol v Ontario Gymnastic Federation (2001) – ONCA – Employers cannot evade protections of the ESA and common law by resorting to the label of a fixed term contract. Must consider the underlying reality of the employment relationship; form will not defeat substance

* **Facts:** Ceccol was high up in a 14-person office, for 15+ years her employment was governed by a series of one-year contracts with similar terms. She was in a high up administration position. Each year she was given a 1 year contract to sign. In 1997, Ceccol was notified her contract would not be renewed among other layoffs and she commenced a wrongful dismissal action. In her contract, it stipulated she was a fixed-term employee, but the long-term nature of her employment suggests she was an indefinite duration employee. Fixed-term employees are not entitled to reasonable notice.
* **Prior Proceedings:** Trial judge found Ceccol was an indefinite term employee and entitled to reasonable notice
* **Issue:** Was she an employee for 15 years and there entitled to severance pay of 15 months, or was she an employee of only 1 year and therefore entitled to severance pay of only 1 month?
* **Held:** The employment contract was for an indefinite term. They would not let the form defeat the essence of the relationship. The court found that she was an employee for 15 years
* **Analysis:** Her continuous service coupled with verbal representations and conduct by the employer that signal an indefinite term relationship. There were ambiguities in the written contract which are to be resolved against the employer's interest. Court said that in order to create an actionable fixed term contract, there must be clear unequivocal language to establish that and if you do not have that language then you will be deemed to be an indefinite employee.

# Incorporating Terms

##### Elison v Burnaby Hospital Society (1992) – BCSC – Being aware of a policy does not establish the employee has accepted the policy as part of her contract of employment

* **Facts:** Plaintiff hired by the defendant as a nurse. Worked for 25 years, up to Nursing Director. Dismissed because of restructuring, it was a lay off there was no just cause. Benefits policy was introduced by the defendant after the plaintiff had been working for 20 years (therefore was only in effect for 4 years), says specific stuff about reasonable notice, but she doesn't remember reading it. Employer never told her that this policy was going to be a part of her contract, she never read them and did not know they were important. This contract was drafted by the employer and simply signed by the employee.
* **Issue:** Was this policy part of her contract for which she could sue to augment some of her damages?
* **Ratio:** Being aware of a policy does not establish employee accepted the policy as part of their contract of employment. Only true if it is clear both parties intended it.
  + Both parties must consent to the variation or incorporation for it to be enforceable
* **Held:** She wins. Employer was trying to limit the range of her benefits if she was let go, but the employer never put it in writing, never explained to her what they were trying to do or that there was an alteration to her contract. Unless the employer takes ALL reasonable steps, ALL due diligence steps to ensure that any unilateral alteration of a contract was clearly brought to the attention of the employee, then the purported alteration of the contract is nullified.
* **Analysis:** Not enough evidence to show the policy formed part of the contract of employment. She was simply given it. Therefore, common law rules apply to reasonable period of notice.
  + The employer has to bring changes to the attention of the employee, invite them to seek legal advice so that they clearly understand the altered terms
  + Without this clear due diligence in altering the contract, purported alterations are null and void

#### Restrictive Covenants

* Express contractual terms which limit an employee's right to compete with their former employer after leaving their employment (non-competition clause) or to solicit clients of former employer (non-solicitation clause)
* Not enforceable against an employee when they are wrongfully dismissed (*Globex v Kelcher* 2005 ABCA)
* Commonly used in employment matters to restrict someone who may have specialized knowledge, experience or experience with clients from doing something for a period of time that would harm your business.

##### Elsley v JG Collins Ins Agencies (1978) – SCC

* **Facts:** Collins bought competitor Elsley's insurance business. Collins hired Elsey as manager and the employment contract contained restrictive covenant – Elsey couldn’t carry on/engage in insurance business for 5 years after termination. To customers throughout Elsey's 17-year employment, Elsey was the business and Collins was just the name. In 1973, he leaves the company and takes a number of the employees and long standing clients with him. It was natural for policyholders to follow him if he left. Factual dispute re: whether solicited the business of former clients. Collins sues.
* **Issue:** Is the restrictive covenant valid?
* **Three part test:**
  + does D have a proprietary interest entitled to protection?
  + Were there time or space feature of the clause that were too broad, too over bearing or too oppressive? Did they breach some standard of reasonableness?
  + Public interest test. Is the clause unenforceable for the competition reason or for another public policy reason?
* **Ratio:** A restrictive covenant is enforceable only if it is reasonable between the parties and with reference to the public interest and reasonableness will depend on the circumstances.
  + After the party relying on a restrictive covenant has established its reasonableness between the parties, the onus of proving it is contrary to the public interest lies on the party attacking it.
* **Held:** Would not be in public disinterest and so the clause can be enforced. Restrictive covenant was legally valid, it was not too broad, was not personally oppressive against the complainant and the terms were reasonable, they did not unduly restrict him, it was only 5 years. Therefore, he did breach the restrictive covenant and damages would flow from that.

##### Lyons v Multari (2000) – ONCA – the court will not enforce a non-competition clause when a non-solicitation clause would suffice in protecting the employer

* Court refused to enforce a non-competition clause on the basis that a non-solicitation clause would have been sufficient to protect the former employer's legitimate proprietary interests

#### Common Law Implied Terms

* Courts use implied terms where parties intentions do not appear to be fully represented by the written terms of a contract
* Facilitates prevailing system of work organization and HR management and reflect society's view of how work relations ought to be conducted

# Terminating the Contract of Employment

#### Wrongful Dismissal

* Dismissal is "wrongful" at common law where:

1. Employer dismisses the employee without alleging cause and without giving notice or wages in lieu of notice as required by the express or implied terms of the employment contract; or
2. The employer summarily dismisses the employee, alleging cause that is not proven; or
3. Employee quits in response to repudiatory breach of the employment contract by the employer, sues for damages and the employer cannot demonstrate cause

#### Cause for Dismissal

* If employee commits a breach severe enough to constitute a repudiation of the employment contract, the employer has cause for dismissal
* Can come from breach of express term, or implied obligation, or general conduct showing employee's intention to no longer be bound to the contract
* Off-duty conduct is not sufficient cause unless it has a nexus/connection with the employer

##### McKinley v BC Tel (2001) – SCC – dismissal must be a proportionate punishment for the actions of an employee; not all dishonesty is sufficient to justify a dismissal for cause; misconduct must go to the heart of the employment relationship.

* **Facts:** McKinley was an accountant for BC Tel, held various positions, promotions, etc. Health got bad (anxiety and stress) and took leave of absence. He said he would be willing to come back but needed a less stressful position. BC Tel originally looked at less stressful positions for him. Respondents terminated his employment after finding out he could've taken a pill to make him better enough to get back to work – said he was dishonest. Filed wrongful dismissal action arguing his termination was arbitrary and a willful breach of contract and intentional infliction of mental suffering. He was looking for a reasonable severance package. Respondents said appellant's conduct was dishonest.
* **Held:** For employee. Jury could have reasonably found he did not engage in dishonesty in a way that undermined his employment relationship.
* SCC reconciles 2 different lines of authority coming from lower courts. There was one line of cases that said that any line of dishonesty by employee is grounds for just cause termination. Second line of cases which said that you have to look at the facts of each case, look at it’s context and ask yourself “was the dishonesty of such a degree to cause such harm that the employment relationship was fundamentally ruptured?”, if it did not reach that degree then this was not a case of proper just cause and the employee should be entitled to severance pay. SCC favors this second approach.
* **Takeaway:** You always take a nuanced approach when dishonesty has been alleged, was the alleged dishonesty of such a degree that it went to the very heart of the employment relationship, did it break the trust that is at the heart of that relationship? If yes, then just cause has been met but if it does not then it has not been met
* **Analysis:**
  + Context must be considered when assessing severity of dishonesty
  + To be decided by trier of fact through analysis of the circumstances surrounding employee's behaviour, think of if it violates the "essential conditions" of the employment contract or breaches employer's faith
  + Dishonesty is not always just cause for dismissal
    - Must satisfy three aspects
      * Have to show that the dishonesty violates the essentials of the fundamental conditions of the employment relationship (goes to the heart of the employment relationship)
      * Has to breach the employees’ duty of trust and fidelity to the employer
      * Must be directly inconsistent with the employee’s obligations to the employer

#### Constructive Dismissal

* When an employer commits a repudiatory breach of the express or implied terms of the employment contract, the employee may treat themselves as dismissed, terminate the contract and sue for damages.
* when a fundamental component of the employment relationship has been taken way from the employee. The job they are now asked to be doing is no longer the job that they had signed up for. Even though they are not formally fired or terminated or dismissed, but because of this breach of fundamental character they are arguing that the employment relationship has been constructively ended by the employer
* Two types:
  + Unilateral alteration of an essential term of the employment contract
  + Mistreatment that demonstrates the employer no longer views itself as bound to the employment contract

##### Potter v New Brunswick Legal Aid Services (2015) – SCC

* **Facts:** Potter is a lawyer in New Brunswick, was appointed Executive Director of Legal Aid as governed by the Legal Aid Act. Took time off for medical reasons and delegated duties to someone else. Before this, Potter and the Board were in negotiations of a buyout of his contract (resignation for compensation). Board decided without telling Potter that if the negotiations were not done before Jan 11, they would revoke his appointment for cause pursuant to the Act. This happened. They told Potter he's suspended indefinitely. Potter brought action for constructive dismissal.
* **Issue:** Was he constructively dismissed?
* Test is whether there is an express or implied term of the employment relationship was breached unilaterally.
* **Holding:** For the employee. SCC ruled that there was a substantial alteration excuse. The employer failed to act in good faith and the unilateral change meant that an essential part of the employment relationship and been determined and altered.
* **Analysis:** 
  + When an employer's conduct shows intention no longer to be bound by the contract, the employee can either accept that conduct or changes made by employer, or treat them as repudiation and sue for wrongful dismissal (*Farber*)
  + Burden rests on employee to establish he has been constructively dismissed
  + Two elements to the test for constructive dismissal:

1. Prove that the employer's conduct, whether by a single action or a series of acts, demonstrated intention to no longer be bound – objective standard
2. Prove that a reasonable person in the same situation would have felt the essential terms of the contract were being substantially changed

* Any employer’s right to administratively suspend an employee must be fettered by the principles of good faith, minimal impact and by legitimate business reasons. There was no communication to employee. – breached first branch of test and second branch fails as well.

##### Hill v Peter Gorman Ltd (1957) – ONCA

* **Ratio:** Employer does not have unilateral right to change a contract, nor can he force employee to accept it or quit.
  + Employee does not necessarily accept attempted variation to contract simply by continuing their employment

##### Lloyd v Imperial Parking Ltd (1997)

* **Facts:** After some arguments, employer became verbally abusive to Lloyd, threaten to fire him, etc. basically trying to get him to quit. He eventually did leave.
* **Held:** The repeated incidents of yelling at Lloyd in the workplace and the repeated threats to terminate his employment constitute constructive dismissal.
* **Ratio:** A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect and dignity. Violation of this may constitute a repudiatory breach by the employer and thus constructive dismissal.

# Extent of Financial Compensation

#### Assessment of Reasonable Notice Damages

* Damages for wrongful dismissal determined by the amount of reasonable notice to which the employee is entitled
* If employment contract contains express notice term, that is the amount to which employee is entitled (if it complies with employment standards statute)
* If employment contract is silent on notice, employee under an indefinite duration contract is entitled to common law reasonable notice (*Machtinger v HOJ Industries)*
* Famous principle:
  + "The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant (most important), age of servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant." (*Bardal v Globe & Mail 1960 Ont SCJ)*
  + Generally one month per year of service unless there are compelling reasons to reduce that or extend it

##### Cronk v Canadian General Insurance Co (1994) – ONCA – It is necessary to balance the traditional factors enumerated in Bardal, not just the re-employability factor

* **Facts:** Edna Cronk dismissed from her job due to restructuring. 55 years old, had been employed there for 29 years. She worked as a clerk stenographer. When she was laid off, she had been employed for a total of 35 years except for 6 years when she was raising children. Sued for damages for wrongful dismissal and argued 20 months would have been reasonable in the circumstances. Seeks 20 months salary as compensation for dismissal.
* **Companies Argument:** Did she lose all of her prior employment status when she left work to have children for several years and then was hired back? According to the company she quit and there was no obligation for her to come back. She worked for 13 years, went off for 6 and then came back for 16 more years.
* Trial Judgment
  + **Ratio:** *Bardal* principle (see above)
  + **Analysis:** Edna was not a highly visible and renowned employee occupying a senior mgmt. position, vulnerable age to look for a job, she only has high school education, limited qualifications, worked for a long time at this company – only interrupted by childrearing which is a good reason
    - Court also said the stigma that a dismissed employee would feel is similar no matter how high up the employee is in the hierarchy
    - It is wrong to contend that clerical workers like Edna, or other employees in low-level positions should receive a shorter notice period because they are likely to obtain new positions more quickly – the data actually supports the opposite
  + **Prior Proceedings:** She was entitled to 20 or 21 months. TJ ruled that she was a 29 year employee but also that there is a difference between a high ranking employee and a modest employee and she certainly met the terms as having a modest position. The old thought is that modest employees would get less because it is harder to find work if you are a senior employee and let go.
* ONCA – reversed above decision
  + **Held:** 12 months notice. Granted judgment to the employer. She gets only 13 months of severance. They maintain this artificial distinction between higher ranking and more modest employees.
  + **Analysis:** The character of the employment of the respondent does not entitle her to a lengthy period of notice. Entitled simply to the maximum notice in her category of clerical, non-managerial employee because of her age and lengthy service.
  + **Ratio:** It is necessary to balance the traditional factors enumerated in *Bardal*, not just re-employability factor
* *Di Tomaso v Crown Metal Packaging (2011) ONCA –* no empirical evidence to support presumption that higher status employees face greater difficulties finding new employment. Employee status is of "declining significance"

##### Bartlam v Saskatchewan Crop Insurance Corp (1992) – Sask QB – WRONG – The Lazarowicz Approach is the better approach for SK because it is capable of addressing all relevant criteria suggested in Bardal but always in the context of what the employer and employee would have agreed to, having regard to nature of their employment activity and economic and other factors associated. They are trying to go away from the Bardal rules and instead of looking at those 4 factors, you should look at the intention of the employee at the time that the contract was formed. HAS BEEN OVERTURNED BY SCC IN WALLACE.

* **Facts:** Plaintiff was senior manager, supervised 650 employees, 62 years old, 18 years of service to employer – but was only appointed to senior position 2 years before dismissal.
* **Held:** 12 months notice
* **Issue:** Should the reasonable notice period be based on the parties' factual intentions or on broader public policy grounds
* **Analysis:** Two approaches:
  + (1) *Bardal* Approach
  + (2) *Lazarowicz* Approach (*Lazarowicz v Orenda*): Court looks at all relevant factors existing at the time the employment contract was entered into and imply a notice provision of the kind the parties would have agreed to had they considered the same
  + These are irreconcilable and can lead to diff conclusions
  + If *Bardal* Approach is applied in future, it must be amended to take into account more criteria for policy reasons
    - Not relevant factors anymore – people job hop a lot, does not include relevant factors like what he believed the notice period was to be, the nature of his employer's business, reasonable industry standards, etc.
* **Ratio:** The *Lazarowicz* Approach is the better approach for SK because it is capable of addressing all relevant criteria suggested in *Bardal* but always in the context of what the employer and employee would have agreed to, having regard to nature of their employment activity and economic and other factors associated.

##### Anderson v Haakon Industries (Canada) Ltd (1987)

* **Facts:** Anderson was Alberta branch manager of engineering company. Approached with offer of employment by someone else, left current employment to work for Haakon, Haakon's financial performance was poor, employer wanted to reduce notice period because of this (especially because Anderson was in a management position so sort of in control of the financial performance of company)
* **Ratio:** the economic circumstances must form a part of the background in which the business and employment relationship is assessed but should not be a major factor in determining the correct notice period.
  + The economic performance of an employer would not reduce the period of reasonable notice unless it were demonstrated those economic circumstances reduced the amount of the loss suffered by the employee for the breach of his employment contract
* **Held:** Notice period not reduced

#### Mitigation – duty to mitigate applies in labour and employment

* Wrongfully dismissed employee has obligation to mitigate financial loss resulting from the dismissal by making reasonable efforts to obtain comparable employment
  + or else damages will be reduced to their degree of inactivity

##### Evans v Teamsters Local Union (2008) – SCC – the employee has a duty to mitigate the damage of wrongful dismissal by searching for new work; Employer bears onus of demonstrating an employee has failed to make reasonable efforts to find work and that work could have been found

* **Facts:** Trade union official who had worked for 23 years. New executive was elected and he was fired. He sues for wrongful dismissal and early on the new union executive offered him a chance to return to work and he turned it down. He did not want to work for him.
* **Issue:** is an employee who was wrongfully dismissed required to mitigate damages by returned to work for same employer?
* **Ratio:** Where the employer offers the employee a chance to mitigate damages by returning to work for him the central issue is whether a reasonable person would accept such an opportunity – take into account all elements of the situation (loss of dignity, stigma, etc.) in an objective approach
* **Union Argument:** Even if you found that we wrongfully dismissed him, Mr. Evans failed to properly mitigate his damages by failing to return to work.
* **Evans Argument:** Constructively dismissed because of how he was treated. He said he could not be effective as a union representative and he would feel no respect for himself if he went back to them after what he did.
* **Held:** Union wins, Mr. Evans should have accepted the offer and that would have allowed him to mitigate his damages.
* **Analysis:** 
  + Requiring an employee to mitigate by taking temp work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice (not penalize employer)
  + Employer bears onus of demonstrating an employee has failed to make reasonable efforts to find work and that work could have been found
  + Using an objective lens (not subjective – employee didn't like work environment but that wasn’t clear from an obj POV) the relationship between Evans and the union was not seriously damaged and the terms of employment of new offer were the same as last = not objectively unreasonable for him to return to work to mitigate his damages

#### Other Damages

* Development in regard to damages for mental distress and punitive damages for losses from manner of dismissal

##### Wallace v United Grain Growers Ltd (1997) – SCC – Where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the TJ has discretion to extend the period of reasonable notice to which an employee is entitled

* **Facts:** Wallace was 46 when hired by United after being lured away from his old company, received assurance he'd be treated fairly and security in employment until he turned 65. Top salesperson and then was fired without explanation – letter afterward said "main reason for his termination was inability to perform duties satisfactorily". He was fired without reason, without cause and in a particularly humiliating fashion in front of everyone else, he was yelled at and escorted off property. Caused emotional distress, unable to find another job, filed for bankruptcy, etc.
* **Prior Proceedings:** TJ awarded 24 months salary in lieu of notice. TJ gave him extra money, beyond the 14 months, because of the unfair and humiliating way the employer treated him. Appeal reversed this and lowered it to 15 months of salary in lieu of notice.
* **Held:** the trial judge's award of 24 months was reasonable, as bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period. Give him 15 months of severance pay based on *Bardal* and they give him 9 extra months called “*Wallace* damages”. They were not meant to take the place of aggravated punitive damages but it did do so. He was awarded Wallace damages because of the particularly egregious way in which the employer treated him. BUT, they did not make a calculation, they tied it to months of service. 15 months for ordinary reasonable notice and 9 months as punishment for employer.
* **Ratio:** Added two factors to *Bardal*: whether the employee was induced to leave secure employment, whether the employee was given a promise of job security at the time of hire.
  + "The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive..."
  + Where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the trial judge has discretion to extend the period of reasonable notice to which an employee is entitled
* **Takeaway:** Employers owe a duty of good faith and fairness to an employee when they are being terminated. SCC said that employers ought to be deterred from acting unfairly at the point of termination and therefore, Wallace damages are supposed to act as a deterrent. They also accepted that employees should be made whole if there is resulting sociological or psychological damage to them, where there is a reasonable nexus to the way in which the employer behaved at the point of termination. Going into Wallace we had 3 categories: compensatory, aggravated damage (employee can prove depression etc stemming from the termination) and punitive damages (meant to punish or deter employers). SCC added a 4th category which seems to be a substitute for categories 2 and 3. Wallace damages were only for when the employer acted in a particularly brutal and humiliating way when terminating the employee.
* Wallace damages went on for a long time but it did not bring order, they wound up confusing it more.
* Wallace set a new precedent in wrongful dismissal law by putting aside aggravated and punitive damages as a category of monetary remedies that could be awarded to an employee if there was employer misconduct.
* This case confirmed that *Bardal* was the proper formula for measuring damages.

##### Honda Canada Inc v Keays (2008) – SCC – Corrected Wallace; Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own

* **Facts:** Keays was employed for 14 years at Honda. He was diagnosed with chronic fatigue syndrome, put in Honda Disability Program, he could miss work if got a doctors note. It was not a very well understood condition back then, people often thought they were making it up. The employer and Insurance carrier were skeptical about his illness. Honda alleged his absences increased, doctor's notes became cryptic and not trustworthy, Honda offered to provide an approved doctor, Keays refused, Honda fired Keays for failure to proceed with the medical assessment they had proposed and for failing to return to work. Sued for wrongful dismissal
* **Prior Proceedings:** TJ found entitled to notice period of 15 months and considered additional damage dependent on manner of dismissal (*Wallace* damages), and increased this to 24 months. TJ awarded $500k punitive damages against Honda as well. Appeal upheld the finding but reduced punitive damages to $100k.
* **Held:** Regular damages should be maintained, but punitive damages and costs premium should be set aside. There was no bad faith when terminating Keays.
* **Ratio:** Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.
  + The normal distress and hurt feelings resulting from dismissal are not compensable
  + Also the tort of discrimination argument fails:
    - The Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong

##### Vancouver Native Health Society, 2019, BCSC

* **Facts:** Someone working at a Native Health Clinic in Vancouver serving Indigenous peoples in a poor part of Vancouver. He was fired in May 2018 and told he was being let go immediately without cause due to a restructuring of the Early Childhood Education program. Given several months of severance pay but he is saying he deserves more. Brings an action for wrongful dismissal. He was 54 years old.
* **Issue:** Was he able to claim *Bardal* principles for the 22 years that he had worked there?
* **Holding:** Held in favour of plaintiff. He had been fired without cause and employer was ordered to give him 24 months of severance. And the fact that the employer gave him shifting reasons as to why he was fired and they escorted him off the property the court awarded him additionally 30, 000 in aggravated damages.

# The Employment Relationship at Statute

#### Coverage: The Meaning of “Employee” Under Employment Standards Legislation

* Employment standards statutes typically apply only to “employees,” but the term “employee” is defined under the legislation in very general terms
* Courts have interpreted the meaning of that term purposively, in a way that brings within the legislation workers who are in a position of economic subordination to their employer and are part and parcel of their employer’s business, which excludes those who are independent entrepreneurs running their own business
* Self-employment and other forms of so-called atypical work such as home-based work, telecommuting, casual, and part-time work, along with unpaid internships, appear to be outside the scope of Employment Standards protections

##### Renaud (Re) (1999) – BCESTD – Interpretation of BC Employment Standards Act definitions

* **Facts:** Mr. Renaud was a ventilator-dependent complete quadriplegic who required personal care on a 24 hours basis as a result of a bad car accident. Ms. Spivey was hired and paid directly by Mr. Renaud as a personal care attendant. Ms. Spivey held no qualifications for this type of work and was trained on the job by Mr. Renaud’s mother. Ms. Spivey worked three days a week for 24 hours. She was paid for 13 hours of the day while the remaining 11 were her “rest” period though she was on-call throughout. She slept on the couch at her place of work in case he rang a bell or needed her help. She quit after 5 months. Mr. Renaud failed to pay Ms. Spivey for overtime, statutory holiday pay, and compensation for length of service. She brought an action under BC employment legislation, saying that she wanted to be paid for the entire 24 hour period. The original Director’s Delegate concluded that she was not one of the excluded professions (“live-in home support worker;” night attendant;” or “residential care worker”), which are excluded by regulations from the hours of work and overtime provisions of the BC *Act*. This meant she was entitled to pay for the full 24 hours of work and entitled to overtime wages. This decision was then appealed.
* **Holding:** Appeal allowed; Ms. Spivey is not protected by the *Act* as she was not an employee.
* **Analysis:** Ms. Spivey does not fall within the definitions of live-in home support worker, night attendant, or residential care worker. Rather, Ms. Spivey falls within the definition of a “sitter” as she attends to the care of another individual and was hired to work in a private residence, solely to provide the service of attending to Mr. Renaud. Because Ms. Spivey was considered a sitter she is excluded from the minimum standards of employment prescribed in the *Act*

##### Girex Bancorp Inc v Lynette Hsieh (2004) – ONLRB – Interpretation of Ontario Employment Standards Act definitions; there is a general drift by legislatures to close off loopholes with respect to payment and minimum standards in the workplace

* **Facts:** Mr. Schmidt is the owner and sole director of Girex Bancorp Inc, an e-commerce business, he is engaged at the early stages of a startup. Mr. Schmidt acquired the services of several recent immigrants through HRDC’s “Jobstart” program. HRDC pays the salaries of new immigrants under this program to assist them in gaining Canadian work experience. In October 2000, the Company began selling shares to raise necessary capital to fund its development costs, including the salaries of individuals with the necessary skill set to develop a software program (skills that the Jobstart immigrants did not possess). Mr. Schmidt made “training” opportunities available to students from the Institute of Computer Studies wherein the students would help develop software. Mr. Schmidt intended to provided “training” for the Claimants and then offer employment once financing was available. The financing did not materialize, and Mr. Schmidt offered the Claimants a contract to continue as independent contractors. The Company is no longer in operation and the Claimants are claiming wages for the time they worked for the Company. He offered them jobs as independent contractors, but they argued that they were employees, not interns or trainees and sued for wages.
* **Holding:** Claimants are employees, they did not meet the criteria of being trainees, it was not for their benefit, no evidence that the work was similar to that they would be getting in school and the benefit really all flowed to the owner of the startup.
* **Analysis:**
  + From *Employment Standards Act*
    - An “employee” includes a person who receives training from a person who is an employer
  + The majority of the proceedings focused on whether the “training” Mr. Schmidt provided the Claimants fit the definition set out in the *Act*
  + The following are preconditions which must be met to exclude those receiving training as employees:
    - The training is similar to that which is given in a vocational school
      * Board found that the work experience the Claimants received is not similar to that given in vocational school
    - The training is for the benefit of the individual
      * Training could not be said to be to the Claimants’ benefit as they were assisting with building a software program
    - The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained
      * The company should be doing something gratuitous in having an intern, and the benefit rests with you getting the training rather than with the company getting free labour
      * The Company reaped the primary benefit
    - The individual does not displace employees of the person providing the training
      * While the Claimants did not displace any employees, it is clear that the work the Claimants had been brought in to perform had initially been done by employees who were paid
    - The individual is not accorded a right to become an employee of the person providing the training
      * This prerequisite was met, the Claimants did not have a “right” to become employees
    - The individual is advised that he or she will receive no remuneration for the time that he or she spends in training
      * This prerequisite was met, there was no remuneration
  + As only two of the preconditions were met, the Board found that the Claimants were employees and entitled to minimum standards

##### New Jenny Nail & Spa v Qiurong Cao Jane and Director of Employment Standards (2016) – ONLRB – restatement of test of whether an individual is an employee

* **Facts:** Quirong Coa (“Coa”) is seeking payment for New Jenny’s failure to pay the minimum wage rate for all hours she worked, pubic holiday pay, and vacation pay. Jenny Nail submits that Coa was an independent contractor and therefore not entitled to the amounts claimed.
* **Holding:** Ruling in favour of the employee
* **Analysis:**
  + In *2006515 Ontario Inc*, the court held that there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor
  + It is important to note that whether or not an individual is an employee or independent contractor is a question of law to be determined after consideration of all relevant factors
    - Intention of the parties is relevant only to the extent that it reflects the actual arrangements made
  + *McCormick* stated that control and dependency are the main things to be assessed when determining whether an individual is an employee or not
  + In the current case, the Board found that Coa was an employee
    - New Jenny was responsible for determining the working conditions and financial benefit
    - New Jenny supplied the premises and the equipment
      * Also supplied work through booking of appointments
    - New Jenny determined what Coa would be paid and the hours she worked

# Statutory Minimums, The Contract of Employment, and the Common Law

##### Machtinger v HOJ Industries Ltd (1992) – SCC – attempts to contract out of ESA minimums will result in that clause being “null and void” and common law principles will be substituted

* **Facts:** Machtinger and Lefebvre were dismissed after being employed by the respondent for seven years. They were under indefinite contracts of employment to act as salespeople at a car lot. For Machtinger, the contract said that there was no notice period if they let him go. For Lefebvre, the employment contracts provided a two-week notice period on termination. They were earning $75,000 each a year. The employer gave each appellant four weeks’ pay in lieu of notice which was the amount required by the Ontario *ESA*. At common law, the appellants would have been entitled to a significantly longer period of notice. They sued for the difference between the common law and statutory entitlements, so they decided to sue for wrongful dismissal at common law.
* **Holding:** Ruling in favour of Machtinger; provided common law notice
* **Analysis:**
  + The two contracts at issue attempt to contract out of the minimum notice periods required by the Act
  + The common law principle of termination only on reasonable notice is a presumption, rebuttable if the contract of employment clearly specifies some other period of notice
    - Use *Bardal* factors to determine what would be reasonable notice
  + Fact that the contracts provided for less notice than required under the *Act* makes the clause null and void
    - This means that the appellants are entitled to common law notice
  + Employment contracts should always be interpreted in a way that protects the employee
* **Takeaway:** Employment contracts will be interpreted consistent with the liberal protections. Employment law, both the common law and the statutes, are there to address mischief. They are social protection provisions and where you have inequality in bargaining power, terms will be read strictly against the employer.

# Statutory Protection of Non-unionized Employees Against Dismissal for Cause

* Generally, non-unionized employees have little protection against unjust dismissal due to cost and time of litigation
* Unionized employees usually enjoy relatively comprehensive, cheap, and fast safeguards against unjust dismissal under collective agreements
* In all provinces except Quebec and Nova Scotia, non-unionized employees have rights against unjust termination and are afforded statutory remedy for when they are terminated without just cause or adequate notice
  + The most comprehensive statutory protection in Canada against the unjust dismissal of unorganized workers is set out in the *Canada Labour Code*
    - Provide for third party adjudication of claims of unjust dismissal
    - The just cause standards developed by adjudicators under these statutory provisions are very similar to those applied by collective agreement arbitrators
      * Main difference is that adjudicators rarely order reinstatement

##### Wilson v Atomic Energy of Canada Ltd (2016) – SCC – the Canada Labour Code does not permit dismissals on a without cause basis, even where adequate severance pay is provided; an employee can receive notice payment and reinstatement when dismissed without cause

* **Facts:** Atomic Energy Canada Limited (AECL) hired Wilson in 2005. He worked for 4.5 years before he was dismissed in November 2009. Wilson filed an “Unjust Dismissal” complaint in December 2009, claiming that he was unjustly dismissed contrary to s. 240(1) of the Code. AECL sent a letter in March 2010 saying that Wilson was terminated on a non-cause basis and was provided severance that exceeded statutory requirements. Mr. Wilson claimed that his dismissal was in reprisal for having filed a complaint of improper procurement practices.
* **Holding:** Appeal allowed
* **Analysis:**
  + The first Adjudicator held that an employer could not resort to severance payments to avoid a determination under the Code about whether the dismissal was unjust (*Redlon Agencies Ltd v Norgren*)
    - Federal court judge and FCA found this decision unreasonable/incorrect
  + SCC held that the Adjudicator’s decision was reasonable based on the text of the Code, the context, and the statements of the Minister when the legislation was introduced
    - Purpose of the scheme was to ensure that non-unionized federal employees would be entitled to protection from dismissal without cause
  + The Code requires reasons for dismissal

# Termination Pay Under Employment Standards Legislation

#### Entitlement to Individual and Mass Termination Pay

* During the various economic slumps in recent decades, there has been increased terminations for economic reasons
* In theory, a non-unionized employee in such a situation has some protection under the employment contract
  + Redundancy does not provide just cause for summary dismissal at common law and so the employer must provide “reasonable notice” or wages in lieu of notice when laying an employee off
* Generally, the length of notice increases with the employee’s service with the employer up to a specified limit
* Another level of protection consists of the mass termination provisions found in all Canadian *ESA* statues
  + Provisions typically require employer to give longer notice where large numbers are laid off in defined period
  + Rationale: more difficult to find other work if many of them are thrown into the labour market simultaneously
* Employers are usually required to notify the labour ministry of plans for a mass termination so that the ministry can help the parties alleviate the impact of the layoffs
  + Ministry may appoint a joint committee, consisting of government, employer, and employee representatives, to formulate plans for coping
  + The federal scheme is unique in Canadian employment law because it gives even non-unionized workers a right to participate in collective decision-making with the employer
* In Ontario and the federal jurisdiction, permanently displaced employees in defined mass-termination situations are entitled to a severance payment based on their length of service with the employer
  + In *Stevens v The Globe and Mail*, the ONCA held that severance pay had to be deducted from damages for wrongful dismissal
  + However, some courts have held that severance pay vests in the worker as a form of deferred wages and is therefore not deductible from damages for wrongful dismissal
* No provinces have given laid-off employees a statutory right to be recalled if work becomes available

# Status Under Collective Bargaining Legislation

* Bargaining unit
  + Group of employees who work for an employer and share some commonality in the work that they’re doing
    - E.g., all professors are a single bargaining unit
  + Separate from a union
* Collective agreement
  + has to be an (1) agreement and (2) has to be in writing (3) between employer and a trade union and (4) it has to deal with terms and conditions of employment
  + There is no limit to what can be included within the collective agreement
  + Can’t contract out of legislation through collective agreement
  + Under this, the bargaining unit will recognize the union as the exclusive bargaining agent for the unit
  + Several provisions mandate what must be in the collective agreement
    - **S. 45** - there has to be a recognition of the union as the exclusive bargaining nation somewhere in the collective agreement
    - **s. 46**- there has to be a no strike and no walk out position for the life of the collective agreement
    - **s. 47: Union security clause**- deducts unions dues every month off paycheck of employees and remit that money to union. This is Ran Formula. Even if individuals opt out of being a union member, they still have to pay union dues.
    - Any disputes during the life of a collective agreement between the union and employer over the interpretation or application of a provision in the collective agreement, the union cannot strike over that and it does not go to court, it **goes through a grievance process to an arbitrator**
    - **privative clause:** gives a degree of protection to the decisions of that administrative tribunal from being reviewed by the courts. There is in s. 48 a privative clause that states that decisions by labour arbitrators are to be final and binding.
* Two competing tensions in the Wagner Act. Labour law is all about managing this tension.
  + (1) Industrial Justice
    - what unions and employees want
    - they want to have their rights recognized in law, they want dignity at work, want to be able to exercise a meaningful voice through their union, they want to have a form of industrial citizenship
  + (2) Industrial production
    - employers want to be able to exercise their right to organize work, manage the workplace, produce revenues, sell what they are producing, want to be able to have a predictable culture of command and discipline in the workplace and they want to know that work stoppages wont occur except in the narrow definition when lawful strike can occur

# Who is an Employee? Who gets to be unionized?

* Major concern is that too broad a definition of "employee" will allow collective bargaining to cover economic relationships that do not really involve an employer-employee, but rather a buyer-seller of services
* Someone who is not performing managerial duties under labour relations, it is left up to the labour relations board to determine this as it is very vague
* Manager is not an employee for the purpose of labour relations legislation but they are an employee for the purposes of the Employment Standards Act
* Only those who are being directed by others, who are not performing supervisory or managerial jobs, are considered to be employees for the purpose of being able to form and participate in unions
* **union:** organization of employees formed for purposes including the regulation between employers and employees
* **exclusivity:** the union is now the sole bargaining representative for the 100 employees in that bargaining unit
* **strike:** union withdraws its about and refuses to engage in production
  + defined very broadly. S.1 states “includes a cessation of work, a refusal to work or to continue to work by employees including a slow down or any other form of concerted activity designed to limit production at that particular place of work” It is concerted action by 2 or more employees that has a common intention
  + can have either a lawful or unlawful strike
* **lock out:** when the employer closes the doors of the workplace and refuses to allow the employees to work. Industrial action taken by an employer.

#### Dependent Contractors – eligible to be unionized

* "Fourfold test" for employee vs. independent contractors, from *Egg Films* (below)
  + Takes into account four factors:
    - Control of the relationship
    - Ownership of the tools
    - Chance of profit
    - Risk of loss
* Sometimes this leads to confusion and exclusion of workers who should have access to the right of collective bargaining, so some legislatures adopted "dependent contractor" provisions:
  + Extend the reach of the term "employee" to cover some of the most problematic independent contractors
* Definition in ON *Labour Relations Act:*

"Dependent contractor means 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 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 contractor"

##### International Alliance of Theatrical Stage Employees … v Egg Films Inc (2012) – Nova Scotia Labour Board – Interpreting the Act in a manner which enables non-self-dependent workers in a particular industry to exercise their freedom of association and achieve certification of their union is consistent with Charter values and the purposes of the Act; in substance, are individuals more like an employee or more like an independent contractor in terms of control and economic dependence

* **Facts:** The Alliance applied to *Trade Union Act* s. 23 to become certified as the bargaining agent for certain employees of Egg Films doing technical work. Egg Films said it has no employees doing work described in the proposed bargaining unit and that it only uses independent contractors. The question was whether an occasionally paid worker is considered an employee for the purposes of the NS *Labour Relations Act* even if the employer has explicitly described their position as independent contractor.
* **Analysis:** 
  + SCC has reinforced notion that labour relations tribunals must be careful to ensure that in interpreting their constitutive statutes, they engage in purposive interpretational approach consistent with *Charter* values of freedom of association and upholds at least minimal core of collective bargaining rights (*Ontario v. Fraser*)
  + Also must take into account a broader socio-economic context – must balance promotion of economic efficiency with protection of vulnerable members of the workforce
  + Issue of "dependent contractors" is that it assumes on-going employment relationship of "dependency" on one employer, while many are actually dependent on numerous employers, and when they are working for a given employer they may be seen as employees for the purposes of the Act
  + The technicians in this case only gain small portion of income from Egg Films, but are dependent on Egg Films for their livelihood – they are dependent on the industry which Egg Films are a part of and they are part of
  + **Ratio:**
    - The four-factor test for employees (*Montreal Locomotive*) boils down to two questions:
      * Whether the worker is controlled by the employer/client
      * Whether the worker is economically independent
    - "Non-self-dependent" personal workers can be "employees" where the facts so warrant
    - Interpreting the Act in a manner which enables non-self-dependent workers in a particular industry to exercise their freedom of association and achieve certification of their union is consistent with Charter values and the purposes of the Act
      * Section 2(d) of the *Charter* includes the freedom of association
* **Holding:** The technicians are employees.
  + They agreed to become integral part of the shoot, agreed to perform work under supervision of Egg Films
  + Not a long period of subordination but were fully integrated into shoot's activities which was not in their hands
  + Not totally dependent on Egg Films for income, but they are part of a workforce in the local film industry which is generally available for personal hire by production companies like Egg
  + Film technicians not self-dependent but dependent on the industry to which they and Egg Films are a part
* Different jurisdictions take different approaches to the appropriate bargaining structure for dependent contractors
  + BC brings together dependent contractors and other employees in a single bargaining unit
  + ON favours a more fragmented structure

# Excluded Employees

* *ON LRA* has a long list of wholly or partially excluded groups including civil servants, firefighters, police officers, agricultural workers, domestic workers, etc.

#### Professionals

* Some Canadian jurisdictions still exclude certain groups of professionals from scope of collective bargaining legislation (e.g. physicians, lawyers, dentists, architects)
* General trend though toward professionals embracing collective bargaining successfully (nurses, engineers, teachers, uni profs)

#### Public Employees

* Rate of unionization in public sector in Canada today far exceeds that in the private sector
* Most Canadian civil servants are covered by special public sector collective bargaining statutes which vary considerably across country but put more restrictions than private sector labour relations on right to strike and bargaining

#### Managerial Employees

* Labour relations statutes have traditionally tried to draw a clear line between those who are "employees" and those who exercise "managerial functions"
* Employees may bargain collectively under the Act but managers may not
* managerial employees are excluded from forming a union

##### Re Burnaby (District) and CUPE (1974)

* **Issue:** Whether there should be managerial exemptions for a particular union draw that was going on?
* Whiler gives rationales why managers and supervisors are not in the same bargaining unit as employees because management has to be able to depend on employees who will do their direction of the work, who will wind uptaking high ranking managerial orders and then commanding the workforce to perform specific tasks. This protects the employer but also the employees and the trade union.
* True bargaining requires an arm's length relationship between employers and unions
* **Ratio:** Management must be assigned to the side of the employer, as the employer wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement adhered to
  + Also ensures that unions are independent and not dominated by the employer due to the managers that would otherwise be a part of the union
  + Ensures there is no undue influence by the employer

##### Captains and Chiefs Association v Algoma Central Marine (2010) – CIRB – Canada Labour Code has a much broader definition of employee and so managers can sometimes unionized under this Code; the traditional indicia of management responsibility are authority over employment conditions of other employees, particularly the authority to hire, fire, promote and discipline employees

* **Facts:** Algoma owns/operates Canadian-flagged ships. The commercial and operational aspects of their dry-bulk fleet are the responsibility of SMT but the shipboard workforce including captains and Algoma employs the chief engineers. Application made to the board for CCA to represent these 60+ captains and chief engineers.
* **Issue:** Are the captains and chief engineers "employees" or do they perform management functions and thus excluded from unionization
* **Analysis:** 
  + The traditional indicia of management responsibility are authority over the employment conditions of other employees, particularly the authority to hire, fire, promote and discipline employees
    - The captain was found to have no independent authority to hire employees nor advance employees
    - They could discipline but this can be overridden by HR
    - They can fire within limits and this authority is no greater than any first line supervisor
    - No evidence that meetings involving captains and chief engineer's are intended to be decision-making meetings
      * They must seek approval of ship manager for any unbudgeted expenses
  + A master's position on board a vessel is similar to airline pilots and locomotive engineers and conductors – all highly unionized
    - Trained professionals who are in charge of transporting an important vehicle with valuable cargo
    - Operate under detailed government regulations and company policy
* **Held:** While they have supervisory responsibilities, evidence did not persuade Board that they have the level of independent decision-making authority to find them as managers within meaning of the Code. Certification issued.

##### Children's Aid Society of Ottawa-Carleton (2001) – ONSC – Onus is on employer to establish the supervisors perform managerial functions within the meaning of the Act

* **Facts:** OPSEU applied to represent a unit of 43 supervisory social workers who had traditionally been excluded from a CUPE bargaining unit containing non-supervisory workers, counsellors and support staff. These supervisors had informally bargained with employer but now wanted to be represented by a certified union.
* **Issue:** Whether the supervisors and managers can be in a separate union as well?
* **Analysis:**
  + Supervisors are the front-line of management and supervise employees in the bargaining unit directly
  + Have independence in hiring, carry out performance reviews, discipline employees – which is a key factor
  + Onus is on employer to establish the supervisors perform managerial functions within the meaning of the Act but over the years the relationship between CAS and OPSEU has been to treat the supervisors as excluded employees exercising managerial functions
* **Held:** The supervisors in this case do exercise managerial functions, despite constraints, and are denied access to collective bargaining as structured

##### Ontario Public Service Employees Union v Family Services of Hamilton-Wentworth (1980) – CLRBR

* Board considered whether employee-directors of social service agency exercised independent decision-making authority which would bring them within the exclusion
* **Held:** Because of the nature of the employer, composition of its workforce and history of employee involvement, employee-directors not considered managers

#### Confidential Employees – very narrow definition for exclusion

* Section 1(3)(b) of Ontario *Labour Relations Act*
  + Confidential Employees are not permitted to be able to join trade unions
  + Confidential employees: those employees who are employed as clerical assistance to managers who would have access on a regular basis to confidential industrial relations information.
* Except in Quebec, Canadian collective bargaining legislation excludes employees employed in a confidential capacity in matters relating to labour relations
  + Based on possible conflict of interest
  + E.g., individual with regular access relating to labour relations strategy or grievances under a collective agreement from the employer’s perspective
    - Excluded because they are privy to information about how employer strategizes with union

##### Grande Prairie Roman Catholic Separate School District v CEP, Local Union No 328 (2011) – CLRBR – test for exclusion as a confidential employee

* **Facts:** The District applied to have two people excluded from a bargaining unit represented by a union, saying they perform managerial functions and are employed in a confidential capacity in matters relating to labour relations. The people work in the Employer's central office as a payroll officer and finance officer.
* **Analysis:** 
  + Three-fold test to determine whether exclusion is warranted (all parts must be satisfied):
    - Do the person's duties involve labour relations activities, information handling or strategy?
    - Is the involvement with this info on a regular basis as opposed to incidental or accidental? And
    - Would disclosure of the information adversely affect the employer's interests in industrial relations?
  + Neither individual is involved in matters relating to labour board proceedings but they do have some connection to collective agreement negotiations
  + One of them knows the specific wage and benefit changes contemplated in the budget, while the Union does not – her participation in the creation of the budget and her ongoing monitoring of and support regarding the Employer's financial circumstances place her within the confidential labour relations exception found under section 1(1) of the *Code*
  + The other's knowledge of options being considered by the Employer during bargaining and before bargaining even starts makes her privy to collective bargaining strategies being considered by the Employer
* **Held:** Both are excluded from the bargaining unit
* See also *Sulthum* (2000) – ABLRB
  + **Facts:** Involved a secretary to the managing editor of a newspaper. Managing editor has some role over industrial relations in the workplace
  + **Issue:** Is she excluded as an employee due to her access to information about industrial relation?
  + **Analysis:** She had access to employee files but does not work for the manager of HR and her occasional access is not related to the work she was doing.
  + **Held:** She was considered an employee

# Qualified Trade Unions

#### The Union as an Organization

* S.3(1) of the Canada Labour Code defines a trade union as "any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees"
* Labour boards have held an organization must meet certain requirements of form to be recognized as a trade union under this legislation
* Trade Unions regulate the relationship between employer and the workplace
* **Employee:** includes a dependant contractor
* **Collective agreement:** Agreement in writing that governs the relationship between the employer and workplace that lays out the terms and conditions of employment
* WHEN DISCUSSING DEFINITION USE THE STATUTORY DEFINITION AND U OF T CASE LAW DEFINITION
* **trade union:** organization of employees formed for the purposes that includes the regulation of industrial relations

##### Ontario Workers' Union v Humber River Regional Hospital (2011) – CLRBR – five-step facilitative test for determining whether a trade union exists

* **Facts:** ON Workers' Union trying to be certified. The incumbent union and employer argue the applicant is not a trade union under the *Labour Relations Act*, they say it had no officers because the organization's constitution did not provide for the election of founding officers and the founding members were not employees
* **Analysis:**
  + From *Canadian Labour Congress v U of T* (1999) OLRB, case law establishes that: USE THIS DEFINITION
    - Trade unions are unincorporated associations of individuals
    - Two or more such individuals who have agreed to be bound by the terms of an identifiable written agreement between them
    - One of the purposes of organization, usually expressed in constitution, must include regulation of relations between employee and employers
    - The organization must be viable and therefore must have at least one officer, official, or agent to act on its behalf
  + "Five-step" Guideline for those wishing to set up a trade union:
    - 1) A constitution should be drafted setting out the purpose of the organization and procedure for electing officers and calling meetings
    - 2) A constitution must be placed before a meeting of employees for approval
    - 3) The constitution should be adopted or ratified by the vote of said members
    - 4) The employees attending such a meeting should be admitted to membership
    - 5) Officers should be elected pursuant to the terms of the constitution/ collective agreement
  + Although the Constitution in this case lacks a specific process for the election of officers, the only members of the organization became directors as was contemplated by the Constitution
  + The Constitution was not very clear, but it still had an identifiable set of rules that render the organization legally viable for the purpose of the Act
    - Had a process for amendment to “clean up” the constitution
* **Held:** The applicant was a trade union, therefore they could raid and displace the union.

##### Smith & Rhuland Ltd v Nova Scotia (1953) – SCC

* **Facts:** Appeal of an order made by the Labour Relations Board rejecting application by Union of Marine and Shipbuilding Workers for certification as the bargaining agent on the basis that the union was dominated by a Communist
* **Ratio:** The Board is not empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization
  + There must be some evidence that the influence of that person has led to the destruction of the purposes of the union before it can justify the exclusion of employees from a statute created primarily for their benefit
  + No law against holding communist views nor of being a member of a group/party supporting them

# Employer Influence

* Management interference with or domination of unions is prohibited by labour relations legislation as an unfair labour practice
* S. 15 of Ontario *Labour Relations Act*: forbids certification of a union "if any employer … has participated in its formation or administration or has contributed financial or other support to it"
  + Unions and employers must have an arms length relationship with employers.
  + The board shall not certify a union if any employer participates in the formation or administration, has contributed financially to it or if the union has discriminated against anyone against the Charter or Human Rights Code
* If an association happens to have some people in it who were found by the board to be managers but who were not doing management's bidding, the association would not be disqualified the association from certification if the rules made such people ineligible for membership and if they were expelled when managerial status became known (*Children's Aid Society*)
* *OSSTF v Toronto Board of Education* (1994) OLRB
  + "The composition of an organization's membership, although in certain circumstances relevant to the question of whether a trade union is *dominated* by the employer … does not enter into the question as to whether that organization is a trade union"
  + An association may still be a trade union if it permits the admission of non-employees
* *BC Transit and Transit Management Assn* (1990) BCLRB
  + An employee organization does not have to be committed to an adversarial form of collective bargaining in order to qualify as a trade union

# The Employer for Purposes of Collective Bargaining

#### C Michael Mitchell & John C Murray, Changing Workplaces Review: Special Advisors' Interim Report (ON Ministry of Labour July 2016)

* Increasingly, organizations do not always operate as a single employer that directly hires its workforce and controls all aspects of its business
* Businesses may subcontract supervision, not clear who the employer is
* Several policy questions arise in these situations – ex. whether a collective bargaining relationship can be effective if parties who also impact the relationship are not at the table

#### True Employer

* When there is more than one potential employer for a group of employees under the LRA, the OLRB will determine which is the true employer on case-by-base basis
* Considers numerous factors, like whether a party:
  + Exercises direction and control over the workers
  + Has authority to dismiss employees
  + Is perceived by the employees to be the employer; and
  + Whether there exists an intention to create an employer-employee relationship
* No single factor is determinative – look at full picture
* Has considered other factors in *Pointe Claire v Quebec (SCC)* including: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business

##### Pointe-Claire (City) v Quebec (Labour Court) (1997) – SCC – assess the fundamental control over the employee regarding the working conditions when determining who the real employer is

* **Facts:** Labour Court decided a temporary employee of Pointe Claire city who had been hired through a personnel agency was included in the bargaining unit of the union the represented the City's permanent employees. Employee who gets registered at a temp work agency and they place her with Municipality of Pointe Claire who needs someone for part time basis. Agency receives a fee for placing her and employ the worker. Initial period was for 6 weeks, she took a break for Christmas, then went back for 18 weeks and then the city ended up hiring her on full time basis. For the entire time she was working as a temp, she would have been in the bargaining unit therefore for 24 weeks total. Employer owes union dues but the city said no because she was not their employee until they hired her permanently at the 25th week mark.
* **Issue:** For the first 24 weeks, who was the employer of this employee?
* Looking at who selected her, who hired her. who paid her, who supervised her performance at work, who had the capacity to discipline her, and who controlled the working conditions? The temp agency or the employer?
* **Analysis:** 
  + Personnel agencies are occupying an increasing share of the labour market
  + Both the agency and the client have some traditional attributes of an "employer" – leads to a splitting of the employer in a tripartite relationship
  + Note - This court only has to decide whether they made an unreasonable decision by holding that the City was the person's employer
  + Uses comprehensive approach in *Hopital Royal Victoria v Vassart*: In a tripartite situation, the control test is too rigid and does not take into account other fundamental aspects that are important
  + Legal subordination and integration into the business criteria should not be used for identifying real employer
  + The OLRB and CRLB have noted the test for identifying an employer/ee relationship in a tripartite context is that of fundamental control over working conditions (looking at several factors)
* **Held:** Found that the work she performed for the first 24 weeks was at the direction of the city even though she was technically employed and paid by the temp agency. It was City Hall who directed her, who indirectly paid her, who evaluated her performance, who had the power to discipline her therefore when you weigh who had the ultimate control over her, it was the city. Therefore, she was employed for the entire period of time and employer owed 24 weeks of union dues.
  + Labour Court's reasoning was not patently unreasonable

#### Related Employer

* The OLRB has the power to treat related businesses as a single employer for the purposes of the *LRA* where they carry on related/associated activities under common control or direction
* Sometimes treats franchisors and franchisees as related employers

##### White Spot Ltd v British Columbia (Labour Relations Board) (1997) – BCLRB – The control exercised by a franchisor in a franchise arrangement and whether that degree of control is sufficiently dominant to be common control or direction of the franchised operations are inferences flowing from the evidence; question is whether there is functional interdependence between the employers

* **Facts:** Labour Board declared White Spot and Gilley Restaurants to be a common employer pursuant to Code. White Spot sold Gilley a White Spot restaurant, employees of which are members to a union and have collective agreement with White Spot. Gilley accepts it is bound by the terms of agreement. The restaurant was unionized so when it was unionized, the question became who was the true employer? Was it White Spot or Gilley Restaurants?
* **Issue:** Was there an arms length relationship between White Spot and Gilley Restaurants such that they were independent enough franchisees that they could make distinct corporate decisions or was there sufficient common control and direction between the two that they were in effect one business?
* **Held:** The Board made an extensive inquiry into the franchise arrangements and reached conclusions as to White Spot's degree of control – no reason to say that its factual conclusions are patently unreasonable. Petition dismissed. White Spot so dominated the agreement, that they effectively controlled most of the bargaining that would take place between the union and Gilley Restaurant. They were a common employer under R s. 1(4)
* **Analysis:**
  + The control exercised by a franchisor in a franchise arrangement and whether that degree of control is sufficiently dominant to be common control or direction of the franchised operations are inferences flowing from the evidence
  + Board found them as common employers because of several factors
    - White Spot controls menu prices, and the operations about how Filly Restaurant ran the White Spot restaurant, has a lot of requirements and approvals for Gilley to abide by, etc.
  + Looking at the fact that Gilley was buying all its products from White Spot, was required by agreement to let White Spot have a certain control over the profits, White Spot controlled the marketing, white spot controlled the managerial training so there was not a huge amount left to do by Gilley.
  + Found that White Spot continued to control Human Resources aspects of the Gilley Restaurants businesses.
  + The test is a functional independence test (page 395)

#### Successor Employers

* In the absence of any statutory provision to the contrary, the concept of the "corporate veil" means that a change in the employer's corporate identity puts an end to any statutory bargaining rights by which the old employer was bound and to any collective agreement pursuant to those rights
* Now, all Canadian labour relations statutes have provisions to protect existing bargaining rights when the business is sold or transferred
* The court will be flexible in finding a sale of a business (*Ajax v National Automobile, Aerospace…Union of Canada*)
* A successor employee will inherit a pre-existing collective agreement

##### Hospitality & Service Trades Union v Service Star Building Cleaning Inc (2013) – OLRB – test for when there was been the sale of a business for the purposes of carrying over a collective agreement; however broad sale of a business is to be interpreted, it is not so broad as to cause recognize the sale of a business without continuity between the employing organization and the type of work

* **Facts:** Applicant is requesting declaration that Service Star is a successor employer to ARAMARK and continues to be bound by the collective agreement between applicant and ARAMARK. In assuming the cleaning and maintenance contract previously held by ARAMARK, Service Star took over the employees, including three managerial personnel, who had been working for ARAMARK. According to HSTU, the employees were also directed to continue using some of the equipment they had used when working for ARAMARK, although the employees were issued new uniforms, mops and pails. Service Star did not acknowledge the pre-existing collective agreement that governed the employees.
* **Held:** Board unable to find "necessary link" which facilitates or caused sale of ARAMARK's business to Service Star
* **Analysis:** 
  + Two step analysis set out in *Metropolitan Parking*:
    - Has there been a "sale" within the extended statutory definition of that term (basically just that a transfer has taken place) 🡪 no evidence in this case, just a continuation of work
    - Whether what has been transferred or sold is a "business" as opposed to a mere transfer of assets.
* There was no flow through of the bargaining rights
  + There was a clear line between when ARAMARK’s contract ended and when Service Star’s contract began
* In 2017, the Ontario *Labour Relations Act* was amended
  + Includes changes to the meaning of “sale of a business” under section 69(3)
    - 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

#### Contracting Out

* Ontario has dispensed with the need to demonstrate a sale of a business had taken place if "substantially similar services are subsequently provided at the premises under the direction of another employer"

##### Re Canada Post Corp and CUPW (2013) – CLRB – test for declaration of a single employer is the degree of inter-relationship between the main employer and those it contracts with

* **Facts:** CPC is a federal crown corporation, employs 60k employees, enters contracts with external service providers. CUPW (trade union) made application to have CPC and RMS Pope a single employer – RMS Pope is Newfoundland based company that entered into several contracts with CPC to provide services in the Atlantic provinces.
* **Held:** Application dismissed. Code contains alternatives to common employer declaration, intended to address the economic consequences of contract tendering system. Board declines to extend concept of the labour relations purpose to encompass notion that a contractor's employees should be fully insulated from the normal consequences of contract tendering and retendering. The contracts were legitimate, it was not a form of contracting out.
* **Analysis:**
  + The main purpose is to deal with complex corporate relationships that conceals the true relationship between an employer and those working for them
    - Meant to avoid the erosion of bargaining rights
  + Well known criteria must be met before consider making a declaration of single employer under s 35 of Code (from *Murray Hill Limousine*)
* There must be two or more businesses
* Both under federal jurisdiction
* That are associated or related
* Of which at least two, but not necessarily all, are employees, and
* Which are under common control or direction
* Even then, the Board has discretion as to whether a single employer declaration should be issued
* In this case, the Board is satisfied there are two or more enterprises.
* Common ownership is not required for a finding that two enterprises are associated/related – it is sufficient if the businesses are interrelated and complementary 🡪 satisfied in this case
* Board is unable to find the two companies are under common control because RMS Pope operates independently without reference to CPC's employment policies and strategic plans, but looking at the totality of the evidence and interaction between CPC supervisors and RMS employees, sufficient to conclude common direction exists
* No evidence that the contracts with RMS have been used by CPC to undermine CUPW's bargaining units, no evidence that the work of unionized CPC employees has been transferred to lower paid unionized employees of RMS or CPC is avoiding obligations under the Code

# The Right to Join a Union

* Section 5, Ontario *Labour Relations Act*: Every person is free to join a trade union of the person’s own choice and to participate in its lawful activities.
* Unfair labour practices provisions are covered under sections 70, 72, and 76 (always list all three if you are bringing a claim for unfair labour practices)
  + Union lawyers will always argue breaches of all three
  + These sections govern the bargaining phase and the entire relationship afterwards
  + These provisions are one of the key elements of the *Wagner Act* compromise
  + These provisions guarantee that a range of unnamed events would amount to an unfair labour practice, in effect, if we are trying to manage the relationship between unions and employees on one hand and employers on the other, unfair labour relations put restrictions on both sides, but mostly on employers, not to interfere with the formation, the selection or the administration of a trade union
  + **Section 70:**
    - employer cannot interfere in the formation, selection or administration to a trade union nor can it contribute financial support to a trade union and nothing shall be done to deprive an employer of its freedom of expression as long as its freedom of expression does not amount to coercion, intimidation, threats, promises or undue influence
  + **Section 72:**
    - No employer shall refuse to employ or refuse to continue to employ of discriminate against somebody because they are in favour of a union or are involved in union activities
    - Prevents an employer from putting a provision in contract binding an employee to never support or join a trade union
    - Ensures that employer cannot interfere with either administration of a union or are employees join to join or participate in a union
  + **Section 76**
    - No employer and no trade union shall try to seek by intimidation o coercion to compel someone to belong to or refrain from belonging to a trade union
* **Section 96(5):**
  + Reverse onus provision
  + This is the enforcement provision of the *Labour Relations Act*
  + The employer is deemed to know information as to why someone was fired so burden begins with them.
  + **Taint Theory:** I may have 5 reasons for why I fired you, and it may be true that you did not have the highest performance evaluations or that you were late a few times but if one of the 5 reasons why I fired you was because you were involved in the union drive, as a union sympathizer or an inside leader of the union drive that is sufficient to taint the entire reason to fire them
  + If a union brings an unfair labour practice allegation or a duty to bargain in good faith allegation against an employer, the onus starts with the employer to justify that it did not commit an unfair labour practice. Employer bears the onus under this section to prove that it did not violate the *Labour Relations Act*
* **Section 11:** Automatic certification provision
  + If there has been an unfair labour practice committed by the employer during certification campaign such that it is impossible to discern the true wishes of the employees, the union is then entitled to make a filing under this section saying that the unfair labour practice committed by the employer put a “chill” on the organizing of this certification drive. If the Board accepts that an unfair labour practice occurred and it is persuaded that holding a certification vote would be unlikely to reflect the true wishes of the employees because the intimidation level has likely gone up considerably, the Board has a choice. They can order a new vote if they thought the true wishes of employees would be reflected. If they do not think they could be reflected, then they can automatically certify the union, notwithstanding that the most it ever received in terms of support were say the 25% of employees who signed the cards.
  + If during a union organizing drive and then an employee is fired and this causes the union organizing to go cold, this section allows for the union to apply to the LRB alleging that an unfair labour practice occurred and if the LRB upholds that allegation, one remedy is automatic certification
  + Bill 148 made it easier for a union to get automatic certification under this section
    - Just had to prove unfair labour practices and that a vote would not represent the true wishes of employees
    - Bill 47 may repeal this
      * Union has to show an unfair labour practice and then the board can order a vote or not
* **Section 86:** Statutory freeze
  + Restricts the changes to employee working conditions that can occur once union has filed an application for certification through the LRB
  + Fairly broadly interpreted statutory provision
  + Meant to limit the ability of employers to unfairly interfere with what is supposed to be an employee’s free choice to join a union or not

# Non-Motive Unfair Labour Practices

* Covered under s. 94(1) of the *Canada Labour Code* and s. 70 of the Ontario *Labour Relations Act, 1995*

##### Canadian Paperworkers Union … v International Wallcoverings … (1983) – ONLRB – In the absence of an anti-union motive, it is not a violation if the employer’s conduct simply affects the trade union in pursuit of an unrelated business purpose; The onus is on the employer to demonstrate a credible business purpose to justify conduct; two narrow exceptions to the fact that subjective intent must be proven.

* **Facts:** A union already existed. There was a lawful strike between the Union and International Wall Coverings. Employer is going to bring in strike replacement workers, temporary workers hired to perform bargaining unit work that the employees are striking over. The company kept its operations going during a legal strike by using agency-supplied strikebreakers who were picked up at secret locations each morning by the agency and driven to the plant in adapted vans. The strikers learned that the strikebreakers would be picked up at a restaurant and a number of strikers showed up there at the pickup time. Nine striking employees go to the restaurant and confront them. A fight breaks out. 9 strikers were dismissed as a result of the altercation. Employer honestly believes that all 9 striking employees had gone there involved in intimidation, coercion and assaults.
* **Holding:** Two employees properly dismissed, four reinstated
* **Analysis:**
  + There were 3 alternatives that union has to try to defend workers that got fired during lawful strike when there is no collective agreement or automatic access to arbitration:
    - (1) If the union has a fair amount of bargaining power, when the strike is over, the union could force the employer to waive the dismissals and take the 9 employees back as part of the Back to Work Protocol. Did not happen here- union did not have enough bargaining power
    - (2) If union has some bargaining power, during the back to work protocol, they could make as special agreement with the employer that they will send the 9 cases off to an arbitrator, they will appoint a special arbitrator, and the arbitrator will decide whether or not the picket line incidences were serious enough to justify dismissal or reinstatement with some suspension or full reinstatement
    - (3) If union has no power at all, the union would go to the Labour Relations Board and they would say that there was an unfair labour practice committed in the firing of the 9 employees.
      * Problem is that the union is going to have to show that there was subjective intent by the employer that it had anti-union feelings towards the workers and that’s why they fired them
      * They must try to prove that the employees were fired for anti-union animus but in this case the employer honestly believed that the 9 employees actually engaged in misconduct
      * This is what the union here did
  + 3 of the 9 workers were involved in the assault, 2 of the 9 were mistakenly identified as being there but they in fact were not, the other 4 were taunting the strikebreakers at the restaurant but were not involved in any assault or threatening of assault
  + There were differing fault requirements in the Ontario *Labour Relations Act*
    - Section 66 and 70 (now 72 and 76) required motive while section 64 (now 70) is expressed in terms of effect and motive is not mentioned
      * 64 does not require intent to interfere with a trade union
  + Past decisions have read into section 64 that there is an exception for employer conduct that only incidentally affects a trade union
    - Distinguish between legitimate and illegitimate management initiatives
  + Have to find a balance between bona fide management action and any adverse impact upon trade union activity
    - In the absence of an anti-union motive, it is not a violation if the employer’s conduct simply affects the trade union in pursuit of an unrelated business purpose
    - The onus is on the employer to demonstrate a credible business purpose to justify conduct
  + The improper motive need not be the dominant purpose underlying disputed conduct for the Act to be breached
  + Judges comes up with a middle path and says that in most cases you need to show subjective intent except in 2 exceptional areas:
    - (1) Where an honest mistake has been made by the employer
    - (2) Where the punishment imposed by the employer was disproportionate to the offence
  + In the current case, the respondent contends that the manner in which the grievers attended the restaurant demonstrates that their arrival was not a simple extension of the picket line but was a concerted attempt to interfere unlawfully with the pick-up and workers involved
    - This employer had never committed unfair labour practices before
    - The grievers were discharged because of their unlawful assault of other workers, not because of the fact they were engaged in a strike
    - The grievers who were not involved in the assaults should not have been dismissed and were ordered to be reinstated. They were reinstated under exception 1.
      * This is a breach of section 66 (now 72)
        + Even though it was an honest but mistake belief
    - The griever who assaulted the bus but not people should also be reinstated but without back pay
    - The grievers who assaulted the strike breakers should have been dismissed. There is no hope for them, they did not fit under either of the two exceptions above

##### Canadian Broadcasting Corp v Canada (Labour Relations Board) (1995) – SCC – unfair labour practices are assessed under an objective test at a federal union; there is broad protection of unions in the right to choose their leadership

* **Facts:** The union filed a complaint with the CLRB alleging that the CBC had breached several sections of the *Canada Labour Code* surrounding ULPs. Dale Goldhawk was CBC host and president of union. During federal election, Goldhawk was outspoken opponent of NAFTA and free trade. He wrote an article in Union newspaper highly critical of free trade. CBC found conduct unacceptable, as he was both host and president. CBC asked that he choose to leave one of the positions. He chose to step down as president. Union filed a complaint against CBC for interference with the administration of Union's business. The Board considered the issue of whether Goldhawk's conduct was protected by the Code. They found that it was and that the CBC violated the Code. It was reasoned that the article was directed at the Union and so was protected under the Code.
* **Holding:** Appeal dismissed
* **Analysis:**
  + Under the Federal code, the intention of the employer does not matter and the code only looks at the effect of the employer’s actions
  + Union has the right as an independent, arms length, industrial institution to be free to choose its leadership from the entire group
    - The employer cannot set standards that would stop members from joining the executive
      * This would create a disincentive to be involved in union activities
  + The Federal Court of Appeal held that the standard of review was patent unreasonableness and found that on the facts the Board decision was not patently unreasonable
  + The issue before the Supreme Court was the decision of the Board was a question of jurisdiction, which would set a standard of review of correctness, and whether a different standard of review should be applied to external statutes such as the Canada Labour Code
  + The decision of the majority of the Board was arrived at in a principled manner and was not irrational
    - Board set out an analytical framework
    - Board was entitled to apply the law as found in existing decisions to new and analogous facts

##### Westinghouse Canada Ltd (1980) – ONLRB – an employer suffering from economic difficulties caused by collective bargaining-related factors cannot circumvent the union

* **Facts:** Employer decided to close centralized manufacturing operation and open new plants at different locations. The old plant was unionized, and the new ones were deliberately placed in areas with little union presence
* **Held:** Board concluded that the employer was motivated by unfair labour practices

##### Kennedy Lodge Nursing Home (1980) – ONLRB – a desire to save money and thereby increase profits is not equivalent to an anti-union motivation simply because the money saved would otherwise have been paid as wages to employees in the bargaining unit

* **Facts:** Employer had contracted out its housekeeping and janitorial functions and laid off 65 employees represented by the union. The employer testimony indicated that the decision was made to save money
* **Held:** Employer was not motivated by unfair labour practices.

# Alteration of Working Conditions: The Statutory Freeze – 86(2) and 86(1) of Ontario *Labour Relations Act*

* Collective bargaining legislation provides for a two-stage “statutory freeze” that prohibits the unilateral alteration of terms and conditions of employment
  + First during the certification process – section 86(2)
    - Begins when an application for certification is filed and ends when the application is dismissed or after the certificate is issued
  + Then during much of the bargaining process after certification – section 86(1)
    - The bargaining stage of the freeze begins once notice to bargain is given and continues until the parties are in a legal strike or lockout position or the collective agreement is signed
      * **Section 16** is the notice to bargain provisions for a new collective agreement
      * **Section 59** is the notice to bargain provisions for the renewal of the collective agreement
        + Has to be given in the last three months of the existing agreement
* The freeze aims to restrain employer conduct that may have the effect of undermining the union’s organizing or negotiating efforts
* Anti-union motive on the employer’s part is not required for a breach of the freeze provisions
* SCC in *United Food and Commercial Workers v Walmart* (2014)
  + The purpose of the freeze provision is to maintain a balance or the status quo during the negotiation of a collective agreement
  + Limits the primary means available to an employer to influence its employees’ choices
  + Exists to foster the exercise of the right of association
  + The essential question in applying section 59 is whether the employer unilaterally changed its employees’ conditions of employment during the period of prohibition
  + Union must show
    - That a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired
    - That the condition was changed without its consent
    - That the change was made between the start of the prohibition period and either the first day the right to strike or to lock out was exercised or the day an arbitration award was handed down
  + The condition of employment was to be given large and liberal interpretation
    - Includes anything having to do with the employment relationship on either an individual or a collective level
* A change to a condition of employment does not violate the freeze provisions in the following circumstances:
  + It is consistent with the employer’s past management practices
  + It is consistent with the decision that a reasonable employer would have made in the same circumstances
* **Section 86(1)** statutory freeze ends when either the employer and the union have concluded the negotiations for a first collective agreement OR if a lawful strike or lockout occurs because they could not reach collective agreement
* If employer and union are negotiating a renewal of a collective agreement, then it ends when either (a) they sign a new collective agreement or (b) they engage in a lawful strike or walk out

##### Simpsons Limited v Canadian Union of Brewery … Workers (1985) – ONLRB – when determining whether a statutory freeze is breached by the employer, ask what would a reasonable employee expect to constitute his or her privileges in the specific circumstances of that employer; the test should not be unduly narrow; layoffs and contracting out can be reasonably expected in some cases (business as usual)

* **Facts:** The employer was in financial difficulty. The union had recently acquired bargaining rights for one of the employer’s manufacturing facilities in Toronto. Just before the union gave notice to bargain, the employer gave layoff notice to more than one-tenth of its nationwide workforce, including a substantial number in the recently certified unit. The functions of most of the laid-off employees in the unit were discontinued but some were contracted out. These layoffs occurred during the statutory freeze. The union alleged a violation of the Ontario *Labour Relations Act*.
* **Holding:** Board said that test should really be the reasonable expectations approach. Would the employees expect that this would occur? It is more flexible, pro employer. Held the employer did not breach section 86(2) because the employees should have reasonably expected there would be a layoff if the company was facing financial difficulties.
* **Analysis:**
  + Instead of concentrating on “business as before” the Board considers it appropriate to assess the privileges of employees which are frozen under the statute and delimit the otherwise unrestricted rights of the employer but focusing on the “reasonable expectations” of employees
  + The “reasonable expectations” approach incorporates the “practice” of the employer in managing the operation
    - What would a reasonable employee expect to constitute his or her privileges in the specific circumstances of that employer
    - This test must not be unduly narrow given that some types of management decision do not occur every day
      * E.g., where a pattern of contracting out is found, it is sensible to infer that an employee would “reasonably expect” such an occurrence during a freeze
  + Employer proved that the layoff was due to provable economic conditions and that there was no anti-union animus in the conduct of its decision.
  + When examining layoffs, employers are generally expected to respond to changing economic conditions through the hiring, termination, and attrition of employees
    - It is in this sense that it is “reasonable” for employees to expect an employer to respond to a significant downturn in the business with layoffs, even where such layoffs are resorted to for the first time during the freeze
    - The magnitude of the layoffs must be proportional or relative to the severity of the economic circumstances

##### Ontario Public Service Employees Union v Royal Ottawa Health Care Group (1999) – ONLRB – pay attention to how the proposed change in employment conditions relates to bargaining; if it is something that should be negotiated or might disrupt the bargaining process then there is a breach; employer can demonstrate a compelling economic reason for acting the way it did. Current test that is in Ontario today.

* **Facts:** There was a statutory freeze. The hospital admitted that it reduced the level of employee benefits during the negotiation for a collective agreement. Hospital said this was due to serious budget constraints. The union brought forward a complaint that the hospital’s actions violated the freeze.
* **Held:** New test. Not an absolute freeze on employers activities, it is a strict freeze. It does away with the *Simpsons* test. Says that employers can make changes if economic circumstances require it UNLESS it is something that the employer would normally bargain about (this last part is the difference between Simpsons and Royal Ottawa). If it is something they would normally have to bargain about, then they are caught by the statutory freeze and they must wait until the freeze is over.
* **Analysis:**
  + Employer cannot use bribes or threats against employees
  + Put forward a third approach
    - Must pay attention to how the proposed change in employment conditions relates to bargaining
    - Is it the kind of thing that would typically be subject to collective bargaining?
    - Would changes of this kind unduly disrupt or distort the bargaining process
    - If the answer to these questions is yes then it probably breaches the statutory freeze
* **Takeaway:** More flexible for employers but still preserve some restrictions on what employer can do in order to not unduly undermine the status of a union either during a certification application or during a collective bargaining

# Employer Free Speech

* During union organizing campaign, management representatives often want to communicate with employees, with a view to pressure them not to opt for unionization
* Legislation in some jurisdictions expressly recognizes right of employer free speech, but adds that the employer must not use threats, promises, or undue influence
* Section 70 guarantees employer free speech: Employers are permitted free speech as long as it does not constitute coercion, intimidation, threats, promises, or undue influence
  + This includes during a certification drive
* Employer has a stake in whether its employees are unionized or not and is entitled to provide correct information
  + Legal intervention would be to address or correct positions advocated by union during a certification drive
  + Employees must make an informed decision

##### United Steelworkers of America v Wal-Mart Canada (1997) – ONLRB – employer can speak out against the formation of a union but cannot engage in coercion, intimidation, or undue influence

* **Facts:** An organizing drive at Walmart’s Windsor began on 14th of April, 1996. By April 27th, they collected 84 membership cards. From April 27th to May 2nd, they only collected 7 more. On April 26th, an employee had told the store manager that employees were being approached to sign union membership cards. The store manager immediately told Wal-Mart’s labour relations specialist, Mr. Borean. The union filed a certification application on May 2nd with 90 membership cards in support. The board directed that a representation ballot be held on May 9th. A total of 205 ballots were case; 43 were for certification, 151 were against, and 9 were segregated and not counted. The union brought numerous allegations of unfair labour practices against Wal-Mart and was seeking to get a s. 11 automatic certification. Walmart brought in 4 additional managers to the store to talk to employees about their work, what kind of things they are doing wrong and how they can make their working life better and more enjoyable. Walmart also organized employee meetings and would allow one employee who was opposed to the union to speak to the gathered employees but they would not allow anyone in favour of the union to speak. They also sent out a flyer trying to answer employee’s questions, including “If you unionize would we close the store” and Walmart responded by saying they don't know or not whether they would close the store if the employees unionized.
* **Issues:** Is this a breach of unfair labour provisions? If they were does it trigger s. 11 automatic certification?
* **Holding:** The employer engaged in unlawful speech; union was automatically certified under section 11. Unfair labour practice was found, employers arguments that it was free speech were found to amount to coercion or a threat and therefore were not accepted by the Board. Board was satisfied that employee wishes could not be satisfied through a new vote so they gave them automatic certification. But they sit down after to bargain and the employer is fairly confident union does not have a lot of support, and so when they sat down to negotiate they could not get a contract that would get them better working conditions.
* **Analysis:**
  + The union’s key allegation is that the company raised issues of economic and job security with the employees and then failed to answer questions asked on the matter
  + An employer is entitled to engage in legitimate persuasion but cannot engage in unlawful intimidation or undue influence
  + The fact that Mr. Borean came to the store to speak with employees is not a violation of the Act but it sets the tone for what followed
    - It is not surprising that the union’s organizing drive began to falter after his visit
  + A store employee also gave a speech against unionizing
    - Store failed to state that her comments were not reflective of the company’s views on unions and the effect that a union would have on store
    - Did not provide time for other employees to share opposing views should they have them
  + An employer cannot hide behind “open door” policies when the effect of the open communications is to put undue influence on employees concerning their selection of a trade union to represent them
  + If you adopt the approach of constantly soliciting questions in an environment such as in the present case, you have to answer them
    - By not alleviating employees’ concerns by answering the question, the company was intentionally fuelling employee concerns

##### RMH Teleservices – BCLRB – An employer cannot force an employee to listen to its views

* Forcing employees to listen to anti-union views can amount to coercion or undue influence
* **Ratio:** Forced listening is the bright red line that separates the freedom of an employer to say what it thinks during a union organizing drive to something that goes across the line to a coercion or a threat
* **Test:** What would a reasonable employee in these particular circumstance wind up thinking in terms of whether or not they were simply getting an employers passive point of view or actually getting threats and coercion
* Whether there is impermissible employer interference with employee free choice as to whether or not to join a union
* Said there were a number of violations of employer amounting to a finding of unfair labour
  + 1) Regular showing of a slideshow that all employees would have been forced to watch or consciously turn away emphasizing an anti-union message

##### American Airlines

* **Ratio:** Employee joining union must not be treated as second-class citizen who is adhering to a secret society and should be ashamed of it. Employers right to converse with employee must be strictly to do with business.
* There are limitations when it crosses into coercion or threats

# Solicitation On Employer Property

* **General Rule:** Union cannot sign up employees during working hours. The point is that an organizing drive should not interfere with employer production. Outside union organizers have no right to be on employer property at any time to try to sign up employees.
* The workplace is the usual location for union organizing but it is also the employer’s property
* Employees can be solicited generally during unpaid time that they are at work
* **Section 77** – nothing in the act allows a person to persuade another individual during working hours to unionize
* **Section 13** – if you are working for an employer where you are living at the work site then the union can solicit you but still not during production/work hours

##### Canada Post Corporation (1995) – CIRB – Employer must have a valid and compelling business reasons to restrict access to employer property during breaks/unpaid work times

* **Facts:** The inside workers were represented by one union and the outside workers were represented by a different union.Employer wanted just one big bargaining unit and they were successful in this application. The Letter Carriers Union of Canada (LCUC) alleges that CPC contravened the Code by refusing to grant access to employees from other than their own work locations. The employees wanted to canvass co-workers at the other CPC premises during non-working hours and within designated lunch areas. The employees were part of LCUC’s raiding campaign to replace the Canadian Union of Postal Workers (CUPW) as bargaining agent for the operational bargaining unit. LCUC says the employer had no compelling business reasons or justification to prohibit access to any location to its employees who were not scheduled for work at their own premises. LCUC argues that the decision was aimed at prohibiting the solicitation of employees. LCUC asked the Board to declare that CPC violated the Code by interfering with the organization and formation of a trade union.
* **Issue:** Could the raining union sign up workers on employer property or could the employer stop them from doing this? Did Canada Post interfere with the organization in formation of a union by excluding the insurgent union from having the same access to company property as the incumbent union already had?
* **Holding:** LCUC was entitled to solicit other employees during non-working hours. Membership solicitation can only be restricted for compelling and justifiable reasons that relate to either safety, security or production issues. To establish that, the employer would have to show that operations were being disrupted or other legit business operations were being interfered with. In order to give a level playing field between the two unions, the Letter Carriers were allowed to be able to canvas on company property during non-working hours.
* **Analysis:**
  + Employer relies on two reasons for not allowing LCUC to enter the premises
    - Solicitation on the employer’s premises would be allowed if it was carried out by employees employed at the worksite, outside of business hours, and in non-working areas
      * Security concerns about allowing individuals to enter any depot
    - The employer has an obligation to act in a neutral manner when two unions are competing to represent a group of its employees
      * It cannot grant access to LCUC and not CUPW
  + Employer must have a valid and compelling business reasons to restrict access to employer property
  + Legislation prohibits trade unions from persuading employees to join a union or refrain from or cease being a member of a union during work hours
  + Issue here is whether employees have the right to solicit membership of their co-workers in the same bargaining unit during non-working hours at the company’s work locations other than their own workplace
    - The employer did not point any specific disruption or adverse effect on its business which could be reasonably be anticipated should greater access be granted to LCUC as requested
    - CPC has established a complete set of security guidelines that can be adapted and followed to ensure that LCUC supporters are identified and monitored when they legally canvass on CPC’s premises

##### T Eaton Co (1985) – OLRB – an employer cannot implement a no-solicitation policy without a sufficient business justification

* **Facts:** Workplace was a department store inside the Eaton Centre. Employer applied a blanket rule prohibiting distribution of union literature on its premises at all times, including when store not open to public and when employees not working.
* **Held:** OLRB held the employer had unlawfully interfered with the formation of a trade union by maintaining a no-solicitation policy for all areas of the mall with no sufficient business justification

# Union Unfair Labour Practices

* The law forbids trade unions from coercing employees to become members, management also not allowed to exert pressure to not become members
* *Milnet Mines Ltd* (1953) OLRB
  + Threats of violence against organizers and supporters of an intervener union by supporters of the applicant union led OLRB to dismiss the application
* *Canadian Fabricated Products Ltd* (1954) OLRB
  + Dismissed an application by the applicant union to replace the intervenor union as bargaining agent for the respondent company's employees
  + Threats of economic reprisals forbidden by s. 48 (**now s 76)** o the ON Labour Relations Act which says "no person shall seek by intimidation or coercion to compel any person to become a member of a trade union"

# Remedies for Interference with the Right to Organize

* Labour relations legislation provides for both quasi-criminal penalties and administrative remedies
* Most boards have a broad legislative mandate to provide remedies:
  + **Section 96(4)** authorizes OLRB to determine what should be done to redress contravention of the legislation
  + **Section 11** allows the OLRB to award automatic certification as a remedy

##### Royal Oak Mines v Canada (Labour Relations Board) (1996) – SCC – demonstrates wide deference courts given to labour boards’ remedial awards; board must show a relationship between the breach, its consequences, and the remedy awarded; role of labour board is to provide remedial remedies, not punitive remedie

* **Facts:** There was a strike at a mine just outside of YellowKnife. It was one of the most violent and ugly strikes. Miners went on strike and the strike is long and bitter. One of the striking miners, without the knowledge of the union, sneaks into the mine itself and plants dynamite on one of the rail lines taking miners down into the mine. Employer is using replacement workers (scavs). The rail cart taking them into the mine hits the dynamite and blows up and 11 miners were killed. That miner was caught and sentenced to life imprisonment for his actions. The union goes to CLRB on a bad faith bargaining charge and says they committee unfair labour practices during bargaining and during the subsequent strike.
* **Prior Proceedings:** Labour Relations Board found that it is going to award broad remedies against the employer for a slew of unfair labour practices.
* The wording of s. 99(2) does not place precise limits on the Board's jurisdiction
* Board may order anything it is "equitable" for a party to do/refrain from doing to fulfil the objectives of the Code
* Aim of labour relations is positive resolution of labour disputes for benefit of the parties and the benefit of the public.
* Board's remedy must be rationally connected or related to the breach and its consequences
  + Test established in *National Bank of Canada v Retail Clerk's International Union* (1984) SCC
    - There must be a relation between the breach, its consequences, and the remedy. Labour Relations Boards cannot dream up any remedy at all in its quest to puttee party in the place it would have been, there must be some link or connection between the breach the consequences and the remedy
* There should be no judicial interference with remedial orders of the Board unless they are patently unreasonable
* Remedies are a part of the expertise that a Labour relations Board possesses. There should be deference shown by the courts to a decision of LRB in the remedies that they decide to do.
* When an employee engages in an unfair labour practice by suspending/dismissing an employee, the normal remedy is reinstatement with compensation for lost wages and benefits
* Boards have also recognized the employer's actions may have discouraged other employees from supporting the union so they have made a variety of remedies available
* *United Steelworkers of America and Radio Shack* (1980) OLRB
  + Found employer had engaged in serious unfair labour practices
  + Awarded number of remedies, including a direction that the employer post a notice drafted by the board for 60 days informing employees of their rights, stated the employer violated their rights, and set out a promise by the employer to comply with legislation & board
  + ON Div Ct refused to interfere with the board's remedy
    - "So long as the award is compensatory and not punitive; so long as it flows from the scope, intent and provision of the act itself, then the award is within the jurisdiction of the board"
* Sometimes monetary awards have been granted to compensate unions for legal costs or wasted organizing costs resulting from employer unfair labour practices
* *Baron Metal Industries Inc* (2001) OLRB
  + Employer found to have committed particularly egregious unfair labour practices, OLRB held the union had been put to unnecessary expense and ordered employer to compensate it for its campaign
  + Board rejected union's request for legal costs though
  + In Ontario, such costs have only been ordered where there's no chance of an ongoing relationship between the parties, and where the employer had failed to comply with the board's remedial orders
* Courts have sometimes set limits on board’s power to remedy ULPs, especially when the remedy is punitive
* **Held:** SCC upholds the remedial powers of the Labour Relations Board.

##### WestingHouse Canada (19180) OLRB - Employer was ordered to give union a list of those employed at the new plant, give union access to company bulletin boards, permit union reps to address employees during working hours

* **Facts:** Westinghouse was a large electronics manufacturer and closed its old plant in Hamilton and was going to open up new plants in rural Ontario with an attempt to escape unions. LRB found that this was an unfair labour practice. Union wanted LRB to order the employer to reopen up it’s Hamilton plant as the remedy, they said no other remedy would put the workers who lose their jobs back in a position they would of been had the breach of the act not occurred. Board says no. They said they will instead allow the union to have all the employee lists of the new locations where they are opening up and that will give them an advantage in trying to persuade the workers at the new plants to unionize plus the employees who lost their jobs, if they want to move they would have first crack at being hired at the new plants.
* **Held**: that ordering for the plant to be re-opened is too far
* **Ratio:** There are limits to the remedial remedies that a labour relations board can impose upon an employer
* Bill 148 allowed unions to request the list of employee
  + Bill 47 repealed this

##### National Bank of Canada and Retail Clerks' International Union (1982) – CLRBR – the court will overturn remedies that are not sufficiently connected to the breach in question; remedies are meant to be remedial, not punitive

* **Facts:** Union was certified to represent employees at Maguire Street branch. *Canada Labour Code* imposed a statutory freeze on the terms and conditions of employment from the date of the application for certification until 30 days after the certificate was granted. Giving notice to bargain led to another statutory freeze, but union did not give such notice until more than 30 days of being certified. Because of the delay, neither freeze was in force for 3 days, when senior bank officials met and changed plan to reduce services at the Maguire branch to plan to close it and transfer its accounts to the non-unionized Sheppard branch. Union said unfair labour practice. A bank wound up aggressively fighting a unionization drive and the union was slow in getting off their notice to bargain and there was a point at which the certification had been given but no notice to bargain and during the statutory freeze they decided to close the branch and transfer all counts to a non-unionized branch in Quebec City.
* **Holding:** The Bank's officers' closure of the branch was clearly their opportunity to get rid of the Union
* **Analysis:** 
  + Found anti-union *animus* and found had been a transfer of a business between the unionized and non-unionized branches and intermingling of employees from the two branches.
  + Board held the union was the bargaining agent for employees at Sheppard branch
  + Remedies for employer's unfair labour practice – ordered employer to:

1. Give the union lists of employees at the Sheppard Street branch
2. Allow the union to hold meetings at that branch
3. Allow the union to install a bulletin board in that branch
4. Pay all associated costs
5. Send letter to all employees across Canada saying it had violated their Code rights, that it recognized they had a right to organize and managers must also recognize that right
6. Deposit $144k into a trust fund to be administered jointly by the union and the bank to promote the Code's objectives among all the employees ($144k is estimate of the amount the bank had saved by closing the branch)

* **Ratio:** Labour Relations Board remedies **cannot** be punitive !
* **SCC Decision**
  + **Holding:** Struck down the last two remedies^. First 4 remedies ordered were fine as they were proportional to the scale of the breach but the other remedies were punitive and so they were struck down. There was insufficient connection between the scale of the breach and the remedies that were ordered, the last 2 remedies were not remedial they were punitive.
  + **Analysis:** 
    - Remedies #1-4 are designed to ensure the Union would be firmly established at new branch
    - Remedy #6 is not something intended to counteract the consequences of the closure of Maguire branch. The fact that a large # of employees are not unionized is not a consequence of the closure - this remedy should be set aside.
    - Remedy #5 since the letter put emphasis on the fund, this should also be set aside. Also it was punitive and beyond the board's powers.

#### Interim Relief

* Remedies may come months after the violation was committed, and in meantime support for union may have plummeted because of the employer's unlawful conduct
* 1992: OLRB was authorized by statue to grant interim relief pending the final disposition of a complaint
  + Repealed in 1995 and reintroduced in 2005
* *Loch Highland v United Food and Commercial Workers Union* (1993) OLRB
  + An employee allegedly was fired for participating in an organizing campaign
  + Was reinstated pending the adjudication of his complaint on the merits

# Remedial Certification

* This is the most severe remedy
* Purpose is to counter illegal employer interference by granting employees the union representation they would likely have obtained but for the employer's misconduct
* Only available where the labour board concludes that the employer interference was so serious that no other remedy would suffice, and a representation vote would not reflect employees' true wishes on unionization

#### Changing Workplaces Review – Final Report (C Michael Mitchel and John C Murray) 2017

* Ontario's remedial certification provision has undergone many changes
* Prior to 1993: If employer misconduct resulted in the true wishes of employees being unlikely to be ascertained in a vote, the union would be certified without a vote, if there was adequate membership support for bargaining
* 1993: Requirement for adequate membership support was eliminated
* 1995: Requirement was reinstated; remedial certification limited to situations where OLRB found no other remedy other than a second vote would counter the employer's misconduct
* 1998: Remedial certification eliminated altogether
* **2005**: Reinstated. But the OLRB could now certify the union without a vote only if *"no other remedy would be sufficient to counter the effects of the contravention"* 
  + This is the situation today
  + OLRB may also consider the results of a previous representation vote and whether the union has "adequate membership support" for collective bargaining
* The Final Report criticized the provisions and recommended revisions:
  + The premise that steps can be taken to ensure a second vote is sufficient to counter the effects of employer misconduct is flawed
  + Rare cases where a union could win a second vote following employer misconduct – the second vote is likely tainted
  + The certification process is linked to contract arbitration and remedial certification process and the existing provisions are "insufficient to protect the freedom of association of employees"
  + If an employer unlawfully interferes with the employees' rights to freedom of association and independent choice, that conduct must trigger a meaningful remedy: certification without a vote and access to first contract arbitration
* Recommendation by the Special Advisors has been incorporated into the Labour Relations Act ON:
  + Where an employer intervenes this Act so that the true wishes of the employees are not likely to be ascertained, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit

# What if the Employer Closes the Workplace?

* Creative remedies available when employer decides to close during a period of statutory freeze

##### United Food and Commercial Workers (UFCW), Local 503 v Wal-Mart Canada Corp (2014) – SCC – the statutory freeze does not deprive the employer of the power to go out of business (either in part/completely) but it does require that it exercise the power in a manner consistent with its normal management practices

* **Facts:** 2004, an all employee unit at a WalMart was certified to a local of the UFCW union. 2005, the UFCW applied for first contract arbitration under Quebec *Labour Code*. They are not getting anywhere, Walmart said they are willing to sign collective agreement which codifies what already exists but the union said no because they want better working conditions. Next week, Walmart informed the Minister of Employment and Social Solidarity it intended to close this store. Closed the store in April 2005 and terminated the employment of all the store employees. Among others, a grievance was filed by UFCW claiming that the terminations violated s. 59 freeze provisions of the Quebec Code meant that Walmart had reached the freeze conditions by unilaterally closing tis store during bargaining.
* **Prior Proceedings:** Arbitrator finds in favour of the union. Arbitrator upheld the grievance, affirmed by Superior Court, overturned by CA. Now appealed to SCC.
* **Held:** Appeal allowed – case goes back to arbitrator to decide appropriate remedy in accordance with his finding that the store closure violated the statutory freeze provision. Union prevails.
* **Union argument:** asking for damages for the employees with respect to loss of work and damages to the union for its cost for organizing the bargaining unit
* **Walmart argument:** There is no breach of the statutory freeze because it went out of business
* **Test:** What would a reasonable employer do in these circumstances?
* **Analysis:** 
  + WalMart argued closure of the store bars employees from invoking s. 59, or, the closure constitutes a full defence that justifies the change in the employees' conditions of employment
  + Court found the employer is (1) neither shielded by the closure (2) nor otherwise relieved of the burden of proving that its decision was consistent with its normal practices
  + S. 59 contains no language that would support a conclusion that its applicability depends on the existence of an active business/possibility of reinstatement
  + Primary purpose of s. 59 is not to restore the balance for a given period of time, but to facilitate certification and foster good faith in collective bargaining, to enable employees to exercise their right of association
  + The termination of the process undertaken further to the petition for certification does not eliminate the employer's obligation to make reparation for a violation of s. 59
  + An arbitrator considering a case involving a closure cannot refuse to apply s. 59 of the Code on the basis that specific performance is no longer possible
  + Longstanding principle that the Code does not preclude companies from going out of business, but the exercise of the right to do so is contingent upon the decision to go out of business being "authentic and not a simulation"
  + S. 59 does not deprive the employer of the power to go out of business (either in part/completely) but it does require that it exercise the power in a manner consistent with its normal management practices
  + The necessary principal effect of the section is to "freeze" the employer's business environment as it existed at the time the union arrived
  + Going out of business is not something that occurs frequently in any company, and the arbitrator has to ask whether a reasonable employer would in the same circumstances have closed its establishment
  + If Arbitrator is convinced it is not consistent with the employer's normal practices, they must find the employer's decision resulted in a "unilateral change in conditions of employment" that is prohibited by s. 59
  + Appropriate remedy in that case is to compensate the employees

##### Plourde v Wal-Mart Canada Corp (2009) – SCC – employers have the freedom to close their operations, but the extent to which these would shield an employer from remedies for unfair labour practices may be limited to WalMart

* **Issue:** Whether a dismissed employee at the closed store could rely on s. 15 of the Quebec Labour Code, which allows the labour tribunal to award reinstatement "because the employee exercises a right arising from the Code"
* **Holding:** An employee cannot seek a remedy under s 15 in situations of store closure because:
  + Damages are not a remedy open to the tribunal under s. 15, and the inability to force the store to remain open means no effective remedy is available
  + Even if the commission did have that power, Quebec caselaw shows the closure would be a "good and sufficient reason" for dismissal under s. 17 (does not matter whether the closure was motivated by anti-union animus)
* A number of other jurisdictions have specified in their labour legislation that employers have the freedom to close their operations, but the extent to which these would shield an employer from remedies for unfair labour practices may be limited to *WalMart*

# Criminal Law Penalties – Exceptionally Rare

##### R v K-Mart Canada Ltd (1982) – ONCA – example of the standard that employer action must reach to merit criminal penalties

* **Facts:** Prior to 1975, Kmart had a warehouse in Scarborough and a Union had been certified as the bargaining agent for that location's employees. Kmart opened new distribution center and some employees were moved there. In 1975, application was made to OLRB for certification of the Union as the bargaining agent at the new center. Kmart opposed application and a postponement of certification vote was granted by the OLRB on the representation that the workforce at the new location would be increased to exceed 120 after it opened. The employer hired a number of fake employees to be on its payroll who would be guaranteed to vote against the union and then the employer lied to the LRB about what it had done. But actually, there was no intent to increase the workforce there. So OLRB ordered a certification vote. Before the date of the vote, Kmart senior people met and discussed ways to discredit the Union. The union certified, there was a strike and then the union got decertified. There are provisions in the criminal code where an employer could be found guilty of engaging in unfair labor practices, this is one of those extremely rare occasions when CC provisions have been applied.
  + Criminal court imposed $25k on the employer for conspiring to effect an unlawful purpose – to commit ULPs
  + Crown appealed arguing fine was too light
  + They had undercover employees give false evidence detrimental to the Union at a hearing of the Board
  + Finally Union gets certified, but it was unable to negotiate a contract with Kmart, long strike ensued, and Union ceased to act as the bargaining agent
* **Holding:** Fine is increased from $25k to $100k.

# The Professional Responsibility of Lawyers

##### Law Society of Upper Canada v Rovet (1992) LSDD – lawyers are responsible for advice given to employers about labour practices

* **Facts:** Rovat was a management side lawyer and he advised a company to engage in a range of unlawful practices in order to avoid unionization. Company was worried about the advice it was receiving and sought advice from another lawyer and when their suspicions were confirmed, they reported his firm and their actions to the Law Society. Jan 1991, Company A learned certain employees were considering joining a union. President ("B") spoke to lawyers who informed him there was little the company could do to stop them. One lawyer was the Solicitor met with B, and another Company executive ("C") attended. Lawyer told B and C that the number who would be included in the bargaining unit is critical in the success of an organizational drive. Lawyer asked of any plans to increase size of workforce, B said an expansion could be justifiable. Lawyer said he knew employees of Company D that could provide employees favourable disposed to the employer's interests until the union organizing campaign ended. A and D negotiated an agreement with lawyer's help for workers to be provided to A, and a separate contract for extra payments to be made to D out of a numbered company (sketchy deal).
  + Union was filing for certification in the background of this and sketchy deals continued with company A
  + Labour relations board granted certification application
  + A Company reported lawyer to the Law Society
  + Revealed the lawyer had been charging random personal expenses to Company A
* **Holding:** The lawyer is guilty of professional misconduct and suspended for 6 months
  + **Note:** Recommendation was considered by Convocation which imposed a 1-year suspension

# Acquisition of Canadian Bargaining Rights

#### The *Wagner Act* and the Principle of Exclusivity

* Before the advent of modern collective bargaining legislation, workers and trade unions had to rely on economic sanctions to induce employers to engage in collective bargaining
* The principles of majority rule and exclusivity of bargaining rights are central to the *Wagner Act* model
  + **Majoritarian:** Union is certified to represent all employees if it winds up winning majority of votes during a certification election.
  + **Exclusivity** is justified by the fact that the union has demonstrated that it has the support of the majority of the employees, as well as by the assumption that it is generally to the advantage of all parties to have one clearly identified interlocutor on the employee side. Exclusivity means it is the ONLY union that the employer can bargain with

# Roy Adams, “Union Certification as an Instrument of Labour Policy: A Comparative Perspective”

* Comparatively, the North American practice of union certification is very unusual
  + Other countries do not divide the labour force into tiny bargaining units and do not require representative of employee interests to win the support of the majority of employees
* When WWI began, a broad consensus emerged that all employees should be able to participate in the making of decisions in the workplace
  + There was no consensus on how this should happen
  + At first, the view was that employees should be free to join or not join a union and employers were not to discriminate against employees depending upon whether they joined the union or not
    - Employers did not like this
    - New system was that only when a majority of employees voted to unionize that such a union would exist
      * Later this majority principle was embedded in the *Wagner Act*
* Positives of the certification process
  + Allows employers to contest employee representation campaigns
  + Unions have dissipated the pressure for general enfranchisement of the industrial workers
  + Employers have been relieved of the duty to address the democratic void in industry

# Harry Arthurs, “Reinventing Labour Law for the Global Economy”

* Globalization has changed the effect of the law by placing groups of workers in different jurisdictions in competition with each other
  + Employers now have a choice between producing in their own countries or shifting production off-shore
  + Workers across the globe are forced to compete for jobs
    - Must underbid their rivals by promising to be more productive, to work harder, be cheaper, and be less assertive about their rights
* Now, employees do not work for an identifiable common employer and instead take up a place in a global production and distribution chain
* This creates issues for those who wish to create a bargaining unit
  + The coordination required to develop a bargaining unit across the United States or across the world is nearly impossible

# David Weil, *The Fissuered Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve*

* The large business today looks like a solar system, with a lead firm at its centre and smaller workplaces orbiting around it
  + As you move farther away from the lead organization, the profit margins diminish and this has impacts upon the workforces in each location
* The fissured workplace reflects two interrelated changes that led companies to shed more and more employment as they faced intensifying pressure to focus on their core competencies
  + Capital markets demanded it
    - Reflective of changes in how those markets operate and the standards to which they held businesses seeking financing
  + Technological changes created new ways of designing and monitoring the work of other parties, inside and outside of the corporation
* By shifting employment to smaller organizations operating in competitive markets, a large employer creates a mechanism to pay workers closer to the additional value they create
  + Also avoids the problem of having workers with very different wages under one roof
* Businesses at the top of supply chains split off employment so that they can focus their attention on more profitable activities connected to the revenue side of their income statement
  + Leaves the manufacture of products or the provision of service to be fissured off
* With fissuring, wages are pushed downward but gains are passed on to consumers as lower prices or to investors as better returns

# The Appropriate Bargaining Unit

* The certification process and determination of an appropriate bargaining unit ultimately goes back to the guiding principles of Canadian labour law
  + Exclusivity and majoritarianism
* **Section 9(1)** – LRB makes the decision whether to certify or not and also determines the bargaining unit
  + Board shall determine the unit of employees that is appropriate for collective bargaining

# Bargaining Unit Determination: General Principles

* The bargaining unit is a group of employees defined on the basis of the employer for whom they work and the positions they occupy
* The bargaining unit has two distinct functions
  + It serves as an electoral constituency for the purposes of certification and decertification – s. 8(1)
  + It serves as the basis for collective bargaining, because a collective agreement drawn up at the bargaining table normally covers all employees in the unit
* The most important consideration in determining the appropriate bargaining unit is whether there is a “community of interest” among the employees in question
  + Ideal unit is one that includes all the employees of a single employer (*Insurance Corp of British Columbia and CUPE*)
* The parameters of the unit will affect the ongoing employer-union relationship
  + There may be strong pressure toward the compression of wage differentials and towards uniformity
  + If there is a multiplicity of units within a single enterprise, disputes may well occur over which collective agreement governs particular tasks
    - Inter-union disputes may arise
  + The degree of economic pressure that each party can bring to bear on the other
  + The size and shape of the bargaining unit can influence the frequency and impact of strikes
* Bargaining unit must be at least two employees

# Voluntary Delineation of the Bargaining Unit – section 7

* The employer and union may be able to delineate the bargaining unit on their own in one of two related ways
  + Voluntary recognition
    - Labour relations statutes in Canadian jurisdictions other than Quebec generally allow for an employer to voluntarily recognize a union purporting to represent its employees as the exclusive bargaining agent for those employees and to define the bargaining unit
    - Such an agreement is to be filed with the minister of labour or labour relations board
    - Legislation takes over and governs relations between the parties as if the union has been certified
    - Voluntary recognition agreement must be posted in the workplace to give all affected employees notice of its existence
    - Voluntary recognition agreements are not valid if the union is dominated or inappropriately influenced by the employer, if it engages in discriminatory behavior, it does not actually represent the majority, or if another union already has the bargaining rights
    - Labour boards can adjudicate these issues
    - Usually found in the construction industry or in the trucking industry
  + Collective bargaining after certification
    - Standard in virtually all collective agreements is a “recognition clause”
      * The employer acknowledges the union as exclusive bargaining agent for the relevant unit of employees
    - The voluntary recognition agreement could also be a separate document filed prior to the commencement of collective bargaining
    - These clauses are required after certification though
* Under section 7(1) there is a five-day period for when the vote for certification has to be held. If there is no union in the workplace then the trade union can come around and make a certification application to represent the employees in the workplace as long as they have 40% of the cards signed.
  + Union files a certification application on a Monday, and the vote will be taken five working days later
* Under section 8(1) voting constituency and when the union receives certification. Shall take into account description of the proposed bargaining unit
* Under section 8(5) the LRB will order a certification vote
* Union can be decertified under section 7(2) and (3) if after a year they do not reach a collective agreement
  + If a union does get certified and they don’t reach a signed collective agreement within 12 months with the employer, then any employee can then make an application to LRB to decertify the unit
* Section 7(4) and (5) govern the process of “raiding”. These are called the open periods for a raid
  + When one union seeks to displace another union
  + Lay out when an insurgent union can come in and replace an incumbent union
  + Raid can begin in the last 3 months of a collective agreement
  + If it is 48 months long, the raiding union can raid in months 34, 35, 36 and then in months 46, 47 or 48 and so on. It can raid in the last three months of any year beginning at the end of the third year of a collective agreement
  + Ensure that there is no long-term “sweetheart” deals signed between a union and employer
  + There is a window of time where employees can seek the support of another union that would not be as favorable to the employer
  + Under 7(4), if there’s an agreement, a second union can start to try to displace the first union in the last three months of the agreement
  + Need 40% of cards to trigger a certification vote

# Steps to Certification Drive

* + **Step 1:** Union initiatives an organizing drive and s. 7(1) is the main provision with respect to that, laying out what a union can do in a certification drive assuming there is not already a union in the workplace
  + **Step 2:** The drive itself. The union tries to get employees to sign membership cards. They will try to do this secretly. Cards cannot be signed during production hours at the workplace, but they can be signed at the workplace during breaks but typically unions will get employers to sign at some place other than the workplace
  + **Step 3:** filing the application. Once the union is satisfied it got everyone it can get to sign the card and it is over 40%, it will file the certification application with the LRB and there will be (1) a photocopy of the membership cards that it has been able to sign and (2) offer a description of the proposed bargaining unit. Statutory freeze will kick in s. 86(1).
  + **Step 4:** LRB will notify employer that certification application has been filed. They will supply employer with union’s proposed bargaining unit description but they will not reveal the cards or the percentage of employees who have signed cards. Will ask employer for employee list. They will order the vote within 5 working day of receipt of the application if they are satisfied that 40% of employees signed membership cards. Workers vote during break or non working hours. Employer has the right to challenge the union’s bargaining description, they can propose one of their own.
  + **Step 5:** Union gets certified but here may be some residual questions that have to be determined after certification which usually consist of whether or not certain employees are appropriately members of the bargaining unit or not. Could be that some jobs are properly managerial jobs and the employer will argue they should not be in the bargaining unit. These people can still vote but their votes are segregated until their final status is determined. Whether or not someone is in the bargaining unit does not depend on whether they want to be in the union but rather on what their job description is and whether that is within the bargaining unit that is being proposed by the union.
  + Once union is certified, and Board has decided on a description, new statutory 86(1) freeze is applied when the union files a notice of bargain under s. 16

#### Delineation of the Bargaining Unit by a Labour Relations Board

* Union seeking certification for a unit that it claims to be appropriate for collective bargaining will apply to the relevant LRB
* Then the board decides whether that unit, or some variation of it, is an appropriate one
  + In the private sector, boards have broad discretion to determine what is the appropriate unit
* Labour relations boards prefer to see as large a bargaining unit as possible but will not stand in the way of smaller bargaining units if that’s the only way for employees to get access to collective bargaining

##### Metroland Printing, Publishing and Distributing Ltd (2003) – ONLRB – endorsement of two step test from Hospital for Sick Children for determining the appropriate bargaining unit; community of interest can exist between employees with different terms and conditions of employment if they are within the same workplace

* **Facts:** Small printing firm in suburban Toronto and the union wanted to unionize all 10 employees, an all employee bargaining unit. The employer wanted smaller ones because there were some temporary workers, some full time workers etc. Metroland publishes a variety of community newspapers including the Midland-Penetanguishene Mirror in Midland, Ontario. The Midland office has two departments – sales and distribution that are made up of fulltime employees. From time to time the employer hires part time and temporary employees, as well as co-op students, to replace those on leave or to assist during busy periods. The employer argues that part-time, temporary, and co-op employees should be excluded from the bargaining unit. An intervenor argues that the employees in the distribution department do not want to be represented by a trade union and so should be excluded from the bargaining unit. Board is required to assess what the appropriate bargaining unit should be. Employer argued that there should be different bargaining units because these different groups have different communities of interest.
* **Holding:** There should be one bargaining unit that includes all different types of employees
* **Analysis:**
  + The general view is that bargaining units should be designed to fit the circumstances of each workplace
    - Community of interest is still a relevant factor
  + Community of interest: Do these employees share similar type of work and therefore similar types of bargaining interests.
  + Community of interest has been defined over and over again.
  + Employer argued for the application of the *Hospital for Sick Children* test and Board accepted this test
    - First the employees in the bargaining unit must have sufficient community of interest that they can bargain together
      * Community of interest has generally become less influential in determining the appropriate bargaining unit
      * Employees share a community of interest simply by being employed by the same employer in the same workplace
        + Employees with different terms and conditions of employment can effectively bargain together
    - The bargaining unit must not create serious labour relations problems for the employer
    - 10 factors to consider when determining the size of the bargaining unit:
      * Nature of the work
      * Administrative structure of the employer
      * The geographic circumstances (are they all under one roof?)
      * What is the source of work
      * What are the economic advantages to employer of 1 unit versus several
      * What is its impact upon public policy purpose of collective bargaining

#### Bargaining Unit Delineation and Part-Time Employees

* In recent years, part-time and casual employees have become subjects of prime concern for the union movement and those interested in labour law reform
* Part-time employees are the fastest-growing segment of the workforce and are disproportionately female

##### Canadian Imperial Bank of Commerce (Powell River Branch) v British Columbia Government Employees’ Union (1992) – CLRB – continuity of employment is the most important consideration when determining whether casual employees should be included in a bargaining unit; also ask whether a community of interest exists between casuals and other employees

* **Analysis:**
  + The board considered whether casual employees ought to be included in a pre-existing unit comprising the full-time and part-time employees of a particular branch of a bank
  + What is meant by casual employee
    - Used to describe employees who are employed on a call-in basis
    - Work very irregular hours
    - There is no obligation for them to accept work
    - Paid on an hourly basis plus vacation pay
    - Not entitled to any other benefits
  + Principles that will influence whether casual employees should be included or excluded from bargaining units
    - The possibility of casual employees preventing full-time employees from having access to collective bargaining
      * Would arise when full-time employees are outnumbered by casuals
    - There is a possible negative impact on the free collective bargaining process if casuals are included because in most cases casual employees have a different community of interest
      * The bargaining strength of regular employees would be considerably diluted if the bargaining unit was flooded with casuals
      * Casuals could not be expected to support strike action over issues such as seniority and pensions which have little impact on them
    - The Board is hesitant to confer full collective bargaining rights on small groups of casual employees who only have a marginal connection with a given industry
  + Nevertheless casual employees are still employees and require protection
    - Board must balance these interests with those of other employees in the workplace
    - Board must identify whether a true community of interest exists between causals and other employees
      * An important consideration is the continuity or the pattern of employment notwithstanding the irregularity of hours worked

##### Service, Office and Retail Workers' Union of Canada (SORWUC) v CIBC (1977) – CLRBC – LRBs looking for least terrible solution sometimes when determining the appropriate unit; the right to organize requires that an achievable bargaining unit be formed

* **Facts:** Was a feminist union, and they were trying to organize workplaces which were predominately or exclusively women. They were trying to organize female bank tellers at several different branches of CIBC in Vancouver. They did a certification drive at 8 different branches. Applicant asked to be certified for eight bargaining units, each corresponding to a different branch of the bank but one bargaining unit for all. Bank claimed the only appropriate unit was all of its branches across Canada.
* **CIBC Argument:** looking to be certified for these 8 branches in Vancouver area is not an appropriate bargaining unit. It should either be that the entire 17,000 branches across Canada or maybe it should be the province of BC which is one administrative area for them but it certainly should not be done branch by branch given the size of their operations.
* **Union Argument:** We are a small union, even if we are a huge union, we would never be able to organize 17,000 +1 bank workers in the 6 month period of time we would need to organize across the country. They wanted LRB to certify them for the 8 branches they put their application in for and to certify that as one appropriate bargaining unit.
* **Issue:** The unit proposed by the union is a single location unit – a unit of employees of the employer employed at a branch of the employer's operations. Is it an appropriate bargaining unit?
* **Holding:** A single branch location of CIBC encompasses employees with a community of interest and it is an appropriate bargaining unit. Accepted bargaining proposal by union and allow them to be certified on a branch by branch basis.
* **Analysis:** 
  + Court recognizes that the branch is not autonomous and the bank's success depends on the standardization and centralization of procedures among branches
  + But on the employment side this centralization must not be over-emphasized - promotion, discipline and termination are usually initiated at branch level
  + The Board is vested with the excusive authority to determine the appropriate of proposed bargaining units
  + Common practice of labour boards to hold that the single location unit is an appropriate bargaining unit (ex. retail outlets, mines, radio stations, energy plants, and others)
  + The community of interest of employees at a single location is sufficient to hold that the single location unit is an appropriate unit
  + Too large units in unorganized industries will decrease possibility of collective bargaining ever commencing and defeat intentions of Parliament, but the Board should not create artificial units
  + The employer's proposed bargaining unit would mean only an organization with the enormous financial resources to operate nationwide for a long period of time could make the rights of the Code meaningful for the CIBC employees – this is a restriction of the freedom of employees to join the trade union of their choice (s.110(1))
  + By the time the union could solicit members from across the country, original members would lose interest
  + Under branch certification, centralized employer bargaining and the employees' interests in uniformity and equality can result in uniform terms and conditions of employment
* **Notes**: The union continued to organize bank branches for months. 1977 – made 26 more applications for branch certification in BC and SK, was successful in 16. But, by 1980 it had withdrawn and lost all of its certifications. Banks has waged campaigns against unionization and committed unfair labour practices. Also, Elizabeth Lennon notes three reasons why the unions failed in their attempts to organize the banks:
  + The small numbers of staff in each branch-based bargaining unit and the large number of such potential units meant high organizing and bargaining costs
  + Highly centralized nature of banks and disparity between their bargaining power vs. one branch made it easy for them to resist giving unionized branches any wage increases and benefits not given to non-unionized employees
  + Frequent transfer of personnel between branches and high turnover resulted in disappearance of initial majority that supported the union

##### United Steelworkers of America v TD Canada Trust in the Greater City of Sudbury (2005) – CLRB – The appropriateness of a unit is a matter of fact depending on whether the bargaining agent is able to define a sufficient community of interest among the employees it seeks to represent to justify certifying such a bargaining unit

* **Facts:** Application for a bargaining unit of all employees working in retail personal financial services at TD in Sudbury. Would include 8 branches, 111 employees because it did not represent all TD branches in the area. TD says the appropriate bargaining unit should be on a branch by branch basis and that 6 bargaining units are appropriate. They said the appropriate bargaining unit would be each single branch or the only other appropriate bargain would be for all 19 together.
* **Issue:** What was the appropriate bargaining unit in this particular circumstance?
* **Arguments:** 
  + **Geographical Scope:** Union says all branches are no more than one hour's drive from each other. TD argues Board has favored single branch bargaining units and some of these branches are outside the city of Sudbury and have diff interests.
  + **Business Unit and Operational Structure:** Union says this does not factor into the bargaining unit determination. TD submits the Board should consider differences between branches including staff size, hours, volume of business, etc.
  + **Wishes of Employees:** Union says desire among majority of employees to be repped as a unit, TD says not all concerns of employees of each branch can be properly addressed in one unit
  + **Community of Interest**: TD says the geographical distances between the branches makes the interests of employees local to each branch, union says the branches have same job descriptions which speaks to the community of interest for them all. They are all bank tellers performing virtually the same work servicing customers and fulfilling the employers mission.
* **Holding:** For the Union. Certified all employees.
* **Analysis:** 
  + In terms of public policy, doesn’t have to be the ideal unit, (2) might be more than one unit and (3) they can change determination, are not bound by past decisions
  + Ss. 24(1), 28 and 29(1) are relevant
  + S 24 – the union has the freedom of defining the bargaining unit as it considers appropriate.
  + Must decide (i) whether the unit is appropriate or collective bargaining and (ii) whether a majority of employees in the unit wish to have the trade union rep them as their bargaining agent
  + Board is not required to define the most appropriate bargaining unit but a unit appropriate for collective bargaining
  + The appropriateness of a unit is a matter of fact depending on whether the bargaining agent is able to define a sufficient community of interest among the employees it seeks to represent to justify certifying such a bargaining unit
  + Involves consideration of whether the employees share an appropriate structure of working conditions
  + Case law shows evidence of unions breaking new ground by applying for larger units
  + TDs arguments are not persuasive
  + The number of managers, different reporting relationships, different revenue targets are not relevant
  + Relevant that the employees work in close proximity to each other and similar working conditions
  + Evidence shows most employees want to be repped by a single agent, no coercion
  + Policy established in *National Bank of Canada* CLRB – there is no need for the unioin to demonstrate majority support of each branch in order to be certified
  + Enough that the union has the support of the majority of employees within the bargaining unit

##### United Rubber Cork, Linoleum & Plastic Workers of America, Local 1028 v Michelin Tires (Canada) (1979) – CLRBR – where there is a manufacturing enterprise with multiple locations where they are functionally independent with one another, they will be one bargaining unit

* **Facts:** Company has two plants in NS, 250km apart. It chose rural areas deliberately because those tend to be areas where there is less union support. When it opened it’s first plant, the city had a long history of union organization but when it opened it’s second plant, it chose a place where there was very little union support. Union drive occurs to try to organize workers at first plant in Picton country and it looks like they would succeed but the government called a special sitting of the NS legislature and they pass a special bill Amendment to the Labour Relations Act which says that if a manufacturing plant which is functionally integrated with another plant, you have to organize at both places at the same time. NSLRB followed reasoning in SORWUC case above, holding that a unit comprising only the employees at the Granton plant was appropriate. Board rejected Michelin's argument that the appropriate unit would comprise both that plant and Bridgewater plant. The interest in allowing employees to unionize in the first place favoured the conclusion that Granton was appropriate on its own.
* **Analysis:** 
  + Board accepts that a strike at one plant would bring a halt to work at the other
  + But other factors favouring just Granton as a separate bargaining unit override this
  + While the Granton and Bridgewater plants are interdependent, that is not uncommon in an economic sense
  + No case was cited where a unit of essentially all employees at a single plant has been held not to be appropriate
* **Notes:** Michelin found a more sympathetic ear in provincial legislature which passed s 24A (now s 26) of the *Trade Union Act* – when an employer operating interdependent manufacturing locations so requests, the board must find the appropriate unit is one that combines employees from all locations

#### Brian Langille "The Michelin Amendment in Context" (1984) Dalhousie Law Journal

* Michelin Amendment declares that the appropriate unit consists of both plants
* It may be possible to both ensure that organization takes place and a broad based and stable bargaining structure results for collective bargaining purposes.
* *Amon Investments* 1979 BCLRB:
  + Employer had 13 locations within Victoria and Vancouver. Union applied for unit at one location. Employer urged the appropriate unit was all locations. Board held one location, but qualified it by saying any other union will have to gain the support of those employees already repped by this union, and will just enlarge the existing unit rather than creating an additional one.
* "Amon principle" – enables organization to take place while at the same time ensuring an unfragmented and stable bargaining structure
* One feature of Michelin case makes it a bit more complex: there is little jurisprudence regarding the manufacturing industry and on functionally interdependent operations
* Michelin argued that a strike at Granton would put Bridgewater out of work and it would be undemocratic to allow only those at Granton to vote on something that would affect Bridgewater
* But, this ignores the basic dilemma faced by labour relations boards in unit determinations – ignores real difficulties confronting trade unions in organizing very large bargaining units esp in the fact of an organized employer campaign against unionization

# Labour Relations Board Powers to Amend the Scope of the Bargaining Unit Post-Certification

* A solution to ease tension between effects of bargaining unit scope on the organizing process vs. bargaining process, is to allow for amendment to the scope of the bargaining unit over time
* But not all jurisdictions allow for this

#### C Michael Mitchell & John Murray "Changing Workplaces Review: Special Advisors' Interim Report"

* OLRB historically had position that after it has issued a certificate and parties are in a collective agreement, the certificate is "spent" and OLRB has no jurisdiction to revise it (except where the Act authorizes it)
* With minor exceptions, as bargaining units are added over time, the only way to change the configuration of bargaining units now is for parties to voluntarily agree to changes
* Issue is whether there ought to be an explicit power to revise, amend, and consolidate bargaining units for the rationalization or modernization of bargaining unit where the original structure no longer works

# Other Jurisdictions

* Labour boards have an express power to redefine bargaining units in: BC, AB, NB, NFLD, PEI, NS and federally
* Test for applications to do so vary
* OLRB has maintained consistently that it does not have jurisdiction to do so

# Determining Employee Support

* The certification process is built around the concept that the choice of whether or not to have collective bargaining is given to the majority of employees in the bargaining unit
* Divergences exist in how this support is assessed
* Three Canadian models:
  + A quick vote in every case
  + Primary reliance on membership evidence with a brief period after the certification application is filed to allow for change-of-heart petitions
  + Primary reliance on membership evidence as of the date of application

#### Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA (1983) Harvard Law Review

* American labor law has created an elaborate formal procedure for the representation contest
* There has been steady decline of union success rates since 1950, Weiler argues this is because of deficiencies in the law – the current certification procedure does not effectively insulate employees from the kinds of coercive anti-union employer tactics the NLRA was supposed to eliminate
* Time lag between filing of representation petition and the vote – gives employer opportunity to turn its workers against union
* There has been an increase in unfair labour practices
* Weiler likes the Nova Scotia instant vote – NSLB must conduct an election no more than 5 days after it receives a certification petition – nearly impossible in this time for employer to do sketchy things
* Other scholars have examined relationship between union growth, union density, and type of union certification procedure imposed by labour law. Key findings (see sources on p.511 of textbook):
* *Fewer Certification applications filed by unions*
  + Imposition of a mandatory vote (in place of automatic certification) is associated with significant declines in the number of union organizing attempts that result in applications for certifications being filed
* *Shifts in types of applications filed and certified*
  + Intro of the mandatory vote in ON led to lower levels of organizing activity and lower levels of success in organizing more vulnerable employee groups (ex. part time workers)
* *Lower certification success rate*
  + Mandatory representation elections had a negative effect on certification success rates, with estimated declines in success rates ranging from 9-19 percentage points
* *More effective employer unfair labour practices*
  + Ridell study found that in BC, employer unfair labour practices were twice as effective at defeating union organizing attempts under a mandatory vote system than under a card-based system
  + But also found a major decline in the volume of unfair labour practice complaints filed
* *The role of delay*
  + Key criticism of mandatory vote systems is that it takes longer for the certification application to be processed, giving employers more time to influence employees
  + The "quick vote" is posed as a solution to this concern
  + Research in BC and On show that delay has strong negative effect on the likelihood of certification

# Acquisition and Termination of Collective Bargaining Rights

#### Decertification Applications

* Several different issues
  + Who may apply for decertification, who may cast a ballot in a decertification vote, and how much labour relations boards ought to exercise statutory discretion
* Employers cannot be seen to have influenced the decision to remove the union
  + Have to be neutral
* Can vote to decertify if:
  + No collective agreement reached within 1 year of certification
  + Beginning in the last 3 months of a 3 year agreement and in months 34, 35, 36 and 46, 47 and 48 of a 4 year collective agreement

##### Employees of Kelly’s Ambulance (1982) Ltd and Canadian Union of Public Employees v Kelly’s Ambulance (1982) Ltd (1993) – NSLRB – temporary or replacement workers are not members of a bargaining unit if they were not members at the start of the strike/lockout and do not have an interest in the issue

* **Facts:** Replacement workers wished to apply for decertification of a trade union during the course of a lockout. The union was certified on April 16, 1991. On September 4, 1992, the employer locked out its employees. On February 22, 1993, the Applicants filed their application for revocation of certification. Union was certified but could not get a first collective agreement and so they got locked out, and the employer hired replacement workers who made an application to LRB to decertify the union.
* **Issue:** Do the replacement workers get to vote in a decertification vote?
* **Holding:** The replacement workers cannot apply for decertification. Replacement workers under the LRB are not employees for the purposes of the legislation because they are deemed to be temporary workers whose employment ends at the end of the strike or lock out.
* **Analysis:**
  + Here, there was no evidence of employer interference in the application for decertification
    - Rather, the question was whether temporary workers could file such an application
  + Generally, temporary workers or casual employees are excluded from the bargaining unit due to the fact such employees have no long-term commitment to or status in the employer’s organization
  + Important to note that locked out employees maintain their statutes as employees in the bargaining unit throughout strike or lockout
  + If striking or locked out employees are members of the bargaining unit with statutory rights connected to their status as an employee, the logic of the Act must be to view replacement workers as temporary employees whose jobs terminate at the end of the strike or lockout if and/or when the full-time or regular part-time employees return to work
  + Board concludes that replacement employees in this case are not members of the bargaining unit

##### International Association of Machinists and Aerospace Workers and Courtesy Chrysler (2001) – NSLRB – in determining whether an employer interfered with a vote to decertify, the question is whether there is conduct, either an act or omission, on the part of the Employer from which reasonable employees would infer employer support for the decertification, and which would likely have an impact on whether the vote expresses the “true wishes of employees in the unit”

* **Facts:** There was an application for decertification but the Union alleged that the Employer interfered with the process. The vote to decertify may not have been voluntary. They had been unionized and there was an application by some of the employees for decertification but employer let a supervisor go to any employee during working hours to convince them to sign a petition to decertify. Employer had consented to allowing the supervisor to do this
* **Issue:** Should the decertification application be thrown out because the employer has been involved in it?
* **Holding:** Decertification vote was null due to undue influence from the employer. Employers must take a strictly neutral position to decertification. If an employer is involved in a decertification campaign, that amount to employer interference and the application will generally be thrown out
* **Analysis:**
  + The Board requires that the Employer adopt an attitude of strict neutrality in respect of application for revocation of certification
  + Test for whether there was interference is objective
    - It is sufficient that the conduct could have that effect on a reasonable person. Sufficient that there was a reasonable belief by the employees that the fact that the supervisor was going around was enough for the employees to believe the employer was urging them to do so and therefore their jobs were in jeopardy. This stained the application and it was rejected by the LRB
    - Question is whether there is conduct, either an act or omission, on the part of the Employer from which reasonable employees would infer employer support for the decertification, and which would likely have an impact on whether the vote expresses the “true wishes of employees in the unit”
  + After answering this question, the Board must exercise its discretion to revoke or confirm the certification
  + In the current case, Mr. Chapman was conducting decertification organizing on company time and company premises
    - The Employer was giving tacit support to Mr. Chapman’s revocation efforts

# Alternatives to the *Wagner Act* Model

#### Minority and Occupational Unionism

#### Clyde Summers, “Unions without Majority: A Black Hole?”

* Advocates allowing unions to play a role in representing pro-union minorities in particular workplaces
* There is no suggestion in reports or legislative debates preceding the *Wagner Act* that a majority, preferring individual bargaining, could deprive a minority of their right to bargain collectively for themselves through representatives of their choosing
* A non-majority union would have the same position as a union that had a majority in a bargaining unit encompassing only a minority of the employer’s workforce
* Would help employees know and enforce their individual employment rights
* Could have a role in the enforcement of the Occupational Health and Safety Act
* This option is available in many countries besides USA and Canada
* Minority unionism is unknown in North America, widely known in Europe

#### Roy Adams, “Bringing Canada’s Wagner Act Regime into Compliance with International Human Rights Law and the Charter”

* Recommends the adoption in Canada of a variant of the minority unionism concept, in which existing *Wagner*-type legislation could be revised such that in addition to allowing for union certification based on exclusive-majoritarianism, as they do currently, statutes could also provide for certification based on the concept of a “most representative” union
  + Based on 30% support and a minimum membership
  + Would have the rights and duties of exclusive agents but no the exclusive representation rights

#### Dorothy Sue Cobble, “Making Post-industrial Unionism Possible”

* Evokes the pre-*Wagner* phenomenon of occupationally organized unions as a possible way to facilitate the organization of service sector workers

# Broader Based Bargaining

* Advocated for as a way of addressing the lack of fit between the modern economy characterized by widespread organizational fissuring and the *Wagner Act* model
* 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
* Advantages
  + Uniform industry-wide working conditions might remove wages as a competitive factor
  + May produce a more statesperson like approach on both sides
  + In industries where small-scale firms predominate, organization on the employer side is needed to counterbalance union bargaining power
  + An employers’ organization may help to bring order to an industry by enforcing compliance with industry-wide standards, thereby avoiding the necessity for legal or economic sanctions by the union
  + May also mitigate the problem of the contracting out of work by employers to non-union firms
* Disadvantages
  + Taking labour costs out of competition may decrease labour mobility
  + Industry-wide or regional standards may be unsuitable for particular firms with unique problems
  + Employers’ organizations formed for collective bargaining purposes may become vehicles for the suppression of commercial competition
  + Cost of industry-wide strikes are likely to be very great

#### C Michael Mitchell & John C Murray, “Changing Workplaces Review: Special Advisors’ Interim Report”

* Multi-employer bargaining has existed under Ontario’s labour relations legislation for the construction industry since the 1970s and on a compulsory basis in the industrial, commercial, and institutional (ICI) sector since 1977
  + The accreditation and province-wide bargaining provisions in the ICI sector were employer initiatives designed to equalize bargaining power with then-stronger unions
  + *LRA* imposes a system of single-trade, multi-employer, province-wide bargaining
* *Status of the Artist Act* permits a broad array of professional artists in the federally regulated cultural sector to form associations and bargain collectively with producers who engage their services
  + Also allows for the creation of producers’ associations for bargaining with artists’ associations
  + Holds the potential to extend collective bargaining to types of workers who may not conventionally be thought of as “employees”
  + Due to artists’ and performers’ need or desire to have independent contractor status for tax purposes, the performers are presumed not to be employees under the LRA and so the sector is not governed by the Act
    - Agreements appear to fall outside of the scope of the LRA
* Another approach is to institute a system by which certain terms can be extended by decree to cover all workers, both union and non-union, within a specific sector
  + E.g., Ontario’s *Industrial Standards Act* which was introduced in 1935 and repealed in 2000
    - Provided a mechanism for establishing a schedule of wages and working conditions that was binding on all employers and employees in a particular industry across a given geographical zone
    - Largely fell into disuse after the ESA was introduced in 1968

# Broader Based Bargaining in Quebec

#### Patrice Jalette, “When Labour Relations Deregulation Is Not an Option: The Alternative Logic of Building Services Employers in Quebec”

* Decree system
* In Quebec, the current mechanism for extending the provisions of collective agreements is a remarkable exception to the prevailing employment relations system since, through an extension, the provisions of a collective agreement concluded between private parties are extended to third parties
* Quebec is the only place in North America with a strict extension mechanism
* The Decrees Act allows the Quebec Minister of Labour to issue a decree extending the conditions of employment negotiated in a collective agreement to all employees in other firms within the same sector
  + This system allows for extension of wages and certain conditions of employment to a given sector
  + Any party to a collective agreement may request a juridical extension of the collective agreement

#### Alternative Worker Voice Mechanisms: Workplace Councils?

* Some scholars have argued that a major problem with the *Wagner Act* model is the fact that it does not provide workplace representation for all employees, but only for those within bargaining units
* Given the decline in union density over time, some scholars suggest alternative mechanisms to support workers’ voices, such as the adoption of an employee works council in every workplace, with employees having the right to choose the members of that council but not the right to vote it out of existence

#### Rafael Gomez & Juan Gomez, “Workplace Democracy for the 21st Century: Towards a New Agenda for Employee Voice and Representation in Canada”

* These are bodies elected by all non-managerial employees and entitled to meet with management in establishments and firms operating above a certain size
* Work councils would be apprised of and consulted with on all matters impacting employees and can participate to some degree in management
* Are a mainstay of workplace democracy in many European jurisdictions where they are integrated into larger labour relations systems
  + Seen as a complement to collective bargaining and not a replacement

#### Alternative Worker Voice Mechanisms: Protecting “Concerted Activities” of Non-unionized Workers?

* There has been increased discussion of the importance of providing a broadly defined protection for worker collective action to non-unionized workers in the US
* In the United States, this section has recently been used to provide a degree of protection from employer retaliation for workers engaged in forms of worker expression, voice or activism, in contexts where there was no union certified under the NLRA to represent such workers
* In Canada, there is no comparable express statutory protection for non-unionized workers engaged in forms of collective action

# Negotiating a Collective Agreement

* Once a union secures status of exclusive bargaining agent, it supersedes individual bargaining between employer and employee, and employers cannot bargain with another union
* The law mostly cares here about the process of negotiating and not the outcome
* Key Statutory provisions:
  + **S. 16:** when a union get certified then it is entitled to send a written notice to bargain to the employer
  + **S. 17:** Says that when a notice to bargain has been sent, the parties will meet within 15 days and they shall bargain in good faith and make every reasonable effort to enter into a collective agreement (duty to bargain in good faith)
    - Duty to bargain in good faith: there is an important difference between hard bargaining and surface bargaining. Parties are intended to use their economic might during collective bargaining to try to reach their goals and as long as they do that with the intention to enter into a collective agreement they are entitled to engage in hard bargaining. Hard bargaining is lawful. However, surface bargaining is not. This means that employers cannot come to the bargaining table and go through the motions of bargaining while harboring a secret desire not to enter into a collective agreement and hoping to see the other side disappear
  + There are some exceptions that the law requires to be in a collective agreement or deems to be in the agreement if they are not included
    - **S. 45(1)** – requires that there should be a union recognition clause in the collective agreement
      * Says that the employer recognizes the union as the exclusive bargaining agent for the employee’s in the bargaining unit
    - **S. 46** 
      * Every collective agreement must have a provision that says that there will be no strikes or lockouts as long as the collective agreement continues to operate
      * This is repeated in s. 79 (proves how important it is)
    - **S. 47** – Rand formula or union security clause
      * Every collective agreement must have a provision which says that at the union’s request the employer must make a union dues deduction from employee pay cheques for every member in the bargaining unit whether or not they are a member of the union
    - **S. 48** – one of the most important – arbitration provision (mirror of s. 46 saying there shall be no strike or lock out)
      * Every collective agreement must have a mandatory provision allowing for a grievance process and an arbitration process to settle differences during the life of the collective agreement. If there is a difference that arises over the interpretation or application of a collective agreement, the union’s route is not to strike or withdraw labor during the life of a collective agreement but to file a grievance and if the parties cannot resolve it then it goes to arbitration in front of a neutral arbitrator and the decision of that arbitrator shall be “final and binding”
    - **S. 54**
      * No discriminatory provision in any collective agreement
      * Collective agreements must be consistent with HR codes in Ontario and the *Charter* rights
    - **S. 56**
      * Collective agreements are enforceable
    - **S. 58**
      * The collective agreement must be for a minimum of one year. No maximum. Most are usually for either 3 or 4 years.
        + In times of low inflation, agreements will last longer
        + In periods of high inflation, agreements will only be for one year

# The Statutory Timetable

* The service of a notice to bargain triggers the start of the statutory "duty to bargain", which lasts until they reach a collective agreement
  + The duty does not require they succeed in negotiating an agreement, only that they try
* 2 interrelated branches of that duty under section 17: (1) a duty to bargain in good faith and (2) a duty to make every reasonable effort to reach a collective agreement
  + There is a significant difference between hard bargaining and surface bargaining
    - Hard bargaining: two parties defending their economic interests
      * This is lawful
    - Surface Bargaining: When the party is going through the motions of appearing to be interested in bargaining to create a collective agreement all the while masking an unspoken desire not to complete a collective agreement
      * This is illegal
  + Interest arbitrators may come in when the parties can’t reach a new collective agreement
    - Rights arbitrators come in during a collective agreement to resolve disputes
* Must bargain within 15 days of the notice to bargain being received
* *Royal Oak Mines v Canada (Labour Relations Board) SCC 1996 –* the good faith requirement is the subjective element, and reasonable effort is the objective element
* If they reach an impasse, they usually have to go through mediation/conciliation process before strike/lockout
* Exception to the principle that the state will not impose an agreement on the parties is "first contract arbitration" 🡪 allows for state imposition of the terms of the first collective agreement after certification *if* the parties cannot settle those terms themselves
* Once a work stoppage becomes legal, the duty to bargain continues (even if a strike is underway) but the content of the duty changes
  + A winning party in the strike can take advantage of that situation to toughen their stance
  + If a party has complied with duty to bargain but impasse has been reached, they can break off negotiations on basis there is no prospect of progress
* Once a collective agreement is signed, labour relations statutes provide that conflict in the form of work stoppage is no longer allowed – duty to bargain is suspended until it is time to negotiate a new agreement
* Only significant exception to prohibition against strikes/lockouts during collective agreement is the provision in Canada Labour Code ss. 51-55 that allows for reopening of duty to bargain if employer introduces a tech innovation likely to affect the terms and conditions or security of employment of the bargaining unit

# The Bargaining Freeze

* **Bargaining Freeze:** provisions that prohibit changes in terms and conditions of employment after notice to bargain has been given
* Closely to the "**certification freeze**" which prohibits changes in terms/conditions during a certification campaign
* In Ontario, the freeze remains in force only until a strike or lockout would be lawful (Labour Relations Act **s. 86(1)**)
* If the union does not call a strike as soon as the law allows, the employer can unilaterally change terms and conditions without initiating a lockout

# The Duty to Bargain in Good Faith

* Rests on the shoulders of both parties but primarily rests on the employer
  + Most complaints are the union complaining about employer
    - The employer has less incentive to enter into a collective agreement
* Judged on two aspects
  + Good faith of the party
    - Examination into their subjective thinking
    - Depends on the distinction between hard bargaining and surface bargaining
  + Reasonableness of the bargaining positions
    - Based on objective factors (*Royal Oaks*)

# Purposes of the Duty to Bargain

#### Archibald Cox "The Duty to Bargain in Good Faith" 1958 Harvard Law Review

* **S. 8(a)(5)** of the *National Labour Relations Act*: it is an unfair labour practice for an employer "to refuse to bargain collectively with the representatives of employees"
* Four purposes entered into the enactment of 8(5)
  + Reduce the number of strikes for union recognition
  + Each side has some rough economic power in order to balance each other off to bargain for a fair equitable collective agreement that works for both sides
  + Most important purpose of the *Wagner Act* was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labour standards
  + Impose a duty to engage in collective bargaining (as distinguished from individual)
  + Collective bargaining is a rational process of persuasion (enables to exchange views, dig behind prejudices, etc.). Parties cannot use their raw economic power to destroy collective bargaining, rather it is mean to be a rational process for each side to explain to their other what their economic needs are

#### Content of the Duty to Bargain

* 1935, one of the sponsors of *Wagner Act* defended the of a requirement that the employer bargain collectively, and described the requirement in minimalist terms
* Basically said the bill proposes to escort the legal representatives of employees into the door of the employer and what happens behind those doors is not enquired into
* This has evolved

##### United Electical, Radio and Machine Workers of America v DeVilbiss (Canada) Ltd (1976) – OLRB – the foundation of duty to bargain in good faith is rational discussion between the union and the employer

* **Facts:** Employer takes a stance against the union demands and says we cannot give you those kinds of wage increases or benefits. Union says ok, prove it to us by giving us your economic data which says you cannot afford it. Employer refuses to hand over any economic data to the union that would back up or justify the employer’s stance of not agreeing to make any movement on the economic demands furthered by the union. Union says, by refusing to give them any financial data to back up its claim of not being able to afford the demands, that the employer has breached s. 17 the duty to bargain in good faith
* **Ratio:** Parties are obliged to meet and rationally discuss their mutual problems in a way that satisfies the phrase “make every reasonable effort”
* A very important function of s. 14 (now s 17. of ON labor relations act) is that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent
* The duty in s 14 (now 17) has two principal functions:
  + Reinforces the obligation of an employer to recognize the bargaining agent and
  + That the duty is intended to foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict

##### Graphic Arts International Union Local 12-L v Graphic Centre (Ontario) Inc (1976) – OLRB – an employer is allowed once to go over the head of the union and put the employer offer directly to a vote of employees; Conduct by one of the parties to the process which inhibits or undermines the decision-making capability of the other is contrary to the requirement to bargaining in good faith and to make every effort to reach a collective agreement

* **Facts:** Employer served notice on union to renegotiate the collective agreement. They met; union tabled a list of 12 proposals. Employer wanted to maintain status quo. Union applied for conciliation – did not resolve the dispute. Minister of Labor did not appoint a board of conciliation, setting in motion the statutory countdown, which would lead to strike/lockout option. Employer proposal put to union members, they voted to accept it, results of the vote were conveyed to the employer. Union brought grievance during negotiations that the employer had breached old collective agreement by hiring a certain person. Employer refused to sign a renewal agreement unless the grievance was dropped. Employer felt salty and put forward 16 new demands for the new collective agreement. Union filed a s. 17 and alleged that the employer had failed to make every reasonable effort to reach a collective agreement and that they did not bargain in good faith.
* **Held:** The union was not forthright in holding back the grievance until it thought the bargaining had concluded. But the union was justified in bringing it forward within the context of the bargaining process, and the tabling of the grievance did not justify the employer's response – especially because the response occurred after a verbal settlement had been achieved.
  + Employer's conduct violated of s. 14 which requires the parties to act in a way that fosters, not undermines, decision-making capability of parties.
* **Analysis:** 
  + Conduct by one of the parties to the process which inhibits or undermines the decision-making capability of the other is conduct contrary to the requirement to bargaining in good faith and to make every effort to reach a collective agreement
  + Decision-making capability depends not only on a full and open discussion of the items in dispute but also on an awareness that the scope of the dispute is limited to those items which have been put into dispute in the early stages of the bargaining process
  + The tabling of additional demands after a dispute has been defined must be construed as a violation of the duty to bargain in good faith

##### Canadian Association of Industrial, Mechanical and Allied Workers (CIAMAW) v Noranda Metal Industries Ltd – CLBR – a party violates the duty to bargain in good faith if it withholds relevant economic information without reasonable grounds for doing so

* **Facts:** Dispute between Noranda, employer and CIAMAW arose during collective bargaining process. Parties reached a deadlock in bargaining. CAIMAW alleged to the BC Board that Noranda violated s. 6 of Labour Code: "*no trade union or employer shall fail or refuse to bargain collectively in good faith in BC and to make every reasonable effort to conclude a collective agreement".* Noranda wrote a letter to its employees bypassing the union and offered an inaccurate description of the bargaining taking place and insinuations about the bargaining process. The Board did not find Noranda liable under s. 6 for this letter, but found it violated s 6 for a different communication to its employees where it "deliberately withheld factual data" on fringe benefits from the union. It raised the issue for the first time in its letter to employees rather than brining the issue to the attention of the union at the bargaining table. Board dismissed Noranda's contention that once the board finds that the bargaining parties have made a sincere effort to reach a collective agreement it cannot find a party liable under s. 6 for incidents part of the bargaining process.
* **Held:** The withholding of factual data did violate section 6.
* **Analysis:** 
  + The crucial standard in the legal framework is the duty to bargain collectively in good faith and make every reasonable effort to reach a CA
  + Noranda has made a considerable and continuing effort to reach a collective agreement
  + Failure to reach a collective agreement because of determination not to make concessions is not on its own an unfair labour practice
  + The Board must exercise restraint in intervening in negotiations between parties committed to reaching a collective agreement
  + The letter to employees was an isolated incident and no serious threat to the Union's status as bargaining agent = no violation of s. 6
  + Long-established principle that a party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds
  + Noranda's letter to the employees raised the issue of the cost of fringe benefits and made this issue a public obstacle to settlement, and in the same letter, company indicated it did have the data to make those calculations, then the company led the union to believe there would be a discussion of the factual underpinnings of these fringe issues
  + Noranda switched gears which prejudiced an opportunity to dissolve this
  + When an employer’s conduct at the bargaining table is being examined, the LRB will look at what the subjective intentions of the employer are in refusing to give info to the union or going over their head to the employees but they will also look at the objective impact on what it has done. Whether or not it is within the rules of fair collective bargaining and if it is done within the realm of good faith.

##### Simon Fraser University v CUPE (2013) – BCLRB – the employer is allowed to bring up issues that concern more than one union at the bargaining table with one union but cannot use it to create an impasse as it cannot be reasonably agreed to by just one union without the agreement of others

* **Facts:** CUPE and the university were in collective bargaining and exchanged their final proposals. There were 4 bargaining units and 4 unions at the University, they are all part of a common pension plan and any changes to the plan requires the consent of the University and all 4 unions. Then the employer proposed changes to the pension plan. The university had previously discussed these amendments with the employees (the employer wanted salary increase to be tied with pension plan) which the employees rejected. The parties agreed an empowered group constitutive of employees represented by several unions would negotiate with the university insofar as modifications to the pension plan were concerned. None of the unions could unilaterally agree to a pension plan during negotiations, but the university insisted CUPE agree to amendments to the plan. CUPE applied to the BCLRB for a declaration that the employer is bargaining in bad faith. CUPE went on a rotating strike and filed a complaint that the University failed to bargain in good faith.
* **Held:** The University's attempt to keep the Pension Plan on the bargaining table at this time is a breach of ss. 11 and 47 of the Code
* **Analysis:** 
  + **S. 11(1) of Code:** A trade union/employer must not fail to bargain in good faith and make every reasonable effort to conclude a collective agreement
  + Principles from *Vancouver Symphony* – discussed exceptions to the Board's hands-off approach recognized in *Noranda*
    - Certain demands will in and of themselves be contrary to s. 6 of the Act
  + *Northwood Pulp* – distinction between process of collective bargaining and the substantive proposals that arise in bargaining
    - Sometimes the substance of collective bargaining overlaps with the process, and the Board will intervene where specific demands are illegal
  + **Issue:** Whether the University's three offers at this stage in bargaining call for the scrutiny referred to in *Northwood*
  + University was entitled to raise solutions to the viability of the Pension Plan and to propose amendments that may have gone beyond CUPE's authority
  + But there comes a point where negotiations reach an impasse
    - CUPE took a strike vote and issued 72-hour strike notice, strike activity took place, CUPE put the University on notice that it will not continue to discuss the Pension Plan

#### Substantive and Procedural Obligations Imposed by the Duty to Bargain

* At one extreme, would be a clear breach of the duty to bargain for a party to propose a term that could not legally be included in a CA (ex. below min wage)
* Another type of proposal which either the employer/union can put forward without violating the duty to bargain, and which the other side can lawfully accept, but which neither side can press to an impasse 🡪 proposals on matters which affect the parameters of the collective bargaining relationship
  + E.g. proposals to reduce/expand the size of the bargaining unit as set by the labour board, proposals to institute multi-employer bargaining, etc.
* In applying the subjective and objective branches of the duty to bargain, labour boards have placed certain restrictions on the freedom of parties to bring whatever they want to the table
* **Surface bargaining:** a breach of the duty to bargain. Distinguished from "hard bargaining" which is not a breach.

##### United Steelworkers of America v Radio Shack (1980) – OLRB – there is a distinction between hard bargaining and surface bargaining; hard bargaining is lawful even if it results in a strike/lockout but surface bargaining amounts to bargaining in bad faith; a rigid position on central bargaining issues without a reasonable explanation as to why the employer had a rigid position can lead to a finding of bad faith

* **Facts:** Radio Shack is a branch of Tandy Electronics (Alberta), a subsidiary of a Texas company. RadioShack did not want to have unions in any of it’s workplaces. Union had been certified without a vote under 7a (now s 11) of Ontario Labour Relations Act, because the Board found the employer engaged in unfair labour practices designed to prevent unionization (failure to comply with board order to reinstate an employee dismissed for union activity, involvement in the circulation of an anti-union petition, warning it would move out west, anti-union T-shirts). Union served notice to bargain. Employer sent employees memo ridiculing union's requests for information, and memos after each stage of the bargaining process. Union wanted to have a Rand formula and at this time there was no provision for a Rand formula to be in collective agreements. Employer's counterproposals included unusual items (ex. "relationship clause" prohibiting union from publicly mentioning the employer/employees without written consent). Union goes on strike and filed a duty to bargain in good faith complaint. At the litigation, employer did not call their main employer bargainer and the union then put forth a claim that this could be taken as an adverse inference that the evidence given by this key witness would have been harmful to the employer’s case.
  + Employers testified they dropped the relationship clause, but the union said they never heard this
  + Employer counsel team changed
  + Strike began, employer sent letter to workers not striking thanking them for their courage and exercising their right to work during a strike
* **Held:** Employer's bargaining posture was in violation of ss. 14, 56, 59 and 61 of *Labour Relations Act*
* **Analysis:**
  + Employer failed in its duty to bargain in good faith and make reasonable effort to reach a collective agreement
    - Failure to call the key union bargainers was used to infer the lack of good faith in bargaining
      * This was an adverse inference
  + Anti-union animus and aimed at undermining union's role in violation of ss. 56, 58 and 61 and their underpinning principles
  + An employer cannot be more rigid and unbending on union security than he can be on any other issue
  + S. 36(a) provides the union with a very limited form of union security, and other form of union security is negotiable
  + There must be clear evidence that the employer really did have a change of heart
  + The court thinks it is likely that the employer's rigid position on union security had the purpose of avoiding a CA and was part of its earlier conduct aimed at undermining the trade union in the eyes of employees
  + "Surface bargaining"– going through the motions without true intent of entering into a collective agreement
    - Inference of this can only been drawn through the totality of the evidence
* The employer behaved badly up until a certain point, but the evidence persuades that both parties had entered "hard bargaining". The employer's new team which brought many unresolved issues down to 3 gives indication of good faith bargaining

##### Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v Canada Trustco Mortgage Company (1984) – OLRB – Example where court found "hard bargaining" which is legitimate rather than surface bargaining

* **Facts:** Union certified as bargaining agent at only two of many branches of Canada Trust in ON (St Catherines & Cambridge). Parties had negotiated a CA for St Catherines, similar to non-unionized branch policies. Negotiations in Cambridge branch, the employer was willing to offer only minor improvements over the terms in St. Catherines. Union complained bad faith.
* **Held:** Employer's conduct is hard bargaining in pursuit of its own self-interest and legitimate business objectives. It was prepared to sign a CA similar to terms at other branch. No breach of s. 15. Even though employer could afford better conditions, they were not compelled to.
* **Analysis:** 
  + Board will not act as interest arbitrator or prescribe the precise contents of the CA, even in the face of an egregious breach of duty to bargain in good faith (*Radio Shack*)
  + The statute does not require any particular concessions, does not require a CA must be the outcome of the bargaining
  + There may not be a perfect answer to the competing interests of the union and employer, their only obligation is to endeavor to conclude a collective agreement and if that is the true intent, neither the content nor consequences of that agreement are of any concern to the Board
  + A party whose bargaining strength allows it to virtually dictate the terms of the agreement does not thereby bargain in bad faith

#### Brian Langille & Patrick Macklem "Beyond Belief: Labour Law's Duty to Bargain" (1988) Queen's Law Journal

* With respect to *Trustco…* The conception of the duty to bargain, which assumes a distinction between bad faith and self-interest is bound to fail. Very critical of this decision. They say it is right that the law come down hard on a powerful but trustworthy employer such as RadioShack but it should come down equally as hard on a powerful but rational employer like Trustco because there is no meaningful difference between a powerful and rational employer and a powerful and irrational one
* There is no distinction between bad faith and self-interest
* Self-interest has become a defense for true bad faith behavior

##### Royal Oak Mines Inc. v Canada Labour Board (1996) – SCC – parties must bargain in good faith (subjective standard) and must make every reasonable effort to enter into a collective agreement (objective standard.

* **Facts:** Unionized workers of Royal Oak Mines, company based in Yellowknife, voted to reject a tentative agreement proposed by new employer. It was going to lower wages, take away overtime incentives which led to an 18-month strike. Caused 9 deaths in a bomb explosion, affected whole community. Duty to bargain in good faith claim was raised with LRB. Labour Board found employer had failed to bargain in good faith by refusing to bargain until a certification issue had been resolved and by attempting to impose a probationary period on all strikers. But board based its decision mainly on what it found to be the employer's most serious violation: the employer's refusal to negotiate until issue of reinstatement and discipline of several employees accused of serious picket line violence had been resolved. Board ordered employer to put back on the table the tentative agreement except for items employer changed mind about. Parties given 30 days to resolve, or compulsory arbitration was to be imposed. Application by employer to Federal Court of Appeal was dismissed. Appealed to SCC.
* **Held:** The court should not set aside the Board's decision unless it was patently unreasonable. There is overwhelming support for the Board's finding that the appellant breached duty to bargain in good faith by imposing an unreasonable condition to the bargaining process. Fed Court properly deferred to the Board's finding.
* **Analysis:** 
  + S. 50(a) of Canada Labour Code has two facets. (1) must bargain in good faith (subjective) and (2) make every reasonable effort to enter into CA (objective)
  + Putting forward a proposal that it knows the other party could never accept, must constitute a breach of the requirement to make reasonable effort
  + If a party proposes a clause in a collective agreement, or refuses even to discuss a basic term that is included in other CA's in comparable industry, they are breaching the reasonable effort requirement
  + Useful test
    - Is the employer proposing clauses that are not industry standard?
    - Is the employer refusing to discuss a basic or standard term that is found in the industry?

##### National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) and its Local 2224 v Buhler Versatile Inc (2001) – MLBD – example of surface bargaining; have to engage in full, rational, and informed discussion about issues; employer is required to disclose decisions that have been made affecting the bargaining unit; parties must avoid deception

* **Facts:** CAW-Canada alleged BVI failed to bargain in good faith and make reasonable effort. Original "Versatile" plant began as a family operation in Winnipeg as a manufacturer of tractors and other equipment. Plant was purchased by New Holland which was purchased by IHF. Plant experienced cyclical nature of the agriculture industry. New Holland purchased another farm tractor manufacturer, this purchase was under scrutiny of the US department of justice – potential loss of competitiveness in industry. DOJ told them the plant had to be sold as a condition of the merger. BVI purchased the plant. CAW-Canada had reservations about purchase of New Holland by BVI, it was not their purchaser of choice. BVI was a tough negotiator, union was fair and willing to work out agreement. Eventually strike happened.
* **Held:** Went beyond the tactics of hard bargaining and contravened s. 63(1) of the Act (the duty to bargain requirement)
  + Constant threat of sale and closure, lack of supporting material to justify demands, switching positions in the middle of bargaining, deterioration of initial offer, lack of attempt to seek common ground
* **Analysis:**
  + Quality > quantity of meetings in considering if bad faith bargaining occurred
  + Employer put forth proposals without justification or documentation to support demands
  + Employer would say no to everything, no discussion
  + Employer ought to have known that certain of demands would eliminate longstanding provisions in the CA

##### United Food & Commercial Workers Canada, Locak 175 v WHL Management Limited Partnership (2014) – OLRB – when arbitrating a dispute, the Board must balance the need to reach an expeditious resolution and the principles of fairness in hearing all evidence; collective bargaining is about process and not content but sometimes the content of bargaining proposals may infringe upon the integrity of the bargaining process

* **Facts:** The employer and the union were made to repeatedly engage in good faith collective bargaining by the ONLRB. Before the commencement of bargaining for the renewal of collective agreement between the parties, the unionized workers were already contemplating striking in the event the bargaining failed. Relationship between the parties was bad and getting worse. Notice to bargain was given April 29, 2013. During July and August, the parties exchanged proposals. The final offer from the employer was made on August 13th. The union rejected the proposal and commenced its strike action. The strike continued until the date of the board’s decision on December 9, 2014. In spite of the strike, the parties continued bargaining from September 2013 to February 2014. The parties also engaged in mediation through the Board. All negotiations and mediations failed. The board then went on to hear the issues on merits. The employer’s counsel argued that it would be a violation of the natural justice principle if the board were to decide the dispute on the basis of submitted documents without oral evidence. The employer alleged a breach of the duty of fairness of the Board.
* **Issues:** (1) Is there a duty of fairness? (2)
* **Holding:** The employer breached the duty to bargain in good faith
* **Analysis**
  + The Board is committed to the over-arching statutory purpose to encourage cooperative participation of employers and trade unions in resolving workplace issues
  + Within the context of its Rules of Procedure, the Board’s process can be said to encompass elements of what has come to be termed “active adjudication”
    - It endeavors to assist the parties before it to come to an expeditious resolution of their disputes
  + Oral evidence in support of a complaint of failure to bargain in good faith may stretch out the hearing process excessively and needlessly hinder the expeditious resolution of the dispute to the detriment of labour relations between the parties
    - Here, there was no need to hear oral testimony to supplement the expansive documentary record
  + The Board’s principal role on a failure to bargain in good faith inquiry is to monitor the process of bargaining, not its content
  + The Employer failed here to bargain in good faith and make every reasonable effort to make a renewal collective agreement
    - As serious impediments to reaching agreement were overcome, minor issues proposed by Employer elevated into major points of contention
    - The Employer attempted to undermine the integrity and credibility of the Union as the certified bargaining agent of the employees
  + Two examples of content that would be evidence of bad faith
    - When one party or the other proposals something that is illegal
      * E.g., the employer refusing to include a clause stating that the union is the exclusive bargaining unit
    - When one party proposes content that they know the other party will reject

# Disclosure of Decisions or Plans Substantially Affecting the Bargaining Unit

* In the early 1980s, the Ontario board considered the extent to which the duty to bargain in good faith required the employer to disclose to the union information concerning plans for closing or reorganizing plants
* In *Westinghouse Canada Ltd* (1980) the CLRB found that the Employer had committed an unfair labour practice by moving a plant during negotiations but dismissed the complaint of failure to bargain in good faith
  + Board said that the duty to bargain places an obligation on the employer to respond honestly to 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 a duty to reveal, on its own initiative, plans that have not yet ripened into at least *de facto* final decisions
* In *Sunnycrest Nursing Homes Limited* (1982), the OLRB found a violation of the duty to bargain in circumstances where it was clear that a decision to contract out a substantial portion of the bargaining unit’s work had been taken before and during negotiations with the union

#### Brian Langille, “Equal Partnership in Canadian Labour Law”

* The above decisions incentivize employers to remain silent, lock the union into the agreement, and then reveal the plans or act upon them
* It is a system geared to non-disclosure

##### International Woodworkers of America, Local 2-69 v Consolidated Bathurst Packaging Ltd (1983) – OLRB –Duty to bargain in good faith does not continue after an agreement has been reached but if the employer is making a significant change then the employer has a duty to disclose this as soon as possible; reaffirmed Westinghouse

* **Facts:** From November 1982 to January 1983, the union and employer negotiated a renewal of the collective agreement covering an all-employee unit in the employer’s Hamilton plant. During negotiations, the union sought to persuade the employer to tighten the provisions in the expired agreement dealing with plant closures and severance pay. The union dropped those demands and the old provisions were renewed. At no point during the negotiations 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 signed, the employer announced it would be shutting down its Hamilton plant. The union complained that the employer breached its duty to bargain.
* **Holding:** Board concluded that employer had made the decision to close the plant before the collective agreement was signed, and that it had therefore violated the duty by failing to disclose that decision during bargaining. Because a de-facto decision had been made, that was therefore a breach of the duty to bargain in good faith
* **Analysis:**
  + A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities
  + Disclosure encourages the parties to focus on the real positions of both the employees and the employer
    - General duty of unsolicited disclosure would be costly, unclear, and potentially counter-productive
  + It is tantamount to a misrepresentation for an employer not to reveal during bargaining a decision it has made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated
  + A strong argument can be made that the de facto decision doctrine should be expanded to include “highly probably decisions” or “effective recommendations” when an issue such as a plant closing is at stake
  + The failure to disclose must be tantamount to misrepresentation

# Remedies for Violating the Duty to Bargain

##### Royal Oak Mines v Canada (Labour Relations Board) (1996) – SCC – The decision of the LRB is broad and cannot be overruled through judicial review unless the court determines that the order was patently unreasonable; the remedy must be rationally connected to the seriousness of the breach of the offending party

* **Facts:** Unionized workers of Royal Oak Mines, company based in Yellowknife, voted to reject a tentative agreement proposed by employer. 18 month strike followed. Caused 9 deaths in a bomb explosion, affected whole community. Labour Board found employer had failed to bargain in good faith by refusing to bargain until a particular certification issue had been resolved and by attempting to impose a probationary period on all strikers. But board based its decision mainly on what it found to be the employer's most serious violation: the employer's refusal to negotiate until issue of reinstatement and discipline of several employees accused of serious picket line violence had been resolved. Board ordered employer to put back on the table the tentative agreement with the exception of items employer changed mind about. LRB ordered that the employer was to put back on the payroll an offer it presented earlier on in negotiations, specifically as part of the back to work protocol that part of this protocol would include arbitration be available for those strike employees who had been fired for various purported acts of vandalism during the course of the strike. Parties given 30 days to resolve, or compulsory arbitration was to be imposed. Application by employer to Federal Court of Appeal was dismissed. Appealed to SCC.
* **Issue:** Whether the remedy ordered, i.e. put the offer you already had on the table back on the table plus place an arbitration clause in the back to work protocol meets number 3 or 4 of the list below.
* **Holding:** Appeal dismissed, the Board was not patently unreasonable in its remedial order.
* **Analysis:**
  + Parliament has clearly given the Canada Labour Relations Board a wide remedial role
    - The Board may order anything that is “equitable” for a party to do or refrain from doing in order to fulfil the objects of the Code
    - The remedy must be rationally connected to the seriousness of the breach of the offending party
  + Here, remedy was not patently unreasonable, rather it was eminently sensible and appropriate in the circumstances presented by this case
    - The factual background and prior involvement of the Board must be taken into consideration and when it is considered, it is clear that the remedial order was appropriate
  + There are four situations in which a remedial order will be considered patently unreasonable
    - Where the remedy is punitive, not restorative, in nature
    - Where the remedy granted infringes the *Charter of Rights and Freedoms*
    - Where there is no rational connection between the breach of the Act, the consequences of the breach, and the remedy ordered
    - Where the remedy contradicts the objects and purposes of the Code
  + While remedies ordered by a labour relations board should not ordinarily mean imposing terms into a CA, if the parties are serious enough and if the behavior by one is egregious enough, then as a last resort it is within the jurisdiction of a labour relations board to impose provisions in a CA
  + The remedy met the rational connection test and the objects and purposes of the Code test because it met the objective of getting the parties to agree to a collective agreement and get back to work.

##### International Alliance of Stage Employees, Local 849 v Egg Films, Inc (2015) – NSLRB – while LRBs are entitled to order mandatory arbitration for determining a collective agreement, it should only be used in extremely exceptional circumstances

* **Facts:** The employer bitterly but unsuccessfully contested certification of the newly formed trade union as a bargaining unit at their establishment. The judicial decision went in favor of certification of union. The labour board determined the terms and conditions of the first collective agreement. At the expiration of the first collective agreement, when the parties negotiated for a second collective agreement, the union complained that the employer, Egg Films, breached its duty to bargain in good faith by employing various subversive strategies intended to avoid a collective agreement. Egg Films hired people on short term contracts whenever work had to be done. Egg Films had already unsuccessful contested the certification of a union and the Labour Board then determined the terms and conditions for a first collective agreement so when the parties sat down to bargain for a second one the union claims the employer breached their duty to bargain in good faith. LRB agreed.
* **Issue:** Can the Board make mandatory arbitration a part of any remedial order?
* **Holding:** NSLB ordered the parties to return to collective bargaining and use the previous collective agreement as a basis for the negotiation. Board also placed limits on the new negotiation and asked Egg Films to compensate its employees for the loss of wages due to unemployment resulting from the lock out by the employer
* **Analysis:**
  + The Board determined that Egg Films made no effort to arrive at a collective agreement and breached its duty to bargain in good faith
  + Can the Board make mandatory arbitration a part of any remedial order?
    - The law does recognize that labour boards do have this power
    - Wording of legislation is broad enough to include the jurisdiction to make this order or impose strict terms on what can be bargained about
    - Should only be used in the most dire and exceptional circumstances
      * E.g., where there is no other way to secure the various social policies that underlie labour relations legislation
    - In the current case, Egg Films’ actions was not drastic enough to order mandatory arbitration

# First Contract Arbitration – s. 33 *LRA*

* Apart from Alberta and New Brunswick, nine other jurisdictions in Canada have devised statutory provisions securing first contract arbitration (FCA), wherein an arbitrator finalizes the very first contract between a newly certified trade union and the employer when the parties fail to reach a negotiated agreement
* Came about because of Radio Shack case- this was an unhealthy strike over the issue of whether union security clauses could be discretionary or not. Ontario Conservative Government made security clauses mandatory in all collective agreements and it inspired the creation of First Contract Arbitration
* **First Contract Arbitration:** Means that if the parties are unable to negotiate a contract by themselves, one of them (usually always union) can apply to the LRB and if it meets the criteria laid out in s. 43, then the LRB will order mandatory binding arbitration to settle all outstanding differences
* Two reasons for imposing the first contract
  + FCA consolidates the legitimate role of trade unions as bargaining agents for employees in an establishment
  + FCA seeks to normalize collective labour relations, which is often difficult for employers to value
* FCA may pertain to two scenarios
  + Fault
    - When 1 or both of parties at fault, mediator or labour board may order FCA as remedy to overcome the disagreement and conclude contract
    - It is not a penalty for fault but rather a remedy for overcoming the negotiation deadlock
  + No fault
    - Overcomes a no-fault collapse of bargaining as well
    - Both parties here are engaging in hard bargaining (not surface bargaining) and cannot reach an agreement so they go to the arbitrator to determine the FCA
* Bill 47 would require the union to prove the difficulties it’s having in order for the union to get FCA
  + Bill 148 made it almost automatic
* First Contract Arbitration reduces the number of strikes and establishes a longer and more permanent solution

##### Yarrow Lodge Ltd v Hospital Employees’ Union (1993) – BCLRB – lays out the principles that should govern first contract arbitration

* **Analysis:**
  + FCA is a remedy designed to address the breakdown in negotiations resulting from the conduct of one of the parties that is not simply an unfair labour practice. Union does not have to prove unfair labour practice in order to trigger an application for FCA. You only have to show that there has been difficulties in reaching a first contract and that the parties are unlikely to do it short of a strike.
  + Policies that underlie the FCA provision of the BC *LRC* (s. 55)
    - The process of collective bargaining itself, to whatever extent possible, is to be encouraged as the vehicle to achieve FCA
    - Mediators should be assigned early into FCA disputes to facilitate and encourage the process of collective bargaining and to educate the parties in the practices and procedures of collective bargaining
    - The timing of the imposition of a FCA should not be at the end of the negotiation process when the relationship has broken down and is irreparable
      * Should take place in a timely fashion after the mediator has identified the stumbling blocks in the dispute and what is needed in order to avoid an irreparable breakdown in the relationship
  + There are a number of factors that the Board will employ in assessing the collective agreement
    - Bad faith or surface bargaining
    - Conduct of the employer that demonstrates a refusal to recognize the union
    - A party adopting an uncompromising bargaining position without reasonable justification (i.e. in bank cases where the employer is not willing to want to vary their offer beyond what they were offering non-unionized employees before)
    - A party failing to make reasonable or expeditious efforts to conclude a collective agreement
    - Unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience
    - A bitter and protracted dispute in which it is unlikely the parties will be able to reach settlement themselves
  + Other principles to consider in arbitrating a FCA
    - A first collective agreement should not contain breakthrough or innovative clause; nor as a general rule shall such agreements be either status quo or an industry standard agreement
    - Arbitrators should employ objective criteria
    - There must be internal consistency and equity amongst employees
    - The financial state of the employer if it is a critical factor
    - The economic and market conditions of the sector or industry in which the employer competes must be considered

##### Communciations, Energy, and Pwperworkers Union of Canada, Local 87-M v Ming Pao Newspapers (Canada) Ltd (2011) – ONLRB – The FCA remedy seeks to facilitate good faith bargaining in sustaining robust collective industrial relations in the long run

* **Facts:** After filing unfair labour practice complaints against the employer, the trade union applied to ONLRB for FCA.
* **Holding:** Employer engaged in unfair labour practices. LRB concludes that the actions of the employer had caused the unsuccessful bargaining because of the refusal of the employer to recognize the bargaining power of the union. Therefore, employers’ actions conveyed message that employees would be better off without union.
* **Analysis:** The FCA remedy seeks to facilitate good faith bargaining in sustaining robust collective industrial relations in the long run

#### Bradley R Weinberg, “A Quantitative Assessment of the Effect of First Contract Arbitration on Bargaining Relationships”

* Statutory FCA reduces possibility of decertification of trade unions compared to jurisdictions where FCA is absent

#### Susan Johnson, “First Contract Arbitration: Effects on Bargaining and Work Stoppages”

* FCA acts as a deterrent and thereby promotes collective bargaining
* FCA also substantially reduces strikes and lockouts

# Regulating Industrial Conflict

#### Industrial Pluralism and Industrial Conflict

* Under general labour relations legislation in Canada, the ultimate means of dispute resolution is the use of economic sanctions
* Ability to maintain/withstand a work stoppage remains central to collective bargaining
* Over the years, Canadian public policy showed a pluralist approach, relying on dialogue and accommodation to resolve disputes
* SCC in *Saskatchewan Federation of Labour v Saskatchewan (2015)* confirmed that the right to strike is included in the *Charter* right to freedom of association
  + Any restrictions on the right to strike will be subject to this case's analysis

#### Paul Weiler, Reconcilable Differences: new Directions in Canadian Labour Law – 1980 (Sets out classic pluralist conception of role of strikes in collective bargaining)

* Labour management relations professionals would agree that there is a natural affinity between the right to strike and the system of free collective bargaining
* Basic assumption of our labour relations system: freedom of contract between union and employer
* The freedom to agree logically entails the right to disagree, to fail to reach an acceptable compromise
* Even good faith bargaining often does not produce a settlement – this makes collective bargaining systems different from other components in the market economy.
  + E.g. when you refuse to buy a car, you just walk away.
* The tacit premise underlying collective bargaining system is that the relationship and employment status will persist indefinitely through one series of negotiations after another, so deadlocks is a social issue
* Employees and union only have one response to a stiff employer - to refuse to work on those terms. Employer loses revenue and employees are out of work. Both lose economically and realize better to work together
* It is more so the credible threat of the strike which plays the major role in bargaining
* A legal ban on strike action is unacceptable if we're going to have free collective bargaining
* Legal right to strike is justified because of its instrumental role in our larger industrial relations system

# The Constitutional Right to Strike

* Right to strike is not expressly guaranteed, but *Saskatchewan* makes it recognized as an essential component of the right to a meaningful process of collective bargaining included in s. 2(d) of *Charter*
* In *Saskatchewan* the SCC struck down essential services legislation which prohibited strikes by public service workers and gave provincial gov discretion to determine which workers would be captured by the prohibition

# Legal Forums Regulating Industrial Conflict: An Overview

* Strike traditionally is a complete cessation of work, but there's a variety of popular employee pressure tactics:
  + Rotating or selective strikes
  + Go-slows
  + Work-to-rule
  + "study sessions"
  + Overtime bands
  + Coordinated sick days
  + Consumer boycotts
  + Picketing
  + Hot declarations
  + Mass resignations
* Most try to disrupt the amount of work done or induce other people to stop doing business with the employer
* Lockout is the counterpart to this strike – but this can be misleading
  + Employers don't usually initiate conflict by shutting down
  + Usually just resisting strike tactics by waiting them out or trying to continue its operations
* Employers can impose new terms unilaterally as long as it does so at the proper time and under certain conditions
* Only exception to the ban on strikes/lockouts during the lifetime of a collective agreement is in:
  + MB, SK, NB and federal labour relations statutes
  + Require the employer to give the union advance notice of any technological change during the lifetime of the agreement.
* Labour relations statutes in most jurisdictions provide that a dispute must be submitted to conciliation/mediation before a work stoppage may begin
* **Legality of a strike/lockout depends on whether the various statutory prerequisites in the relevant jurisdiction have been met:** 
  + It's only "timely" if all statutory requirements have been met, and it must be "timely" in order to be legal
  + Labour boards have power to order against strikes/lockouts that are not timely and will award compensation for losses resulting from such action
* **Explicit requirement for collective agreement to contain no-strike clauses which are enforced through the agreement's grievance procedure and ultimately through arbitration** (s. 48 ON Labour Act)
* If a strike is illegal, any picketing attached to it is illegal automatically.
* Regulation of whether or not a strike is legal belong to the LRB but the regulation of picketing belongs to the courts

# Role of Labour Relations Boards in Regulating Industrial Conflict

* "Strike" defined by *Canada Labour Code* s. 3(1):
  + "strike" includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.
  + This is an extremely broad definition
    - It is not exhaustive
    - Objective
    - Any type of refusal or slow-down of work
* The definition of lockout is primarily subjective
  + The closing is the employer’s initiative to prevent employees from going to work as a means of economic pressure during collective bargaining
  + Employer can close a workplace for reasons other than the above
  + Definition has to be subjective to only capture workplace closing for the proper motivation

# Seven Steps to Reach A Lawful Strike or Lockout

* 1) The collective agreement must be formally expired
  + If it is a 3-year agreement from Jan 2016 to Dec 2019 it must be Jan 1 2020 to be fully expired
* 2) Parties have to give notice to bargain and they have to have engaged in the good faith attempt to bargain
  + Usually union gives this notice
* 3) If the parties are reaching an impasse, one party will ask the minister of labour to appoints a conciliation officer who must meet with the parties at least once.
  + Usually union asks for this
  + Conciliation officers are employees of the ministry of labour and have a background in industrial relations. They are trained mediators and conciliators.
    - Meets with the parties at least once and try to determine if there is a way to reach an agreement
* 4) When the conciliation officer decides/is told that they cannot provide any more assistance to the parties
  + Conciliation officer will write a no-board report to minister saying what happened and recommending that minister does not appoint a conciliation board
    - **No board report:** means that conciliator will write a report to MOL saying that they met with the parties on these occasions, and determines that they are at an impasse and that the differences between them cannot be resolved and that they do not recommend the appointment of a conciliation Board
* 5) Minister can appoint a mediator, appoint a conciliation board (3-person board) and ignore the officer’s report (rare), or accepts advice and doesn’t appoint anyone
  + 99% of the time they do not appoint anybody
* 6) Has to be a secret, mandatory strike vote by union members organized by the union to endorse a strike
  + 50%+1 must agree to strike (must be a majority in favour)
* 7) 17 days must elapse from when the minister releases the no board report to the parties saying he accepts the recommendation of the no-board report
  + It technically says 14 but it really is 17

# Actions Constituting a Strike: Common Action or Concerted Activity

##### Communications, Electronic, Electrical, Technical and Salaried Workers of Canada (CWC) v Graham Cable TV/FM (1987) – CLRB – An employer can take measures to limit the disruptive effect (increase managers and non-striking employees) but cannot discipline employees for engaging in a lawful strike; If the work activities by the employees fall within a "strike" they are protected and the imposition of discipline would be unfair labour practice

* **Facts:** Union was in a legal position to strike under the 7 steps above. Employer was in a lawful lock-out position, but no one had done anything. Union believed that a traditional strike would fail (based on nature of employer's operations – management personnel could maintain service for a long time unless major equipment failure) so the union decided to work to rule. Employee’s decide that it is not useful for them to leave work, and that they would be better off to slow down work (“work to rule”). This means they will follow their work duties to the order and do them diligently, thoroughly and slowly. CWC (union) filed complaint alleging Graham had violated what is now s. 94(3)(a)(vi) of Labour Code by taking disciplinary action against some of its members because they were participating in lawful strike activities. Employer said discipline was only on those who had reported for work but failed to perform the functions of their job descriptions.
  + Union said the job action that was contemplated included slowdowns in some areas and a speed up in others. No OT was to be worked. Study sessions on each floor. This was from July 4-26.
  + July 15 – Employer warned its employees they must do the work required by their job descriptions or be disciplined. Some employers who continued the job action were suspended.
  + July 26 – employer required all employees who wished to work to sign a statement saying they will complete their work assignments
* **Holding:** An employer can take measures to limit the disruptive effect (increase managers and non-striking employees) but cannot discipline employees for engaging in a lawful strike. Employer does have the right to engage in a lock out, but they do not have the right to discipline employees for lawfully striking.
  + Disruption of an employer's normal operations is what a strike is all about and provided the employees are participating in lawful strike activities, their employer is prohibited from any of the actions against them
* **Analysis:**
  + Issue depends on what is a strike under the Code?
    - If the work activities by the employees fall within a "strike" they are protected, and the imposition of discipline is unfair labour practice
  + S.184(3) – protection against penalty for participating in a lawful strike. Broad.
  + Definition of strike encompasses a wide range of activities
    - See *Canada Post Corp* – All it takes for an unlawful strike in fed jurisdiction is an activity among employees with a common understanding, and designed to restrict output
  + Having told unions that limited/sporadic job action are unlawful when done at the wrong time, we can't really say the same activities are not lawful when done in a legal strike position
  + If the same standards are applied to determine lawful strike activities as the Board has applied to unlawful strikes in the past, then almost any concerted activity of employees related to work would fall within protection of s.184

##### CUPW v Canada Post Corporation (1992) – A lockout can be effective to counteract partial strike action

* **Facts:** Union not in strike position but it is getting annoyed with slow moving negotiations and it realizes that if it does something that will slow production during Christmas it will get Postal Office attention. Union says they will allow any envelope to come through that has only 10cent stamps on it meanwhile they are usually 35 cents. Employer argues to LRB that this is a strike. All turned around the definition of strike in the *Canada Labour Code*. Union over one day had engaged in various concerted activities to decrease production (at a time of lawful strike). Union showed employees summaries of *Graham Cable* decision saying they will be protected. Employer responded by refusing to allow employees who participated in the partial strikes to work the following day – union filed unfair labour practice
* **Holding:** Employers conduct was a defensive lockout and is permissible. Board held *Graham* meant employers can defend interests by imposing lockouts. We must distinguish employer conduct that was merely (permissible) defensive lockout from conduct which (impermissibly) discriminated against employees for exercise of their rights under the *Code*.

##### British Columbia Terminal Elevator Operators' Association on Behalf of the Saskatchewan Wheat Pool v Grain Workers' Union, Local 333 (1994) – CLRB – Union cannot circumvent the Code by giving employees the right to refuse collectively to work contrary to section 89

* **Facts:** Employer sought an unlawful strike declaration and other remedies. Argued there had been a concerted refusal by its employees to work voluntary overtime following the temporary layoff of ten employees in the bargaining unit. Collective agreement stated employees could refuse OT work. No evidence that the union authorized/orchestrated the employees' refusal to work OT- circumstantial evidence will suffice though. Parties were in the middle of collective bargaining. Employees in bargaining unit had engaged in a concerted refusal to work OT where normally a sufficient number would’ve accepted work
* **Holding:** Found to be an unlawful strike
* **Analysis:** Board concluded that the union was the architect of the employees concerted refusal and a strike contrary to s. 89 was in effect
  + Statutory definition of "strike" cannot be changed by an agreement of the parties
  + Union cannot circumvent the Code by giving employees the right to refuse collectively to work contrary to section 89

# The Strike Prohibition and Sympathetic Action

* Timing of strike is strictly regulated by statute and the strike ban poses significant obstacles to "sympathetic action" by one group of workers designed to help another group involved in a strike/lockout
* Sympathetic actions of this sort is likely to be a strike and untimely

##### Local 273, International Longshoremen's Association v Maritime Employers' Association (1979) – SCC – Parliament has adopted an objective definition of "strike" – elements are a cessation of work in combination with a common understanding; Whether the motive be ulterior or expressed is not relevant – only need cessation pursuant to a common understanding

* **Facts:** Issuance of injunction against 3 trade unions is being challenged on the grounds that refusal by members to cross a lawful picket line is not a strike and therefore not basis for issuing an injunction. There were several different bargaining units represented by a number of different unions all employed by same employer. Harbour Police was in lawful strike position and they go on strike. Police established picket lines in the entrance to the port's facilities. Other unions who were not in a position to strike refused to cross it because union solidarity and that Parliament could not have intended to breach union solidarity. Members of the three Locals refused to cross the lines and failing to do so and report to work, shipping operations in the Port were closed down. Locals argued that by "union solidarity" doctrine, the meaning of strike could not also mean the refusal to cross a lawful picket line around the employees' place of work
* **Issue:** Was the refusal by the other unions to not cross the picket line constitute an illegal strike.
* **Holding:** Strike has an objective definition. It does not matter who you are taking the action for or against, if you are not reporting to work in concert of one another and your collective agreement is in force then deciding not to cross a picket line out of union solidarity that does not give you any immunity when a declaration of illegal strike is made by the employer. Only exception is if the picket line gets unruly and people claim they do not want to cross the picket line because of fear of harm that might mean they are not doing an illegal strike.
  + Court can infer a "common understanding" where unionized employees respect another union's picket line
  + This inference is based in the idea that unionized workers respect picket lines as a show of solidarity
* **Analysis:**
  + *MacMillan –* BC Labour board held strike to have a subjective element – a concerted effort by employees undertaken for a specific purpose of compelling an employer to settle a dispute. That motivation is absent in the normal case of employees honouring a picket line.
  + Parliament has adopted an objective definition of "strike" – elements are a cessation of work in combination with a common understanding
  + If motive is ulterior or expressed is not relevant – only need cessation pursuant to common understanding
  + Refusal to cross a picket line lawfully established by another union cannot be a strike unless it falls within the definition of strike

##### Unilux Boiler Corp v United Steelworkers of America, Local 3950 (2005) – OLRB – if the employees have a genuine fear of violence or threat of violence for crossing a picket line, it will not be found that there is an illegal strike occurring

* **Facts:** Company's non-unionized office employees refused or were unable to cross a picket line established by its striking unionized employees. Ongoing strike. The picketers were hostile – even police couldn't escort employees through it. Non-unionized workers were scared to cross the picket line. Employer argued the picketers and union had caused them to strike unlawfully, Union said office employees had not engaged in a strike bc their refusal to work was not concerted/in a common understanding.
* **Holding:** No allegation that the employees who did not cross the picket line did so in combination or in accordance with a common understanding, which is a necessary component of a strike. The refusal to work was not done in concert to limit the applicant's business. The fear was found to be genuine. They were therefore not engaged in an illegal strike. Union wins, individuals made individuals decisions not to cross the picket line based on a well-founded fear of the threat of violence.
* **Analysis:** 
  + None of the employees at the picketed worksite are represented by a trade union (except Steelworkers members who crossed the line and are permitted to strike anyway)
  + Non-union workers cannot be expected to respect picket lines/act in concert
  + Workers are expected to cross the picket line or make individual decisions not to

##### Nelson Crushed Stone and United Cement, Lime & Gypsum Workers' International Union, Local Union 494 v Martin (1978) – OLRB – a collective agreement cannot allow for refusing to cross the picket line to NOT be a strike; refusing to cross the picket line will always be considered an illegal strike except for when there is threat of violence

* **Facts:** Refusal by members of one union to cross a picket line maintained by members of another union who are legally on strike against a common employer. Collective Agreement between employer and "non-striking" union contained provision stating it shall not be a violation of agreement if employees refuse to cross a legal picket line.
* **Analysis:** 
  + Board has held the definition of "strike" is not restricted/qualified by the purpose underlying the work stoppage
  + Board does not allow the parties to qualify the no-strike provision deemed to be contained in every collective agreement
  + Clauses like this one may still limit the liability of employees under the terms of collective agreement, and can persuade the Board to decline to grant consent to prosecute, when the employees rely on such a clause to engage in a "strike"
  + Clause can be used as a defense to individual employees who may be disciplined from refusing to individually cross a legal picket line

**Note:** A "hot cargo" or "hot declaration" clause in a collective agreement purports to allow employees to refuse to do any work coming from another employer who has been declared unfair by the union.

* Where strike definition does not include a purpose component, respecting a hot cargo clause would be a strike, unless the statute exempted this behavior from the strike definition (most provinces don’t have this exemption)

# Strike Prohibition and Political Protests

* Whether a purposive restriction should be read into the definition of a strike is controversial.
* Canadian lawmakers tend not to permit untimely sympathy strikes
* Workers may engage in a strike as a form of political expression – unions have recently challenged the prohibition of political protest strikes during the term of a CA as a violation of Charter rights (freedom of expression)
  + These challenges have failed so far

# Regulating Economic Sanctions Available to Employer

#### Lockouts

* Lockout is timely whenever the employees can legally strike
* Lockout does include a purpose limitation
* Defined in Canada Labour Code:

"Lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees, or to aid another employer to compel their employees to agree to terms or conditions of employment…

* For an employer action to be a "lockout", it must seek to influence employee and union views on collective bargaining issues.
* *Humpty Dumpty Foods* (1977, OLRB) – An unconditional plant closure that leads to the permanent layoff of the workforce is not a lockout, unless the union can prove that the company intends to reopen and is using the closure as a bargaining ploy

# Changes to the Employment Contract without Union Consent

* End of statutory collective bargaining freeze (s. 86) = commencement of lawful strike and lockout period
* At this time, employer can make changes to the terms and conditions of employment without union consent
  + Confirmed in *Canadian Association of Industrial, Mechanical and Allied Workers v Paccar of Canada (1989 SCC)* & *Neenah Paper Co of Canada (2006 OLRB)*

##### United Steelworkers 1-2693 v Neenah Paper Company of Canada (2006) – OLRB – Employer can unilaterally impose new terms of employment once CA expires

* **Facts:** Collective agreement expired 31 Aug 2005. Employer told union it was losing money and employees would suffer a pay cut. Met with a conciliation officer, no deal was reached. 5 Dec 2005, parties were in legal strike/lockout position. Before then, employer sent union letter saying unless deal was reached by 5 Dec, they would impose a wage cut and change to pension plan. On Dec 5, the employer did this and employees continued work but said they did not accept the change. Union filed unfair labour practice complaint, saying employer was unlawfully bargaining directly with employees. By unilaterally changing terms of employment before locking out employees the employer was in violation of "statutory bargaining freeze" (s. 86)
* **Held:** Employers actions were not a failure to bargain in good faith. They notified the union before and warned them and told employees to seek union assistance
* **Analysis:** 
  + SCC in *Paccar of Canada Ltd* (1989) – it was not unreasonable for employer to unilaterally alter terms of employment after termination of CA
  + **S. 86** prohibits an employer from altering terms/conditions of employment until after a party has given notice to bargain, the CA has expired, and a party is in a strike/lockout position (doesn't have to be in actual lockout)
    - Holding: No violation of s. 86
  + S. 73 OLRA prohibits unionized employers from bargaining directly with employees, but needs to be read in context of s. 86
    - S. 86 uses phrase "alter rates of pay" – suggests once strike/lockout period commenced, employer's unilateral implementation of new terms is not "bargaining"
    - A unilateral implementation of new terms can be part of employer arsenal
    - Holding: No violation of s. 72
  + Would only be an unfair labour practice if employer implemented new terms while parties are in active bargaining without a good business reason
    - Not the case here

#### Employer Economic Weapons, the Duty to Bargain, and Unfair Labour Practices

* Right to lockout/change working conditions is subject to unfair labour practice provisions

##### Westroc Industries Ltd v United Cement, Lime and Gypsum Workers International Union (1981) – OLRB – replacement workers are lawful so long as there is no anti-union animus

* **Facts:** Company had manufacturing ops in different provinces. During negotiations for renewal of CA in Mississauga plant, company concluded union was deliberately prolonging discussions to conduct simultaneous strikes in other locations where CA had later expiry dates. Company locked out Mississauga employees and hired replacement workers to resume some operations. OLRB found that during negotiations, employer met good faith requirement. Union complained lockout + hiring replacements breached OLRA.
* **Holding:** Complaint dismissed. Company did not violate ss. 14, 56, 58 or 61 of OLRA.
* **Analysis:**
  + An employer may properly decide to continue his operations in a strike and may hire new employees (authority to do so given by s. 64 – now s. 70)
  + If an employer's motive is free of anti-union animus, clear that strike replacement employees can be hired
    - No evidence of anti-union animus here
  + Employer can lockout to apply economic pressure to achieve a collective agreement on terms they want
  + The arrangement of the new employees was clearly temporary – locked out employees could have their jobs back when they agree with the employer

# Labour Board Remedies

* Historically, OLRB could not offer remedial authority over illegal strikes, could only declare a strike illegal
* Declaratory remedy proved reasonably effective though
* Recently this remedy is supplemented by broad and flexible remedial powers (s. 100 of OLRA that can empower boards to seek sustainable industrial relations solutions)

##### National Harbours Board v Syndicat national des employees du Port de Montreal (1979) – CLRBR – unique remedy; Order requiring workers "perform the duties of their employment and refrain from concerted illegal activity" and employer could only prosecute the union if the union violated this order

* **Facts:** Union called two 1-day work stoppages while a conciliation commissioner was attempting to bring a new CA and had also instituted overtime ban. Affected shipment of exported grain through the port. Employer said union's actions were untimely + unlawful (now under s. 91). Union said conciliation commissioner was too slow and was being unfair. Union acknowledge board officer has sped up the process. Union argued employer violated OT provisions of the collective agreement and the protest tactics had no serious consequences.
* **Analysis:** 
  + Board's jurisdiction under s. 182 (now s. 91) is recent – only since Parliament's adoption of Bill C-8 and implementation on June 1 1978
  + Board has a support team of labour relations officer and can establish a date for public hearing for applications under s. 91 while an officer goes to help the parties
  + This officer has full authority to resolve the problem to avoid a public hearing
  + Respondent employees and their union began before the time stipulated in the Code to partially exercise the ultimate form of pressure in collective bargaining – this is prohibited by the legislator
* **Holding:** Order requiring workers "perform the duties of their employment and refrain from concerted illegal activity"
* Note - Employees continued to refuse OT work, board authorized prosecution against union, and directed any prosecution must be brought before the CA was signed

# The Role of the Courts

* Three areas where the courts maintain jurisdiction
  + Picketing
  + Review of tribunal decision
  + Internal trade union affairs

# Criminal Jurisdiction

* Courts continue to play a role in some labour disputes through the general criminal law
* Role consists almost exclusively of regulating conduct of picketing that accompanies strikes and lockouts, rather than regulating the strikes and lockouts themselves
* There are criminal code provisions surrounding assault, mischief, and other forms of trespass that may relate to labour disputes
  + There is also the offence of “watching and besetting” under section 423
* Except in cases of violence, criminal provisions are no longer frequently used in labour picketing situations
* Since an illegal strike or lockout constitutes a breach of statute, it is possible for the matter to be tried before the courts
  + However, every Canadian jurisdiction requires that consent to prosecute be obtained from the labour board or the labour ministry
* Penal prosecutions under LR legislation provide another potential avenue for court involvement in strikes
  + In Ontario, access to penal prosecutions has been reduced or eliminated
    - Section 109 of the Ontario *Labour Relations Act, 1995* is typical
    - Before a prosecution can be launched, consent must be obtained from the labour relations board
    - This consent is seldom sought and rarely granted save in egregious cases
    - Even when consent is obtained, prosecutions is almost never proceeded with

# Civil Jurisdiction

* The courts’ civil jurisdiction has been much more important in regulating industrial action than criminal jurisdictions
* Civil actions can bring immediate relief through injunctions forcing illegal strikers back to work, restricting picketing, or limiting the use of economic sanctions
  + Except in jurisdictions where injunctions have been displaced to some degree by LRB remedies
  + Damages may also be available in certain circumstances
* The interlocutory injunction is the remedy that was developed by the courts to make speedy relief available, not only in cases of industrial action but in many other contexts as well
  + Designed to preserve the status quo pending a full trial in circumstances where the applicant is in danger of suffering irreparable harm that could not be adequately compensated for by money damages awarded after the event

#### Pleading a Cause of Action: Tort Illegalities

* Civil suits with respect to industrial action have sometimes been based on breach of contract, especially where no collective bargaining relationship exists, but in practice such suits are usually based on tort
* Economic torts are the most important area of industrial action
  + Designed to provide redress against losses resulting from hostile use of the collective strength of economic adversaries, especially collective employee strength exerted through strikes and boycotts
  + The most well-established and most frequently used of these torts are the torts of conspiracy and inducing breach of contract
  + Tort of conspiracy to injure by lawful means
  + Tort of conspiracy to injure by unlawful means
  + Tort of directly inducing breach of contract
  + Tort of indirectly procuring breach of contract by unlawful means
  + Direct interference with contractual relations falling short of a breach
  + Tort of intimidation
  + Tort of intentional injury by unlawful means
* Some provinces have enacted legislative provisions restricting or abolishing certain of the economic torts, particularly those that do not require illegal means
* Economic torts are also less important when industrial action constitutes a violation of a labour relations statute
  + The courts have taken the position that the violation of a labour relations statute is enough to ground liability in tort
    - Because such a violation constitutes a tort itself
    - Or because noncompliance with the statute constitutes the element of illegality necessary to make out the tort in question
* In other areas of law, one cannot bring an action for violation of statute and a separate civil suit
  + In industrial conflict, however, the court has allowed both

#### The Legal Capacity of Trade Unions to Sue and Be Sued

* At common law, the union has the capacity to sue and be sued (*Therien; Berry v Pulley*)
* In Ontario, the *Rights of Labour Act* appear to make it so that a union cannot be sued or sue itself
  + Recent decisions have determined that the *Act* does not preclude a suit in the Ontario courts by a union operating in a federal jurisdiction
  + Still possible to bring a representative action against named officers of the union on the basis that they “represent” the interest of the entire membership in the matter
    - The court has held however that this might be improper (*Body v Murdoch*)
    - To avoid putting the personal assets of individual members in jeopardy, the courts have usually restricted representative actions to situations when the union has a trust fund and very few unions have such funds

#### Civil Remedies: Damages and Injunctions

* Damages
  + Damages are a conventional remedy for a civil wrong outside of the labour context
  + Damages have been awarded on occasion in cases arising out of labour disputes
  + The deliberate commission of a tort gives rise to a claim for compensatory damages and also punitive damages
    - The potential for this kind of award in a labour dispute is easily imagined but employers seldom pursue such claims and rarely collect
* Injunctions
  + In labour disputes, injunctions have played a much more significant role because of the speed and relative ease with which an injunction can be obtained
  + Across Canada, injunctions used to be the principal means of enforcing legal limitations on industrial action
    - Labour legislation in several provinces have sought to replace injunctions with cease-and-desist orders issued by labour relations boards
  + The labour injunction is a focal point for union hostility
  + Concerns with interlocutory injunctions
    - The undue haste in the proceedings
    - Laxness with respect to proof
    - Interlocutory orders are not appealable
  + Common law test for an interlocutory injunction – *RJR MacDonald*
    - A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried
    - It must be determined whether the applicant would suffer irreparable harm
    - An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits
    - If union members are engaged in an unlawful strike or activity that poses an immediate safety risk, courts will usually find that the requirements of the test are satisfied
  + Statutory requirements for obtaining a labour injunction
    - Applicants for injunctive relief might also need to satisfy specific statutory requirements to obtain a labour injunction
    - The Ontario *Courts of Justice Act* provides that no injunction may be granted with no notice to the respondents
      * There are a number of safeguards in place on an *inter partes* basis
      * These safeguards apply only to actions in connection with a labour dispute

##### St Anne Nackawic Pulp & Paper Co Ltd v Canadian Paper Workers Union, Local 219 (1986) – SCC – IMPORTANT CASE – The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement; no such thing as the repudiation of a collective agreement; courts exercise judicial deference to the arbitration board decision

* **Facts:** The respondent union represented two bargaining units (the mill workers and office workers) at the appellant company’s pulp and paper mill. The office workers were on strike. The mill workers could not legally strike because their collective agreement was still valid but stayed out in sympathy with the office workers. The company began a court action and obtained an interlocutory injunction. The mill workers did not return to work until a contempt of court finding was made. Two weeks later the mill workers went out again. They did not return to work until the office workers’ strike was settled. The company then claimed damages against the union for the losses caused by the mill workers’ strike. The SCC had to consider whether the lower courts could grant an injunction to enforce the no-strike clause of a collective agreement, as well as whether it could award damages for that purpose.
* **Holding:** Arbitration board is the proper legal forum for award of damages
* **Analysis:**
  + Collective agreements are deemed to include a comprehensive arbitration clause
    - This calls into question the appropriateness of the court intervening with an injunction
    - Prior to this case, the court avoided the question of whether the court had jurisdiction when an arbitration clause exists
  + There are a significant number of decisions doubting the jurisdiction of the courts to hear claims based on the interpretation or application of collective agreements containing provision for binding arbitration
    - The courts have been held in a number of cases to have jurisdiction in a case where, although the claim depends entirely upon a right created by the terms of a collective agreement, the court is not required, in enforcing the right, to interpret the right
    - Second exception consists of cases where the claim can be characterized as arising solely under the common law and not under the collective agreement
    - In cases where the claim concerned an entitlement originating in the collective agreement, and the proper interpretation of the agreement was disputed, the courts uniformly have denied that they have jurisdiction
    - If there were nothing more than the CA between bargaining agent and employer, the courts might still have applied the CL to its enforcement at the suit of the bargaining agent or the employer
  + *McGavin Toastmasters*
    - Previous case involving an unlawful strike at a bread maker in BC
      * Employer would not pay severance because of the unlawful strike
    - SCC
      * In creating the *Wagner Act*, a new legal regime was developed that took some powers away from the courts
      * Courts have no jurisdiction over claims arising out of a collective agreement
      * CA are contracts of a special nature and some contract principles do not apply
        + E.g., repudiation does not enter in to labour relations
  + The courts have no jurisdiction to consider claims arising out of rights created by a collective agreement
  + The court may have jurisdiction over the application of a collective agreement and its violation

# The Role of Arbitrators in Industrial Conflict

#### Awards of Damages by Arbitrators

* Grievance arbitrators have the authority to award damages against a union for a breach but can only do so when the union itself, rather than employees acting on their own, are responsible for the breach

##### Re Oil, Chemical & Atomic Workers & Polymer Corporation (1958) – ON Lab Arb – An arbitrator can only award damages for actions of the union itself and its representatives but not the actions of mere employees

* **Facts:** A strike occurred during the lifetime of a collective agreement. The company brought a grievance under the agreement, alleging that the union had violated the no-strike clause and claiming damages against the union for the losses that it suffered as a result of the strike.
* Holding:
* **Analysis:**
  + There cannot be automatic liability for the breach of an article within the collective agreement
  + The strike need not be official for a breach of a no-strike clause
  + A union member cannot bind the union in contract or make it liable vicariously for his tortious conduct merely by representing that he is acting from the union
    - As such, the company’s grievances must be the alleged failure of the respondents to take prompt and necessary steps to end the strike
  + Stewards or committeemen who are put forward by a union as its representatives must be expected to know that their very status and functions underlies the impropriety and illegality of a strike while the collective agreement is in force
    - Strike called by a steward or committeeman in his area is a strike for which the union must accept liability under no-strike clause
    - Steward action is union action in this respect
    - If employees start a strike and officers of the union do nothing to stop it, union will be found liable for strike

# Employer Disciplinary Action Against Strikers

* Union has 3 avenues for getting jobs back when employees are dismissed as a result of behavior on picket line:
  + 1) Back to work protocol
    - Have the record of employees cleared and have employees brought back to work
  + 2) Union sends all disciplined employees to an arbitrator
  + 3) Union sends the issue to LRB
    - LRB looking at discipline has only a very narrow scope of authority and cannot determine whether or not the discipline was for just cause
      * Can only determine whether the firings were for anti-union animus or not

##### Rogers Cable TV (British Columbia) Ltd, Vancouver Division et al v International Brotherhood of Electrical Workers, Local 213 (1987) – NSLRB – Once a strike or lockout is over and when the full employer-employee relationship is restored, there is nothing in the Code to prevent an employer from using its restored disciplinary powers to deal with acts of employees that occurred during the work stoppage provided the discipline was not for reasons prohibited by labour relations legislation

* **Facts:** The company has attempted to maintain operations during a legal strike. The union picketed vigorously, blocking access to company premises and following company vehicles and harassing employees working. The company obtained three injunctions against picket line conduct. A union business agent and twenty-two members were found guilty of contempt of court. The union complained to the labour board that the company had committed an unfair labour practice by imposing disciplinary suspensions on eight employees for alleged misconduct. Some were awaiting a sentence for contempt and three faced criminal charges
* **Holding:** No unfair labour practice
* **Analysis:**
  + Once a strike or lockout is over and when the full employer-employee relationship is restored, there is nothing in the Code to prevent an employer from using its restored disciplinary powers to deal with acts of employees that occurred during the work stoppage
    - Provided the discipline is not for reasons prohibited by labour relations legislation
  + Once employees return to work, they may find themselves accountable under employment law if they have participated in acts of violence or willful damage against the property or persons of the employer
  + New collective agreements are retroactive to when the work stoppages occurred
  + In the current case, no evidence of anti-union animus and employer did not intend to discipline union members because they participated in a lawful strike

# The Regulation of Picketing

* The court has crafted what is called the “wrongful action” approach which treats all picketing as being lawful unless it involves tortious or criminal behavior
* If the strike is illegal, picketing attached to it is automatically illegal as well
  + Governed by LRB
    - Declaration under s. 100 that the strike is illegal and a cease and desist should follow
  + Court only gets involved for illegal strikes when there is contempt of court
    - E.g., the strikers do not obey the cease and desist
* If the strike is legal, picketing is *per se* lawful unless it degenerates into tortious or criminal conduct
  + Governed by courts
* Picketing consists of three related activities
  + 1) Presence of one or more persons
  + 2) Persons are communicating by spoken word or written sign or both
  + 3) Communicating with specific intent of persuading other workers or the public or customers or suppliers to sympathetically respond to their message

# Regulatory Schemes Governing Picketing

#### The British Columbia Approach

* The BC *Labour Relations Code* gives board considerable power over picketing, to substantial exclusion of the courts
* Picketing is broadly defined but the definition within the BC code is unconstitutional under section 2(b)
  + No replacement definition has been considered

##### Canex Placer Limited (Endako Mines Division) v Canadian Association of Industrial, Mechanical, and Allied Workers, Local 10 (1975) – BCLRB – Labour Relations Board in BC has been given exclusive jurisdiction over the industrial relations regulation of picketing while the courts remain in charged with jurisdiction over its criminal or civil law features

* **Facts:** During a legal strike at the company’s mine, large numbers of picketers completely blocked access to the mine by standing in the road and uttering what the board described as “isolated threats of violence.” The company applied to the board for an order prohibiting such conduct.
* **Issue:** Does the Board have the power to prohibit this behaviour?
* **Holding:** Board does have the power
* **Analysis:**
  + Labour Relations Board has been given exclusive jurisdiction over the industrial relations regulation of picketing while the courts remain in charged with jurisdiction over its criminal or civil law features
  + There are constitutional issues with granting the Board jurisdiction over this kind of conduct
    - Board is simply directed to enforce an additional segment of the Code rather than applying traditional common law torts to the economic conflict

#### Other Regulatory Approaches: Ontario and Alberta

* Although no other Canadian jurisdiction has opted as strongly for administrative regulation of picketing as BC has, labour relations statutes in some other jurisdictions grant labour boards broad remedial authority with respect to illegal strikes and conduct which causes such strikes
* **Section 83** of the Ontario *Labour Relations Act*
  + **83 (1)** No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.
  + Application of subs. (1)
    - (2) Subsection (1) does not apply to any act done in connection with a lawful strike or lock-out.
* **Section 100** grants the Ontario LRB the power to issue cease and desist orders when, among other things, “any person has done or is threatening to do any act [and] the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike”

# Primary and Secondary Picketing

#### Primary Picketing

* Primary Picketing: When the union and its employees are doing the striking themselves
* Both labour boards and courts have tended to allow a wide scope for primary picketing in support of a legal strike, if the picketing is focused directly on the business of the employer and affects third parties only in their dealings with that employer
* When these conditions are met, the only limitations tend to be those based in general tort law and criminal law
  + Prohibitions against physical obstruction, nuisance, assault, property damage, and trespass
* Question is generally whether the picketing is peaceful and informational or violent and obstructive
* Because restrictions on picket line conduct come from the general law, they are enforced by the ordinary courts

##### Harrison v Carswell (1976) – SCC – supported the rights of private property over the right to picket; this has been overruled and is no longer relevant

* **Facts:** Carswell is picketing on a sidewalk outside of a shopping mall operated by Harrison. The sidewalk is private and owned by the shopping mall. She started picketing on a city sidewalk, but it was too far from the store so she moved to the mall property. Harrison asked her to leave, but she came back several times. Harrison charged Carswell under *The Petty Trespasses Act of Manitoba* for trespass even though the strike itself was a legal action.
* **Holding**: Appeal allowed, original conviction reinstated
* **Analysis:**
  + In general the common law always protects private property unless there is an applying statute that takes away one's property rights
  + There is no such statute in this case, and thus the case must be found on the common law bill of rights, which states that private property is the most important thing to be protected at common law
  + The common law protects private property rights unconditionally unless there is an overriding statute
  + **Dissent:**
    - The common law must be updated to take new phenomena into consideration
    - There were no such things as shopping centers like the ones today when the common law developed
      * These malls are essentially public places – the owners invite all members of the public virtually without restriction
    - Therefore there must be a significant grievance to expel someone from the property, which he does not think happens here

##### Cancoil Thermal Corp v Abbott (2004) – Ont SCJ – Employers and unions must make reasonable efforts to privately negotiate suitable picketing protocols before resorting to the courts and attempting to obtain what the courts have called the “blunt instrument” of an injunction

* **Facts:** The employees of Cancoil Thermal were engaged in a lawful strike that involved peaceful picketing at the entrance to the workplace. Thermal shared premises with a related company, Cancoil Corporation, whose employees were not on strike. The picketers detained each person who attempted to cross the picket line for at least fifteen minutes. If a vehicle had several occupants, the fifteen minutes were multiplied by its number of occupants
* **Holding:** Court declined to exercise its discretion to grant injunction because employer had not accepted the union’s good faith offer to negotiate a picket line protocol
* **Ratio:** Employers and unions must make reasonable efforts to privately negotiate suitable picketing protocols before resorting to the courts and attempting to obtain what the courts have called the “blunt instrument” of an injunction
* **Analysis:**
  + Where police rely on a policy of non-intervention but are asked to assist to prevent interference with entry or exit from an employer’s premises, s. 102(3) is *not* met unless the employer can show a “serious ongoing obstruction” by picketers
    - This obstruction is measured by the degree of obstruction, its duration on each occasion, and how many days it has gone on
    - The presence of some degree of delay or obstruction and a police policy of non-intervention with access to property in a labour dispute do not usually on their own satisfy the test, absent a serious degree of non-consensual obstruction of long duration

#### Allied Picketing

* The strikers will picket at the place of business that is still engaged in business with the employer
  + Any other place that has a tangential relationship to the employer
* E.g., if Labatt Brewery union went on strike, the strikers could go to the LCBO and picket
* This would be a type of secondary picketing

#### Secondary Picketing and the “Modified Hersees” Approach

* This is picketing anywhere outside of the place of work or those related to the place of work

##### Hersees of Woodstock Ltd v Goldstein (1963) – ONCA – Even if there were a right to secondary picketing, that right was for the benefit of a “particular class only”, and had to give way to a third party’s right to trade, “a right far more fundamental and of far greater importance”; no longer relevant

* **Facts:** There was a labour dispute between Deacon Company and the Union. The appellant (Hersees) has no difficulties with its own employees but sells goods manufactured by the Deacon Company. Neither the respondents nor the union have a business relationship with the appellant. The union requested that the appellant not conduct any business with the Deacon Company. The respondent stated that if the appellant did not comply, they would picket at the appellant’s business as well.
* **Holding:** Appeal allowed; secondary picketing is not allowed
* **Analysis:**
  + The appellant has a right to lawfully engage in its business of retailing merchandise to the public
  + The right of the respondents to engage is secondary picketing of the appellant’s premises must give way to the appellant’s right to trade
  + The right of secondary picketing is exercised for the benefit of a particular class while the right to engage in business is far more fundamental and of far greater importance

# Pepsi-Cola and the “Wrongful Action Model”

##### Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd (2002) – SCC – secondary picketing is a valid use of freedom of expression so long as there is no “wrongful act”; there must be a balance of convenience between the parties which is set very low – need justification as to why pickets are where they are

* **Facts:** The union engaged in a variety of protest and picketing activities during a lawful strike and lockout at one of the appellant’s plants. These activities eventually spread to “secondary” locations, where delivery of the appellant’s products to retail outlets was prevented and the store staff was dissuaded from accepting delivery. They carried placards in front of a hotel where members of the substitute labour force were staying; and engaged in intimidating conduct outside the homes of appellant’s management personnel. An interlocutory injunction was granted which prohibited the union from engaging in picketing activities at secondary locations.
* **Holding:** Upheld the injunction banning picketing at the private homes of Pepsi-Cola employees but quashed the prohibition of picketing at other locations
* **Analysis:**
  + When negotiations stall, unions and employers may legitimately exert economic pressure on each other to the end of resolving their dispute.
  + It is very difficult to define picketing
    - Picketing represents a continuum of expressive activity
    - From workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers-by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings
    - Picketing, however defined, always involves expressive action
      * As such, it engages s. 2(*b*) of the *Charter*
  + How do we judge when the detriment suffered by a third party to a labour dispute is “undue”, warranting the intervention of the common law?
    - The *Hersees* and modified *Hersees* approaches, which start with the proposition that secondary picketing is *per se* unlawful regardless of its character or impact, are out of step with *Charter* values
    - While protection from economic harm is an important value capable of justifying limitations on freedom of expression, it is an error to accord this value absolute or pre-eminent importance over all other values, including free expression
    - The wrongful action model is the correct model
      * Secondary picketing is generally lawful unless it involves tortious or criminal conduct
  + This wrongful action model best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*
    - It allows for a proper balance between traditional common law rights and *Charter* values and falls in line with the core principles of the collective bargaining system
    - The wrongful action approach focuses on the character and effects of the activity as opposed to its location
      * This approach offers a rational test for limiting picketing, and avoids the difficult and often arbitrary distinction between primary and secondary picketing. In addition, labour and non-labour expression is treated in a consistent manner
  + We should be mindful not to extend the application of the signal effect to all forms of union expression
    - “The ‘signal’ component of conventional picketing attracts the need for regulation and restriction in some circumstances”
    - Can’t be coercive activity as opposed to the permitted expressive activity
    - Given the diverse range of activities captured by the term “picketing,” it is apparent that the signal effect operates to a greater degree in some situations than in others
      * Conclude that signalling concerns may provide a justification for proscribing secondary picketing in particular cases, but certainly not as a general rule
  + With regard to the demonstration outside the homes of Pepsi-Cola’s management personnel, the injunction was well-founded, since conduct was tortious

#### The Impact of Pepsi-Cola Canada

##### Telus Communications Inc v Telecommunications Workers’ Union (2007) – BCCA – a finding of tortious secondary picketing does not require proof of the achievement of the tortious activity

* **Facts:** The union represented workers involved in a province-wide labour dispute. Union members engaged in picketing, and the employer obtained an injunction order prohibiting certain actions by the union’s members. The injunction included picketing, watching and besetting, congregating in areas used by management and non-union employees, “molesting, assaulting, intimidating, obstructing, threatening, or interfering” with management and non-union employees, and following the cars of those employees within a distance of less than five car lengths in a “flying picket.” The union appealed these orders and the findings of contempt for union members that did not follow the injunction.
* **Holding:** The picketing did not have an informational purpose and so this conduct can be enjoined under *Pepsi-Cola* and condemned under the law of contempt
* **Analysis:**
  + Curtailment of freedom of expression may be justified in the interests of protecting third parties
  + It permits the court to intervene and preserve the interests of third parties or the struck employer where picketing activity crosses the line and becomes tortious or criminal in nature
    - Recognizes the importance of the expressive activity involved in conveying information and trying to persuade while also recognizing that the value of some picketing is clearly outweighed by the harm done to the neutral third party, requiring a reasonable balance between freedom of expression and protection of third parties
  + What is required in a contempt application is proof of tortious conduct, not also proof of achievement of tortious intent or proof of actual damage to either the employer or to third parties

# Job Rights of Strikers

* **Section 1(2):** Ensures that striking workers keep their job rights while on strike
  + - Cannot be punished for exercising the lawful right to strike
* **Section 80:** A unionized worker on a lawful strike has a right to return to their job at the conclusion of a strike on the condition that the strike only lasts 6 months, if it lasts longer than 6 months they are not guaranteed this right
  + The Act used to say that this right only lasted for 6 months, Ontario was the only jurisdiction which said that a striking worker had a right to return to work only if the strike lasted 6 months but if it lasted longer they had no statutory right to return. This was changed by the Kathryn Wynn government and they made it indefinite. But when the Ford government came in, they made some reverse reform and returned it back to 6 months

# Employee Status during a Strike

* Protection afforded to striking workers depends on whether strike is in compliance with labour relations legislation

##### R v Canadian Pacific Railway Co (1962) – Ont HCJ – as long as workers are lawfully striking and are within the protection of s. 80, they cannot be fired for exercising their right to strike. 673

* **Facts:** Workers were on a lawful strike. Employer decides he wants to play hard ball and writes a letter to striking workers saying either they accept the wage offer by “x” date and if they do not, they will consider them to have resigned from employment. Workers did not accept the employers last wage offer, it assumed they had resigned. Appeal by way of stated case from a provincial criminal court's dismissal of an unfair labour practice charge against the Royal York Hotel. During course of legal strike, the hotel's management sent letter to strikers saying that they did not indicate their availability for duty (sent them previous letters asking if they will be returning to work or resigning) so they are closing their employment.
* **Holding:** This letter amounted to an unfair labour practice (s. 1(2) of OLRA – no one shall be deemed to have ceased to be an employee by reason only of his ceasing to his employer as result of lockout/strike)
* **Analysis:** 
  + A purpose of s. 1(2) is to preserve employees' rights while on strike
  + In the US it has been held that the relationship of employer and employee continues notwithstanding a strike unless that relationship has been abandoned
  + Otherwise, when a CA comes to an end and conciliation proceedings exhausted, employer could lay down terms that employees could not be expected to accept with the consequence that if they went on strike they'd lose their pension, insurance and seniority rights – this would destroy the security of employees and contrary to development of labour legislation
  + It would undermine their right to get their job back if they had to choose this offer
* **Note:** 
  + This was affirmed by OCA and SCC, *CPR Co v Zambri* (1962)
  + SCC said the Act does not in terms declare the right to strike, but the right is conferred by s. 3: *every person is free to join a trade union of his own choice and participate in its lawful activities*
  + Also held that if a strike is never concluded by settlement the relationship continues until the employee has gone back to work, employed by other employers, died or became unemployable
* "Professional strikebreakers" are forbidden (OLRA s. 78)

##### Canadian Air Line Pilots Association (CALPA) v Eastern Provincial Airways (1983) – CLRB – cannot punish workers for exercising lawful right under the Act; employer cannot give preference to replacement workers over returning union employees at end of strike

* **Facts:** During lawful strike commenced by the pilots, company maintained operations, hired 18 new pilots to fill strikers positions in order to keep some operations of the airline going. On strike for about 9 weeks and the pilots are about ready to go back to work on the terms dictated by the employer. As they are negotiating collective agreement they are also negotiating back to work protocol. Employer is insisting that the 18 replacement workers would be retained and the strikers had to wait until there was an opening. Union does not agree to that. Promised the new hires they would retain their jobs after the strike. Weeks later, employer offered to conclude a return to work agreement with union, said all pilots on strike will be on layoff and pilots will be recalled to openings based on seniority. Union said this violated what is now s. 94(3)(a)(vi): unfair labor practice for employers to refuse to continue to employ because the person participated in a strike
* **Holding:** Employer is violating s. 94 of the Code . Canada Labour Relations Board finds in favor of the union, they find that the insistence that the replacement workers can keep their jobs and put these striking employees on a wait list was undermining the representation rights of the union and was in effect punishing the striking pilots from exercising their lawful right to strike.
* **Analysis:** 
  + Employer position: insistence that new pilots are not replaced by returning strikers is not unlawful. Employer relied on decisions that are irrelevant
  + The construction of (now – s. 94(3)(a)(vi), then – s. 184) leaves no room for doubt that employees cannot be deprived of any term or condition of employment whatsoever because of participation in a lawful strike
  + If an employee is deprived of employment, a diff reason must be present
  + Effect of the employer's work agreement is that the seniority provisions which normally govern the employment relationship would be suspended long enough for the employer to accomplish what it could not lawfully do otherwise
* Canada Labour Code provides in s. 87.6 states that legal strikers or locked-out employees must be reinstated in preference to any replacement worker "who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given"
* Applicability of this case in Ontario is complicated by s. 80 of OLRA – historically allowed strikers individually to return to jobs during first 6 months of legal strike
  + Bill 148 removed the six month ceiling and joined all other provinces in allowing strikers to go back to work no matter how long the strike went on
    - Bill 47 repeals this and goes back to the six month ceiling
* If strike is longer than 6 months, can employer decide to retain replacement workers rather than take back strikers?
  + *Mini-Skool Ltd (1983, CLRBR)* – OLRB held it is notan unfair labour practice for an employer to retain junior employees who wished to return
  + *Shaw*-*Almex Industries (1986, CLRBR) –* depends on a finding that the employer had no improper motive for extending preference to junior employees.

##### United Food & Commercial Workers Canada v WHL Management (2014) – OLRB - an employer's insistence on a back-to-work protocol following a strike that permitted replacement workers to keep their jobs over strikers trying to return violates the duty to bargain in good faith, and violates the prohibition against discrimination for exercising lawful right to strike

* Relied on SCC *Royal Oak Mines* – an employer who insists in bargaining on a clause that would protect less senior replacement workers over more senior employees who exercised their right to strike is proposing a provision to which 'no reasonable union' could be expected to agree. = Breach of duty to bargain in good faith.
* In 2017, Ontario eliminated the six-month limitation on the right of strikers to return to work. Added:
  + **S. 80(3)** - Subject to subsections (5) to (7), at the conclusion of a lawful strike or lock-out, an employer of an employee who was engaged in a lawful strike or lawful lock out shall reinstate the employee in the employee’s former employment on such terms as the employer and the bargaining agent that represents the employee may agree upon
  + **S. 80(5)-** Striking or locked out employees are entitled to displace any other persons who were performing the work of striking or locked out employees during the strike or lock-out if the length of service of the other person, as of the time the strike or lock-out began, is less than that of the striking or locked-out employee.

# Replacement Worker Laws

* Quebec's code contains "anti-strike-breaker provisions" to restrict use of replacement workers, but limited redress is available when breached
* BC Code prohibits employers from using paid or unpaid replacement workers but do not prohibit employees in struck unit from returning to work while strike continues
* ON – anti-replacement worker provisions were similar to Quebec but were repealed in 1995
* 1995 – federal minister of labour appointed a task force to review proposals for adoption of replacement worker legislation – the "Sims Report"

#### Excerpt from Sims Report – Canada Labour Code Part 1 Review, "Seeking a Balance"

* Different views from employer vs. union perspective about what bargaining rights entail and what a strike is all about
* Union maintains the work is worth a specified price, employee believes it can get it done for less
* If replacement workers are unavailable/not good, the employer is persuaded to raise its offer, but if they work well, union feels pressure to reduce demands
* Argument for anti-replacement worker laws is the need to avoid violence that can happen when replacement workers try to cross picket lines
* This isn't a great argument – not an inevitable consequence of replacement workers, can be caused by other factors anyway and can be avoided
* Inconclusive studies on how anti-replacement workers laws affect the incidence, duration or results of labour disputes
* Employers are unequally vulnerable to a prohibition on replacement workers
* Recommendations
  + There should be no general prohibition on the use of replacement workers
  + Unfair labour practice where the use of replacement workers in a dispute is demonstrated to be for the purpose of undermining the union's representative capacity – this was codified in s. 92(2.1) of Canada Labour Code
  + When this is found, Board is given power to prohibit further use of replacement workers

# Alternatives to Strikes

#### Essential Services Legislation

* Rapid growth of CB in public sectors 🡪 more frequent conflict between right to strike and lock out and public right to the maintenance of essential services
* Legislation restricts opportunity to strike in services deemed essential
  + Ambulances, fire services, police, hospitals, TTC
* Three major models for dealing with the regulation of labour in essential services in Canada:

1. Unfettered Strike Model

* Strike action is available to workers in essential services in the same way
* But when workers who are "essential" have unfettered ability to strike, governments in Canada often respond with back-to-work legislation

1. No Strike Model

* Essential services are prohibited from striking
* Governments have power to designate specific groups of workers as essential within the confines of statute provided criteria
* Interest arbitration is used to determine the new collective agreement
  + Finds a balance between the two parties
  + Or both parties present a package and the arbitrator picks one

1. Designation or Controlled Strike Model

* Certain groups of workers are designated as essential services and their strike activity is limited by way of agreement between the parties or by a specialized tribunal or commission

# Interest Arbitration

* Interest arbitration (compulsory arbitration) is to replace the strike as mechanism for resolving bargaining disputes
* If parties cannot agree, work continues, and an arbitrator sets the terms that will govern their future relations – basically writes their CA for them
* Grievance arbitration is opposite – involves application of existing agreement

#### Allen Ponak & Loren Falkenberg, "Resolution of Interest Disputes" 1989

* Reservations existed during growth of public sector collective bargaining about permitting public employees to strike
* Sought out alternatives to strikes: Canadians mostly opted for some form of compulsory arbitration
* Canadian public employees have generally accepted the prohibition on strikes where arbitration is available as a substitute
* Compulsory interest arbitration can be problematic
* Can reduce the likelihood of negotiated settlements by producing a lower cost of disagreement, fear that concessions made during bargaining may be harmful if an arbitrated settlement is required, and makes negotiators get in the habit of arbitrating – they just rely on arbitration and lose ability to settle in negotiations
* Most common form of interest arbitration in Canada is the **conventional form** (arbitrator is free to fashion its own solution)
* Other form is **Final Offer Selection** – arbitrator required to choose one side or the other's
* Third form is **Choice of Procedures** – union can specify whether an impasse will be resolved through work stoppage or arbitration
* Data shows arbitration systems reduce likelihood of negotiated settlements compared to strike-based dispute procedures
* Data shows that a chilling effect may occur with conventional arbitration but is less likely with final offer selection
* While some parties may become dependent on arbitration ("narcotic effect") the majority does not repeatedly use the process

#### Robert Hebdon & Maurice Mazerolle, "Regulating Conflict in Public Sector Labour Relations: Ontario Experience 1984-1993, written in 2003. – Study comparing strike/lockout vs. compulsory interest arbitration

* Bargaining units covered by legislation requiring compulsory interest arbitration arrive at impasse more often than bargaining units in the right to strike sectors
* Compulsory arbitration has a chilling effect on the bargaining process
* Failure to arrive at a negotiated settlement is acute in the health care sectors
* Conventional interest arbitration failed to produce a satisfactory rate of freely agreed settlements
* Supportive of a dependency effect where a union's high usage of arbitration fosters an inability to freely negotiate settlements

# The Collective Agreement and Grievance Arbitration

#### Introduction

* Disputes over the interpretation and application of collective agreements are commonplace
* Modern Canadian labour relations legislation does not permit a contest of economic power over these disputes
  + Strikes and lockouts are banned during the term of a collective agreement
  + Every such agreement must provide a dispute settlement process to resolve disputes over whether the agreement has been complied with
    - Some jurisdictions specify that this process must take the form of grievance arbitration
    - Now some allow for other settlement provisions such as through mediation, mediation-arbitration, and restorative conferencing
* Collective agreements normally provide for an informal grievance procedure through which the parties attempt to resolve their disputes without resorting to an external, third party, expedited arbitration process
  + Only once the grievance is not resolved informally will a party invoke arbitration
* S. 1 – definition of collective agreement
  + Three components
    - 1) Has to be in writing
    - 2) Has to be agreed upon between an employer and an association of employees
    - 3) Has to focus on the terms and conditions of work
* General contract principles apply but are contracts of a special nature
* **S. 45** - Every collective agreement must have a provision that the union is the exclusive bargaining unit
* **S. 46 and s. 79** state that there shall be no strikes or lockouts during the life of a collective agreement.
* **S. 47** says that all collective agreement shall have a union security clause (Rand formula) where there is an automatic deduction of dues by the employer off the weekly, bi-weekly or monthly paycheck of the workers in the bargaining unit which are then turned over to the union
* Important features of a collective agreement
  + 1) A collective agreement when it first comes in extinguishes all individual contracts of employment in the workplace. The entirety of the terms and conditions at work would be found in the new collective agreement
  + 2) The CA binds all members of the bargaining unit, regardless of whether they are union members or have signed membership cards and they all pay union dues whether they are a union member or not
  + 3) Being a union member radically enhances the range of workplace rights that an employee has.
    - E.g., union members have access to the mandatory grievance and arbitration procedure where if you were fired working in a non-unionized workplace you would be going to the courts.
    - E.g., union members can impose a general duty of reasonableness/fairness on an employer that all decisions that an employer makes has to pass a reasonableness standard
    - E.g., the just cause for discipline exists in the unionized world. For an employer to discipline or dismiss a member in a unionized workplace, they have to satisfy a just cause standard.
    - E.g., there is a broader range of remedies available to a unionized worker such as the right to be reinstated
  + 4) It is a *collective* agreement and not a string of individual agreements, so it gives benefits to the collective
  + 5) Collective agreements are continuing agreements and are statutorily recognized as agreements that will be periodically reviewed
  + 6) There is a mandatory forum for disagreements, arbitration which is final and binding. This all means that a unionized employee does NOT take a collective agreement difference between them and the employer to court. The main forum they have is labour arbitration, they can occasionally have a HR Tribunal as well but cannot go to court and sue for wrongful dismissal.
    - **S. 48(1)** – every collective agreement shall provide for an arbitration clause and that shall provide for FINAL AND BINDING settlement by arbitration without stoppage of work of all differences between the parties
      * Arbitrators are chosen by the parties themselves, sometimes a list is made in the collective agreement. If they cannot agree, one party or the other can ask the Minister of Labour to appoint an arbitrator
    - **S. 48(12)** – powers of a labour arbitrator and gives wide power procedurally and substantively. Section lays out the powers of arbitrators.
      * Can admit evidence that the courts cannot admit
    - **S. 48(12)(f)** – arbitrators have the power to accept hearsay evidence that would be forbidden or highly restricted by the courts
    - **S. 48(12)(j)** – arbitrators can read other workplace acts. Arbitrators have the power to interpret and apply HR and other Employment statues
      * This was one of the major reforms by the Bob Rae government in 1993. When he was defeated in 1995, he undid everything that Bob Rae did, this is one of the only reforms that stayed in the act because both employers and unions wanted to be able to have HR issues arising out of the workplace litigated and decided by arbitrators rather than HR tribunals because they thought it would be quicker and that an arbitrator would have a better understanding of the legal culture of the workplace.
      * This means they can decide issues to do with these acts, such as the duty to accommodate
    - **S. 48(14)** – arbitrators have the right to mediate issues
    - **S. 48(17)** – gives arbitrators express power to substitute a penalty. If the employer fires someone and that firing or termination is grieved to arbitration, the arbitrator has the power under this section, if they think there was grounds for discipline because of the misconduct, but the discipline imposed was too strict they have the power to reduce or modify the penalty
    - **S. 48(18)** – privative clause. Decision of Arbitrator is binding and final but of course you can judicial review a decision but on much narrower grounds than an appeal.

# The Common Law View of Collective Agreements

* Before the advent of modern labour relations legislation in the 1940s, collective agreements were generally unenforceable at law
* Three major common law obstacles stood in the way of the enforcement of collective agreements by civil action
  + Trade unions were not considered to have the legal capacity to make binding contracts or to sue or be sued in their own names
  + The courts doubted that employers and unions intended their collective agreements to be legally binding
  + Traditional rules of privity of contract prevented individual employees from enforcing collective agreements to which they were not themselves parties

##### Young v Canadian Northern Railway (1931) – PC – a collective agreement was not legally binding during pre-Wagner Era. This case tells us what the law was like before the Wagner Act came to Canada

* **Facts:** A collective agreement, called Wage Agreement 4, was in force between the Railway Association of Canada, representing employers, and Division 4 of the Railway Employees’ Department of the American Federation of Labour. The plaintiff was not a member of Division 4. The defendant railway hired him as a machinist but did not give him a written employment contract. Wage Agreement 4 provided that in the event of a workforce reduction, junior employees would be laid off first, in accordance with a seniority rule. Young was laid off out of order of seniority. He happened to be a union dissident, he was in favor of a more radical union coming to represent the workers there and so the union leadership did not like him. When he was laid off, the union did not really want to represent him. He sued for damages for wrongful dismissal, lost in Manitoba, appealed to Privy Council.
* **Holding:** Appeal dismissed; ruling in favour of employer. Case fails because up until the *Wagner Act*, the courts did not recognize a collective agreement as having legal standing, it only recognized individual agreements. Only way a union could resolve a difference was if the union was willing to strike
* **Analysis:**
  + The fact that the railway applied Wage Agreement 4 to the appellant is consistent with the view that it did so because as a matter of policy it deemed it expedient to apply it to all
  + Wage Agreement 4 was only intended to operate as an agreement between a body of employers and a labour organization
    - It constitutes no contract between any individual employee and the company which employs him
  + The protection which an agreement such as Wage Agreement 4 affords to a workman who is not a member of the contracting labour organization is to be measured by the willingness of that body to enforce it on his behalf

# Grievance Arbitration as a Distinctive Form of Adjudication

* Proponents of grievance arbitration contend that it offers a very different form of adjudication than the courts do
* Arbitrators are labour law or industrial relations specialists usually selected by the parties, whereas judges are appointed by the state and are usually legal generalists
* The parties to a collective agreement are free to choose their arbitrator but also to design an arbitration process to meet their particular needs
* Four originating principles
  + Cheap
  + Efficient
  + Informal
  + Expert
* Now only the last principle still stands

# The Role of Grievance Arbitration in Our Collective Bargaining Regime – A Story of Transformation

#### Different Visions of the Role of Arbitration

#### Paul Weiler, “The Role of the Labour Arbitrator: Alternative Versions”

* Two themes run through most discussions of the nature of the arbitrator’s role
  + He is expected to act as a lawyer-judge, bringing “legalist” tools to bear on the interpretation of the collective agreement, his only charter for action
  + He is alleged to have certain distinctive qualities, of expertise and experience, which legitimate actions that are based on peculiar “non-legal” criteria, in particular the maintenance of a peaceful, uninterrupted, and fair industrial experience
* The first theory of the arbitrator as judge, contains within itself an essential ambiguity concerning the appropriate mode of judicial action
  + Some arbitrators feel that they must confine themselves to decisions which are based only on an explicit and specific provision in the collective agreement
  + Other arbitrators may feel that it is even more appropriate to delve beneath the surface of the text of a contract clause and assign a meaning which is most compatible with the purpose of the parties in selecting this text
* The second theory of the arbitrator’s role, the arbitrator holds that it is sometimes legitimate for an arbitrator to extend or limit what can be fairly said to be the meaning of an agreement, in the light of certain overriding labour relations goals
  + Some advocate the arbitrator acting as a “mediator” is enhancing the process of free, collective bargaining
  + Others argue that arbitrators must become aware of their necessary position as an “industrial policy maker” and attempt intelligently to lay down authoritative, general policies, in the interests of the public as well as the immediate parties
* Each theory assumes that there is an intrinsic, reciprocal relationship between the job we ask arbitration to perform, the design of the institution within which the arbitrators operate, and the manner in which we expect them to reach their decisions
* Labour arbitration and industrial change
  + Because of the substantial gains in security and stability in a collective bargaining relationship, there is a noticeable impetus in the direction of long term agreements
  + On the other hand, it is increasingly recognized that it is impossible to foresee in advance all the labour relations problems inherent in changing industrial conditions
* The arbitrator as mediator
  + This model conceives as arbitration as being at the end of a continuous spectrum, which extends backward through the mutual adjustment of grievances to the original negotiation of the terms of a collective agreement
  + Arbitration must first be perceived as an essential part of industrial (or economic) self-government
  + Next important facet of the model is the recognition that collective bargaining is sharply distinguished from other forms of contract negotiation because the parties at interest are inextricably linked in a permanent relationship
  + Here, the arbitrator is looking to find a balance between the needs of the parties
* The arbitrator as industrial policy-maker
  + Since control by the market or by the affected constituencies is not possible, it becomes the function of legal and governmental policy to exert some control
  + The arbitrator has larger responsibilities to the public interest of the society of which collective bargaining is an integral pert
  + The arbitrator should base his decisions on their functional relationship to what he believes to be the appropriate goals of the industrial society in whose government he is participating
  + Author disagrees with this theory
* The arbitrator as adjudicator
  + The adjudicative model rests its case largely on the design of the institution within which labour arbitration is carried on
  + Conceives of the arbitrator as an adjudicator of specific, concrete disputes, who disposes of the problem by elaborating and applying a legal regime to facts which he finds on the basis of evidence and argument presented to him in an adversary process
    - The arbitration process mirrors the division of functions conventionally adhered to in political life
  + The key elements defining the adjudicative model
    - Settlement of disputes
    - Adversary process
    - An established system of standards which are utilized in the process to dispose of the disputes
  + Envisages the collective agreement as a more or less successful attempt to institute a governing legal system in the plant
  + The whole institutional structure of arbitration, its incidence, access to it, mode of participation in it, the bases for decision, the nature of the relief available in it, are all defined by and flow naturally from its function, which is to dispose of private disputes arising out of primary conduct by granting relief to parties on the basis of an evaluation of this conduct in the light of the “legal” standards established by this agreement
* Arbitration is suited for problems whose resolution can be achieved by the elaboration and application of established standards
* Arbitrators should restrict themselves to the purely adjudicative role of interpreting and applying terms which were agreed to by the parties and incorporated into the collective agreement

#### David Beatty, “The Role of the Arbitrator: A Liberal Version” – endorsed and applied by arbitrators

* Labour law is full of nuance and is complex
* Have to interpret collective agreements with the backdrop of the complex relationship between the union and management
* Collective agreements should be reopened for interest arbitration when changes affecting the initial terms occur
* Arbitrators can contribute towards procedural fairness of the collective bargaining system of which they are a part
* The availability of arbitration ensures procedural justices

# Management Rights

##### Re United Steelworkers of America and Russelsteel Ltd (1966) – ON Lab Arb – management has a right to contract out and hire employees outside of the bargaining unit to perform similar or the same work; old approach to labour arbitration aka reserve rights approach – all rights that have not been negotiated in favour of the union remain with the employer

* **Facts:** The company leased trucks from another firm but employed four truck drivers to drive them. The leasing arrangements were terminated, and the company entered into a contract with another firm for the supply of trucks and drivers. The grievor’s services as drivers became superfluous and they were offered a choice of going to work for the contractor or remaining in the employ of the company as warehouse labourers. Each of those alternatives offered the grievors a lower wage rate than they were receiving in their capacity as truck drivers. Employer tried to contract out some of the work that was being done but the union said no because the bargaining unit work belonged to them as the union. The employees brought a grievance, contending that the company had violating the collective agreement by removing the regular truck drivers from their jobs and replacing them with persons who are not regularly employed in the bargaining unit
* **Holding:** Grievance dismissed. Accepted employer argument that unless a union has expressly negotiated a no contracting out provision in the collective agreement, an employer can contract out some of the work in order to get a cheaper workforce to do some of its work.
* **Analysis**
  + In these cases, there are strong pressures on a board of arbitration to declare its philosophical allegiances, to adopt a series of broad principles, and to derive a solution of the particular case on the basis of a general approach
  + Management has a right to contract out but sometimes arbitrators rule that the decision to contract out was not justified and should be denied
  + Arbitrator should consider the “climate of employer/employee relations under a collective agreement”
    - Climate reflects the relationship between management and union but also the broader climate prevailing throughout a particular industry
  + Question here is whether the parties by express language in the agreement restrict management’s rights to contract out
    - The agreement did not restrict the right to contract out

##### Communications, Energy and Paperworks Union of Canada, Local 30 v Irving Pulp & Paper Ltd (2013) – SCC – management can only unilaterally impose a rule above the collective agreement if the rule is reasonable and does not contradict/breach the collective agreement; The arbitrator must balance the rights of the employer and the rights of the employee.

* **Facts:** Irving Pulp & Paper is one of largest industrial employers in NB. In their plant they had initiated a random alcohol testing program. There had been eight documented instances of employees coming to work impaired in the past fifteen years. All employees were to be subject to random and mandatory alcohol testing. Union (CEP) brought a grievance through arbitration system under collective agreement, arbitrator determines that random alcohol testing program is overly-broad and strikes it down. Irving seeks judicial review, Queen’s Bench quashes the decision of the arbitrator. NBCA upholds lower court decision.
* **Holding:** SCC overturns NBCA decision, restores decision of labour arbitrator. Said the rule was not reasonable so it failed part 2 of the KVP test because there was no evidence that the drug and alcohol used by the employees was out of control or posing a safety risk to the employer.
* **Analysis:**
  + The appropriate approach is to recognize both legitimate interests at heart here, the interests of employer to have a safe workplace, and the employees’ right to privacy
  + Signal of how highly courts respect the decisions of labour arbitrators
    - Abella reviews leading labour arbitration decisions and notes that most arbitrators have rejected mandatory testing within the workplace
      * Mandatory testing a significant affront to the rights of employees
      * Common law of labour arbitration
      * References *KVP*
        + Arbitration decision from 1965
        + If an employer in a unionized workplace is going to create and impose a unilateral rule, that rule is only effective if

1) It doesn’t contradict or breach the collective agreement

2) If the rule is reasonable

* + - * + A reasonableness test was developed and this is now found everywhere in labour arbitration across the country
      * Any type of policy, when the *KVP* test is applied, must strike a balance between the safety concerns of the employer on one hand and its impact upon employees on the other hand
  + An employer must show actual evidence of a substantial safety problem through the use an abuse of drugs/alcohol in order to implement such rules
    - There are privacy rights that trump proactive measures
  + From a management lawyer’s POV
    - Irving lacking sufficient documentation of alcohol use and impairment within their workplace
    - In the face of lack of documentation, the employer could have attempted to negotiate with the union
    - This would have been a more moderate approach
  + Recognizes the application of balancing test for bringing in random and mandatory alcohol, testing, and recognition of importance of privacy right
    - An employer can only breach these rights by providing proof of a significant safety concern

# Sources of Arbitral Law and Reasoning

* Two pillars for determining the meaning of a collective agreement
  + What is the intention of the parties
  + What is the industrial relations backdrop

# The Collective Agreement- Collective Interpretation

#### Paul Weiler, Reconcilable Differences: New Directions in Canadian Labour Law

* The collective agreement is a unique and unusual kind of contract that requires delicate handling when interpreting
* Rarely is the answer to a hotly contested dispute found expressed within the four corners of the written document

# Negotiation History

##### Re Noranda metal Industries Ltd Fergus Division v International Brotherhood of Electrical Workers (1983) – ONCA – when a clause of a collective agreement is ambiguous, an arbitrator may admit extrinsic evidence in order to interpret the clause

* **Facts:** A collective agreement provided: "3.02. During negotiations it was agreed that the company has the right to subcontract, but in no case shall such subcontracting result in bargaining unit employees being laid off or losing their employment or being likewise affected." The union claimed that the employer violated Article 3.02 by subcontracting work without offering employees a chance to do the work at overtime rates. The union claimed that the employer during negotiations agreed that Article 3.02 applied to such a situation in the wording "or being likewise affected", but the employer denied such an application. The arbitrator considered that the positions of the union and the employer were both plausible, rendering Article 3.02 ambiguous and extrinsic evidence admissible. After considering evidence about the negotiations and past practice the arbitrator ruled in favour of the union's position
* **Holding:** Appeal allowed; arbitrators decision restored
* **Analysis**
  + Arbitrator correctly considered that Article 3.02 was ambiguous and properly relied upon extrinsic evidence in resolving the ambiguity
  + Extrinsic evidence may be admitted to reveal a latent ambiguity
  + Extrinsic evidence is evidenced gathered outside the issue that is being fought over. Ordinarily, it might include past collective agreements, the practices of the parties, negotiating history. You can only turn to extrinsic evidence if a particular provision in a collective agreement is found to be ambiguous.
    - Outside evidence is brought in for interpretive understanding (i.e. negotiation history)

# Past Practice

##### International Association of Machinists v John Bertram & Sons Co (1967) – ON Lab Arb – past practice can be evidence of the meaning of an ambiguous clause but there should be limits on the use of past practice as evidence

* **Analysis:**
  + If a provision in an agreement is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity
  + Best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties
  + There should be strict limitations on the use of past practice
    - No clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context
    - Conduct by one party which unambiguously is based on one meaning attributed to the relevant provision
    - 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 without objection
    - Evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice

# Promissory Estoppel

##### Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals (2011) – SCC – employer’s actions that contradict the collective agreement and are depended upon by the union may be interpreted as the true intention of the employer in the agreement; estoppel applies in labour relations; union cannot let rights slip and then enforce them

* **Facts:** Jacqueline Plaisier has been employed by Nor-Man Regional Health Authority Inc since July 12, 1988. She and her union contend that Plaisier, upon 20 years of employment, is entitled to a “bonus” week of vacation pursuant to the collective agreement between Nor-Man and the Union. Nor-Man denies this request. The disputed clause of the collective agreement states that: “an additional week of paid vacation shall be granted to an employee in the year of her twentieth (20th) anniversary of employment…This provision shall apply to all employees employed on August 31, 1989. It ceases to apply to employees hired after August 31, 1989.” Therefore, a literal reading of the collective agreement favours Plaisier’s grievance. However, Nor-Man argues that Plaisier was employed as a casual in 1988 and she only began to accrue seniority in 1999; thus, she is not eligible for a bonus week of vacation. In reality, over the last twenty years, Nor-Man has been excluding the period of casual employment when calculating vacation entitlements for other employees, but the Union has never challenged such practice until now.
* **Holding:** Arbitrators decision restored
* **Analysis:**
  + Arbitration awards under collective agreements are, as a general rule, subject to review on a standard of reasonableness
    - If the arbitrator outlines a rational or reasoned basis for making a decision, it will not likely be subject to review by the courts
  + While estoppel was imposed based on the circumstances unique to this case, this was a matter under the collective agreement and not deemed to be something which was therefore transformed into a question of general law
    - Importance of taking a contextual approach which includes the following factors
      * The presence or absence of a privative clause which might limit rights on appeal
      * The purposes of the tribunal
      * The nature of the question at issue (whether or not a specific bargaining unit employee had a vacation entitlement for a period of time which would end once the then existing collective agreement expired)
      * The expertise of the tribunal or decision maker
  + High degree of deference to be shown to arbitrators

# General Public Law: Employment-Related Statutes

* The “employment bargain” is affected not only by the collective agreement but also by many statutory regimes
* The extent of the authority of arbitrators to apply such regimes has been a major issue in recent decades

##### Parry Sound (District) Social Services Administration Board v Ontario Public Service Employees Union, Local 324 (2003) – SCC – arbitrators have the authority to arbitrate claims arising from statutes related to employment/the collective agreement

* **Facts:** Parry Sound v OPSEU is about a probationary employee fired shortly after taking maternity leave. She filed a grievance, and the issue was one of jurisdiction. The employer argued that she could not grieve the dismissal due to the collective agreement which held that probationary employees “may be discharged at the sole discretion of and for any reason satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties.” The Board of Arbitration ruled that it had jurisdiction to hear the case.
* **Holding:** Arbitrator’s decision reinstated
* **Analysis:**
  + The human rights code and other relevant statutes are written into every collective agreement and Arbitrators have the jurisdiction to arbitrate claims arising from these statutes
  + The broad rights of an employer to manage operations and direct the work force are subject not only to the express provisions of the collective agreement, but also the statutory rights of its employees
  + While the parties agreed that the collective agreement did not expressly restrict an employer’s right to discharge probationary employees, section 5(1) of the *Code* is an implicit term in all collective agreements, thereby making the discharge of the probationary employee a violation of the collective agreement and thus an arbitrable matter
    - Sections 44 and 64.5(1) of the *ESA*  implicit in all collective agreements give the arbitrator jurisdiction to consider the grievance
  + Grievance arbitration process would increase the ability of employees to assert their right to equal treatment without discrimination, which would likely result in more compliance with the Code
  + Takeaways from Lynk
    - 1) Labour arbitrators are given broad deference by the courts
      * Arbitrators are deemed to be experts
    - 2) Arbitrators get their jurisdiction from two sources
      * Collective agreement
      * S. 48 of *LRA*
    - 3) Arbitrators are to give a broad reading to section 48(12)(j)
    - 4) Endorsed *McLeod v Egan* which states that the parties cannot contract out of statutory minimums when negotiating a collective agreement
    - 5) Collective agreements have two faces to them
      * Public feature
        + Bring in the public statutes
      * Private feature
        + Agreement negotiated between two private parties
    - 6) Re-endorsed the view that arbitration boards are to be given liberal powers to interpret collective agreements due to their expertise and due to the fact they can provide better justice and can understand labour relations better than the courts
    - 7) Arbitrators have jurisdiction over human rights even when there was a broadly worded management rights clause. Arbitrator in this case had jurisdiction even though a probationary employee doesn’t have grievance rights. You have to read a collective agreement in light of broader statutory obligations.
    - 8) This just reaffirmed the broad powers that arbitrators have under 48(12)(j)
* **Note:** SCC endorses the dual objectives are of Canadian Labour law: (1) to ensure industrial peace by creating mechanisms and a legal culture of ensuring there are harmonious ways of trying to find resolution to difference between unions and employers and (2) to protect employees from the misuse of managerial power
* **Note:** This case shows that HR provisions will be read to trump collective agreement provisions where there is a tension or a clash. Employee was able to have her case involving an allegation of discrimination based on pregnancy and gender litigated in front of the LRB because they have the power to read the HR Code.

# General Public Law: The *Charter* and the Common Law

#### Arbitral Authority to Give Charter Remedies

* Where arbitrator’s powers are derived from statute, their exercise is subject to the *Charter*, since the arbitrator is a creature of statute who “does not have the power to make an order that would result in an infringement of the *Charter*”

##### Weber v Ontario Hydro (1995) – SCC – arbitrators have jurisdiction over the dispute of torts and of Charter rights

* **Facts:** Weber brought an action against Ontario Hydro for deceit, trespass, nuisance, invasion of privacy, and an alleged violation of his rights under ss. 7 and 8 of the Charter of Rights and Freedoms. Weber went off on extended leave for sick pay because of back problems. There were reports filtering back to the employer to the effect that he did not have a bad back problem and in fact he was busy doing things that could only be done with a strong back. Based on these rumors, Ontario Hydro hired a private detective who went to Weber’s home and took pictures of him building a back deck. Private detective tried to enter his home. Weber was suspended for abusing his sick leave benefits. Union grieved on his behalf but then settled the matter. Weber then went off and sued the employer both on tort claims and Charter claims saying that Ontario Hydro was a state actor and their attempt to have the detective enter his home and take pictures were a breach of s. 7 and 8 of the Charter and he claimed damages for the surveillance. Ontario Hydro applied for a determination as to whether the action should be dismissed where it was based on the same incident and subject matter as a grievance filed on the employee's behalf and whether Charter applied to actions of Ontario Hydro.
* **Holding:** Weber not to be reinstated, Ontario Hydro appeal allowed. Labour arbitrators were a court of competent jurisdiction under the Charter and therefore had the authority to be able to read and apply the Charter.
* **Analysis:**
  + An arbitrator hearing a collective agreement dispute under the Ontario Labour Relations Act was a "court of competent jurisdiction" to award damages for a violation of the employee's Charter rights
  + Arbitrator had jurisdiction over the parties and subject matter of the dispute and was empowered under Labour Relations Act to award Charter remedies
  + When employee belongs to a union, their sole legal decision maker to decide differences under the collective agreement is in front of a labour arbitrator.
  + Takeaways:
    - Exclusive jurisdiction on collective agreement matters belongs to arbitrators. This meant that matters that were not before in arbitral jurisdiction now were (i.e. torts).
    - The limited remedial power that an arbitrator has in relation to the Charter. All that an arbitrator can do if it finds that a particular law violates the Charter and is not saved by s. 1, unlike the courts who can strike down a law, all that an arbitrator can do is declare a general invalidity of that law for this particular dispute and it will be left either for the case to be judicial reviewed to the courts.

#### Arbitral Authority to Apply the Common Law

* In *Weber v Ontario Hydro*, the SCC also held that arbitrators could apply common law doctrines to resolve claims based on those doctrines as long as the dispute arose out of the collective agreement
* Generally, the main common law action seen by arbitrators is defamation according to Lynk

#### Remedial Jurisdiction of Arbitrators

* Three general types of arbitral decisions (Lynk)
  + Discipline and dismissal
  + Discrimination and human rights
  + Interpretive questions about the collective agreement

# Damages that Arbitrator can Award

##### Re Polymer Corp and Oil, Chemical & Atomic Workers (1959) – ON Lab Arb – the labour arbitrator has the right to award damages for a breach of the collective agreement

* **Facts:** The union called a strike in breach of the collective agreement. The employer brought a grievance claiming damages for the losses caused by the illegal strike. The board held that it had the authority to award such damages. When the board reconvened to assess the quantum of damages, the Union reopened the issue.
* **Issue:** Can the arbitrator award damages when there is not express provision in the collective agreement that gives remedial powers to the arbitrator?
* **Holding:** Yes, arbitrator has a general common arbitrable law power to be able to issue remedies and damages even if there is no express provision
* **Union’s Argument:** you have no power because there is no express grant
* **Employer:** Read collective agreement broadly, they do have the power
* **Analysis:**
  + The arbitrator has the right to impose orders that relieve an aggrieved employee and so the same should be true for aggrieved employers
    - Having recourse only for the employee would call into question the reason for having a collective agreement governing both parties
  + The issue is whether the exercise of arbitral authority encompasses the effectuation of the right and the enforcement of the obligation
    - Making abstract pronouncements devoid of direction for redress of violations would make no sense
  + Board has the right to award damages
  + 2) Arbitrators have the power to remove or reduce discipline imposed by the employer (have the power of reinstatement which the courts do not have)
  + 3) Arbitrator can award compensatory wages (back wages, missed benefits etc)
  + 4) Arbitrators have the power to award interest on compensatory damages
  + 5) Arbitrators have the remedial power to award Charter damages (rarely) and tort damages (usually only in defamation cases which are rare)

# Reinstatement

##### William Scott & Company Ltd v Canadian Food and Allied Workers Union, Local P-162 I

* **Facts:** The union made an application under s. 108(1)(b) for review of an arbitration award which found that an employee had been justly discharged and refused to substitute a lesser penalty. The majority of the arbitration board found as a finding of fact that the employee in question had, with a malicious motive, contacted a newspaper to criticize the employer. The employer, which was partially owned by the provincial government, had at the time of the criticism, been under severe public attack for alleged inefficiencies. The employee had been previously suspended for one year and had been involved in past interferences with the daily operations of the employer. The arbitration board adopted a two-step procedure. First, it evaluated the evidence of the immediate incident and found that employee’s conduct constituted just cause for discharge. Secondly, it concluded that it should not order reinstatement under s. 98(d) of the Code. The union contended that the award was inconsistent with the principles expressed or implied in the Labour Code because the employee’s comments to the press were true and made without malicious intent.
* Holding:
* **Analysis:**
  + Sets out the general principles upon which all arbitrators must weigh and consider when it comes to discipline and discharge
  + Arbitrator can reduce discipline following s. 48(17)
  + Established three questions to determine whether discipline is excessive
    - 1) Has the employee given just and reasonable cause for some form of discipline by the employer?
      * Fact driven
      * If no, employee should be reinstated
      * Did the employee actually do what he or she is accused of?
    - 2) If there was just cause for some discipline, was employer's decision to dismiss employee an excessive response in all of the circumstances of the case?
      * If it was appropriate then go no further but if not and there was not enough just cause to justify termination or that termination was excessive in all circumstances then move to third question
    - 3) If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?
      * In order to determine this, you go through a list of factors to determine what should be the substitute penalty.
        + 1) How serious is the immediate offence of the employee which precipitated the discharge?
        + 2) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
        + 3) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
        + 4) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee, which did not prove successful in solving the problem? This is called progressive discipline.
        + 5) Is the discharge of this individual employee in accord with the consistent policies of the employer or does it appear to single out this person for arbitrary and harsh treatment?
  + These factors are still the commonly cited test for discipline in the Canadian unionized workplace

##### New Dominion Stores (cob Great Atlantic & Pacific Co of Canada) v Retail Wholesale Canada Canadian Service Sector, Division of USWA, Local 414 (McCaul Grievance) (1977) – the penalty of an employee for wrongdoing must be proportional; arbitrators must assess the context of the employment relationship to determine the appropriate penalty

* **Facts:** Carol McCaul was alleged to have stolen a half pint of berries. She claimed to have forgotten they were in her bag from when she had done shopping. She had 23 years of seniority. The main issue was whether this behavior led to automatic termination.
* **Holding:** Grievance allowed; grievor reinstated but suspended
* **Analysis:** 
  + Theft may go to the root of the relationship of trust and confidence that is essential in many employment relationships
    - A single instance of theft may lead to the conclusion that the relationship has been irretrievably broken
    - But each case is unique on its facts and ought to be considered as such in imposing an appropriate penalty
  + The value of the goods taken here was nominal and McCaul has a long record of service with an unblemished record
  + Here, the appropriate penalty would be a suspension without pay but without loss of seniority

#### Procedural Issues with Discipline

* + 1) Onus rests on the union except in discipline and discharge cases where it rests with the employers
  + 2) Burden of proof is the civil burden, balance of probabilities but in a discipline case, it is balance of probabilities in clear and cogent evidence
  + 3) **Culminating incident:** the straw that broke the camel’s back. An employee may have been late 10 times over the last 2 months, but because they were given steadily more serious warnings and may have been disciplined, then their 21st time being late may be the culminating incident which would justify discipline. Employer can give more serious discipline if there has been a recent misconduct history at work for which the employee has been warned.
  + 4) **Off Duty Conduct:** Normal rule is that employer only has jurisdiction to be able to discipline the employee for something that occurs in the course of work or at work but there are exceptions. Exception is where the employee’s off duty conduct has a sufficient connection or nexus to the employer’s interests then the employer may be able to investigate and punish the employee for the off duty conduct.
  + 5) **Last Chance Agreements:** Agreements signed between an employer and a union and an individual employee that give an employee, where there has been misconduct or other issue involving work performance, one last chance to keep their nose clean for a specific period of time to be able to keep their job. These have applied in HR cases where there has been a disability that prevents them from being at work and also in ordinary discipline cases. If there is a subsequent breach of this Agreement, generally there is a clause that states that employer can fire the person and will not go to arbitration but the only way the union can grieve is that the facts did not amount to a breach of the Last Chance Agreement. Arbitrators will upholds the standards in a LCA, they say that if arbitrators can overturn these agreements then employers will not enter into them so arbitrators have to uphold the sanctity of them.

#### Rectification

* Arbitrators have the authority to apply the general contract law principle of rectification
  + Correcting a mutual error made by the parties when reducing the terms of the collective agreement to writing

# The Institutional Framework: Competing Models for Allocating Jurisdiction among Multiple Forums

#### Arbitration and Civil Actions Concerning Charter and Common Law Claims

* *St Anne Nackawic Pulp & Paper v Canadian Paperworks Union* (SCC 1986) – the grievance and arbitration procedure under the collective agreement has exclusive jurisdiction to deal with disputes arising between parties to the agreement – the jurisdiction of the courts was ousted

##### Weber v Ontario Hydro (1995) – SCC – In determining whether the arbitral regime has exclusive jurisdiction, the issue is not whether the action is independent of the collective agreement, but rather whether the dispute is one arising under the collective agreement; SCC recognizes the wide jurisdiction of the arbitration board

* **Issue:** When are employees and employees precluded from suing each other in the courts by labour legislation providing for binding arbitration
* **Analysis:** s. 45(1) of ON labour relations act prevents bringing civil actions based solely on collective agreement.
  + In determining whether the arbitral regime has exclusive jurisdiction, the issue is not whether the action is independent of the CA, but rather whether the *dispute* is one arising under the CA
  + Two elements to be considered: the dispute and the ambit of the collective agreement
    - Decision must define the dispute's *essential character*
    - Only disputes which expressly arise out of the CA are foreclosed to the courts
    - Question to ask: is the dispute’s essential character an industrial relations matter? Or, does this dispute fit within the industrial relationship between employer and employee
  + Arbitrators themselves will be subject to judicial review and their errors may be corrected by the courts
  + When a remedy is required which the arbitrator is not empowered to grant, courts may take jurisdiction
  + Permitting concurrent actions would undermine goals of the collective bargaining regime
  + Application to this case: appellant argued the dispute is outside the CA- specifically the act of hiring private investigators who entered his home and reported on him.
* **Held:** Only bring to judicial court if the dispute did not arise from the collective agreement. In this case, an article of the collective agreement extended the grievance procedure to "any allegation that an employee has been subjected to unfair treatment or any dispute arising out of the content of this agreement". Court held the dispute in this case arose out of the content of the agreement.
* **Notes:** SCC did not address the issue of whether the exclusive jurisdiction model should be applied to common law claims but not Charter claims because it would make a unionized employee's access to courts for enforcement of her individual rights contingent upon support from the union

#### Michel Picher, “Defining the Scope of Arbitration: the Impact of Weber: An Arbitrator’s Perspective” (2000)

* SCC in *Weber* creates uncertainty about the success of arbitration
* Labour arbitration has evolved as an essentially private process whose procedures and scope have traditionally been controlled by the parties themselves
* Central to *Weber* is the perception that the grievance and arbitration provisions of the CA are broad
* Court failed to understand that broad allegations of unjust treatment were never intended to be arbitrated and the grievance procedure outlined in the CA is distinct from the arbitration procedure
* The next article in the CA, titled "arbitration" says "this procedure shall not apply to Union allegations of unfair treatment"
* Courts and arbitrators often struggle with defining disputes which arise inferentially from the collective agreement
* *Weber* will prove to be an anti-union decision from its consequences – unions have reason to fear the pressures that will now mount to pursue wide-ranging claims beyond the scope of grievances traditionally brought to arbitration
* Labour arbitration will become the forum for broader range of claims that would burden the arbitration process
* Main concern is that arbitrators will assume jurisdiction beyond the intended scope of the CA, based on an overly broad characterization of the "nature of the dispute" and "ambit of the collective agreement"
* Arbitration is becoming more about vindicating indv rights at the expense of long-term collective bargaining agreements
* Employers and unions should be explicit in their agreements, should be clear if they do not intend tort claims like defamation and negligence to be arbitrable

##### Bisaillon v Concordia University (2006) – SCC – grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, providing those conditions can be shown to have an express or implicit connection to the CA

* Court reaffirmed "a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, providing those conditions can be shown to have an express or implicit connection to the collective agreement"

# Arbitration and Other Statutory Tribunals

##### Morin v Quebec (2004) - SCC – when determining the appropriate forum look at relevant legislation and what it says about the arbitrator's jurisdiction and consider the nature of the dispute and see whether legislation suggests it falls exclusively to the arbitrator; issues between employees and the union cannot be heard by an arbitrator, arbitrators only have jurisdiction for issues between the employer and the union

* **Facts:** Amendments negotiated during the life of CA between a group of teachers' unions and Quebec gov adversely affected a subset of employees, mostly younger teachers. These teachers complained to human rights commission that their equality rights were violated by treating them less favourably than older teachers. Union decided not to challenge collective agreement. Gov said tribunal lacked jurisdiction because the matter was exclusively within arbitral jurisdiction. Tribunal rejected this, which was reversed by QC Court of Appeal. Now teachers appeal to SCC.
* **Held:** Appeal allowed. Matter was remitted to the HR tribunal. Dissent: Proper application of the Weber test should result in exclusive arbitral jurisdiction in this case
* **Analysis:** 
  + Three outcomes are possible when two possible tribunals could decide disputes in the labour context (from *Weber*)
    - **Concurrent Jurisdiction Model** – find jurisdiction over the dispute in both tribunals, can bring before labour arbitrator, courts or other tribunals
    - **Overlapping Jurisdiction Model** – labour tribunals consider traditional labour law issues, courts/other tribunals have jurisdiction over matters that arise in employment context but fall outside traditional labour law issues
    - **Exclusive Jurisdiction Model** – Jurisdiction lies exclusively in either the labour arbitrator, or in alternate tribunal, but not both
* In *Weber*, concurrent and overlapping models were ruled out bc provisions of the ON labour relations act, when applied to the facts of the dispute, dictated the labour arbitrator had exclusive jurisdiction
  + BUT *Weber* does not stand for proposition that labour arbitrators *always* have exclusive jurisdiction in employer-union disputes
* Question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute
* Two steps
* (1) Look at relevant legislation and what it says about the arbitrator's jurisdiction
* (2) Consider the nature of the dispute and see whether legislation suggests it falls exclusively to the arbitrator
* In this case, QC Labour Code provides that the arbitrator has jurisdiction over matters arising out of the CA's operation.
* S. 111 of QC Charter grants human rights tribunal large and broad jurisdiction which may be concurrent with that of other adjudicative bodies
* Can differentiate this case from Weber by its facts – the essence of this dispute is the process of the negotiation and how they should allocate decreased resources among union members
  + It arose out of the pre-contractual negotiation of the agreement, not its operation

##### Isidore Garon Itee v Tremblay (2006) – SCC –

* SCC imposed limitation on the extension of arbitral jurisdiction over statutory claims
* Substantive rules from a statutory scheme that are incompatible with the collective labour relations regime cannot be incorporated into the CA and therefore are not within the jurisdiction of a grievance arbitrator

# Criminal Courts Versus Arbitrators

##### Toronto v CUPE (2003) – SCC

* **Facts:** Grievor was union member who was convicted of sexually assaulting boy under his supervision as a recreation instructor. Was convicted. Toronto fired grievor a few days later. Arbitrator found conviction to be admissible evidence but held he was not bound to its conclusions on whether the assault actually occurred. Arbitrator found the presumption had been rebutted and the grievor had been dismissed by the city without just cause.
* **Analysis:** 
  + Abuse of process doctrine – the arbitrator was compelled to accept the conclusions of the criminal conviction
  + On a correctness standard, the arbitrator substituted his own finding for that of the court's, and he was required to give full effect to the conviction

# Arbitrators Versus Other Administrative Tribunals

##### BC (Workers' Compensation Board) v Figliola (2011) – SCC – In determining whether a complaint has been appropriately dealt under s 27, tribunal should ask whether there was concurrent jurisdiction to decide HR issues, whether the previously decided legal issue was essentially the same, and whether there was an opportunity for the complainants to know the case to be met

* **Facts:** Judicial review of a decision of the BC Human Rights Tribunal. Three claimants injured while working. Received fixed compensation award through the compensation board's policy. Claimants appealed the decision to the board's review division saying it was unreasonable, unconstitutional and discriminatory on grounds of disability under s. 8 of BC Human Rights Code. Issue under SCC was s.27 of Human Rights Code which allows Human Rights Tribunal to dismiss a complaint where "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding"
* **Held:**Split 5:4. Appeal was allowed and dismissed the complaints.
* **Analysis:**
  + In determining whether a complaint has been appropriately dealt with under s. 27, tribunal should ask whether there was concurrent jurisdiction to decide human rights issues, whether the previously decided legal issue was essentially the same, and whether there was an opportunity for complainants to know the case to be met
  + **Minority:** 
    - Majority characterized the finality doctrines too narrowly
    - Agreed the decision was unreasonable, but it would have remitted the Compensation Board's motion to dismiss under s. 27 to the tribunal
    - Common law finality doctrines should be applied flexibly to maintain balance of finality and fairness

##### Penner v Niagara (Regional Police Services Board) (2013) – SCC - court may choose to hear an action if it would be fundamentally unfair to disallow the civil action

* **Facts:** Penner was forcibly removed from court and arrested for disruptive behaviour. Filed a complaint under Ontario Police Services Act (PCA), alleged unlawful arrest and unnecessary use of force. Began civil action for damages. Chief of police appointed a hearing officer under the PCA, officer did not find the evidence credible, found the officers not guilty of misconduct and dismissed the complainant. At Ontario Court of Appeal, found that applying doctrine of issue estoppel would not be an injustice and dismissed Penner's appeal.
* **Held:** Upheld appeal. Found requirements of issue estoppel were met: same issue, same parties, and earlier decision had been a final judicial decision. But it would be fundamentally unfair in this case to disallow Penner's civil action.
* **Notes:** decisions conflict on the question of *res judicata* for administrative tribunals of concurrent jurisdiction. *Figliola* suggests when one tribunal decides an issue, fairness of finality bars subsequent tribunals from reconsidering it. *Penner* suggests that the subsequent tribunal can reconsider it because of the fairness factor.

# Judicial Review of Arbitration

* By late 1990s, SCC adopted a spectrum of standards of review: correctness, simple unreasonableness, and patent unreasonableness
* With respect to arbitration awards, courts generally applied "patent unreasonableness" standard to arbitral interpretations of CA language and of the provisions of labour relations legislation dealing with the arbitral process, but applied "correctness" standard to arbitral interpretations of other statutes (*Canada Safeway v Retail, Wholesale and Dept Store Union* 1998 SCC)

🡪 This was abandoned in *Dunsmuir*

##### Dunsmuir v New Brunswick (2008) – SCC – Replaced "patent unreasonableness” and "simple unreasonableness" with a single standard of reasonableness

* **Facts:** Dunsmuir was a non-unionized officer in the NB public service. Wrongful discharge grievance was brought under a specialized statutory grievance resolution process, alleged the gov terminated his employment without following the procedures required for the discharge of a statutory appointee. Gov argued the applicable provincial statute recognized the mostly contractual nature of his appointment, and therefore the procedures did not have to be followed. Adjudicator rejected the gov's argument and upheld the grievance. Judicial review reached SCC
* **Held:** Adjudicator acted unreasonably in holding Dunsmuir had the procedural rights of a statutory rather than contractual office holder.
* **Analysis:** 
  + A simpler test is needed, right now there are too many standards of review and can easily be manipulated
  + The two variants of reasonableness should be collapsed into a single form of reasonableness 🡪 two standards of review now: correctness and reasonableness
  + Following factors will lead to deference to decision maker and reasonableness test:
    - Existence of a privative clause
    - Purpose of the tribunal as determined by interpretation of enabling legislation
    - Nature of the question at issue. If it is a question of law which is "central importance to the legal system and outside the specialized area of expertise" 🡪 correctness standard
    - Expertise of the tribunal (highly specialized would attract reasonableness)
    - Questions regarding the jurisdictional lines between two or more competing specialized tribunals also use correctness review standard

# The Future of the Grievance Resolution Process

* Labour arbitration when introduced under Wagner Act models was intended to be quick, cost-effective and expert means to resolve disputes
* Decisions of arbitrators were helpful precedents, labour arbitration reports were published, growing body of jurisprudence
* Canadian admin law treated labour arbitrators as expert decisional tribunals worthy of deference
* There has been a procedural "legalization and professionalization" of arbitration – has become dominated by lawyers rather than union reps or human relations consultants
* Becoming costly, time-consuming, etc.
* Various typed of "expedited arbitration" emerging – most have failed
* But mediation-arbitration (med-arb) is agreed to reduce time and expense in the resolution of grievances for a lot of different issues
  + Legislative approval protects med-arbiters against allegations of bias and gives them authority to speed through the evidentiary phase
  + Respects autonomy of the parties in collective labour relations
  + Respects cost-effectiveness, efficiency and finality of the dispute resolution processes under CA's
* Also emergence of "restorative workplace conferencing" – goes beyond mediation to identify relational issues that may affect more than individual grievors or the union – revolves matters like bullying, sexual harassment, etc.

# The Constitutionalization of Labour Law

#### Freedom of Association

* Along with freedom of expression, this is one of the most important pillars of any free, democratic society
* Has always had a more incoherent history when compared to s. 2(a) or 2(b). SCC has had a harder time defining this right
* ILO has identified four essential labour rights that go to the heart of the obligations of any society to ensure progressive liberal labour law and the right to trade unions
  + Right to organize: right of workers to be able to organize and create their own trade unions
  + Right to collectively bargain
    - Most important of the rights
  + Right to strike
  + Right to be free from undue government interference
    - Doesn’t have a particularly important place in Canadian law because we live in a liberal democracy which means that trade unions being banned or controlled by the government or otherwise face significant restrictions does not typically happen here
* When 2(d) was introduced, there were three schools of thought which reflect the different dominant patterns of academic thinking
  + Industrial pluralists
    - It’s a bad idea for unions to go to the courts to seek constitutional protection because the courts could understand it
    - “*Charter* realists”
    - There was a reason that we separated labour disputes from the regular court system
      * Court will just mess it up
    - Paul Weiler and Harry Arthurs were examples of industrial pluralists
  + Industrial cynics/skeptics
    - Agreed with pluralists that the courts will mess it up
    - They also agreed unions should not be going to the courts to try to argue that their rights could be anchored in s. 2(d). They were skeptical the courts could ever provide fair justice
    - They said courts were biased against unions and will almost always side with employers
    - Neo-Marxist
      * Courts are inherently biased against trade unions
    - Judy Fudge and Harry Glassbeeks
  + *Charter* romantics
    - Important to go to the courts in order to give life to the rights under s. 2(d)
    - They said unions should be going to the courts to try to get constitutional protection
    - Labour rights are human rights, just like womens rights are, and it’s important to educate the courts to get as fulsome a meaning to freedom of association as it is to give meaning to freedom of religion and expression

#### The First Trilogy (The Sleepy Era) (1987): The Alberta Reference, PSAC, and RWDSU (also Delisle SCC 1989) – narrow and formalistic view of freedom of association

* Three cases where the SCC said that there was no meaning given to s. 2(d)
* All these 3 decisions were released on April 9th 1987, the same day

##### Reference Re Public Service Employee Relations Act (Alberta) (1987) – SCC – freedom of association is an individual right that protects collective activities which are already protected by individual rights; Activities that are prohibited individually are also forbidden collectively; A trade union does not have the constitutional right to strike under s. 2(d)

* **Only responsible for knowing this one**
* **Facts:** Case involving the right to strike and right to collectively bargain. The position of the respective unions in this case was that the legislature in Alberta is forbidden from enacting restrictive legislation, as per s.2(d) of the Charter, that removes the right to collectively bargain and also removing the right to strike. The position of the unions was that it is impossible to have freedom of association where the right to collectively bargain is unduly restricted and the right to strike has been severely restricted or removed altogether. The Government of Alberta, and other intervening governments, were of the mind that there is a difference between legislative rights and constitutional rights. The logic of these governments was that the right to strike and collectively bargain are legislative rights that had been around since the 1940’s and they either never were meant to be constitutional rights (covered by freedom of association) or if they were, they hadn’t been around long enough (they were NEW rights) and they had not yet crystalized into constitutional rights. The Alberta Government said that they needed to show a core social right in order for it to be a constitutional right and right to strike and right to collectively bargain did not have that core harness that would make a constitutional right.
* **Holding:** s. 2(d) of the *Charter* does not protect the right to strike
* **Analysis:**
  + Le Dain majority
    - The charter doesn’t protect collective rights at least with regard to freedom of association
      * In modern democratic society, the hallmark is how wide freedom of association is and how wide freedom of expression is
    - Ultimately, the conclusion is that the right to strike does not fall within the freedom of association in addition to the fact that the right to strike is not a matter of social policy
    - Protection under s.2(d) encompasses three situations
      * Protects individuals who want to create/join/maintain an organization
      * Protects individuals who wish to exercise in concert with others rights that are specifically entrenched in the Charter
      * Protects individuals who wish to pursue in concert with others, rights that were lawful for that individual to pursue alone
    - In determining whether the right to strike is protected under s. 2(d), uses these three grounds of protection as a basis for analysis
      * The conclusion is that the right to strike does not fall under any of these situations as outlined above and therefore REJECTS the proposition that the right to strike is protected under s. 2(d)
      * Constitutionally a group could have no greater rights than an individual has
        + Freedom of association means the freedom to associate for purposes of activities that are lawful when performed by an individual
  + McIntyre concurring
    - Rejected the argument of the unions that strikes are fundamental to society/culture and indicates that this is a relatively new statutory right
    - Rejected the idea that freedom of association encompasses all activities that are essential to the lawful goals of an association
    - Rejected that all associational activities not motivated by the desire to do harm are protected
    - Embraces the proposition that there is no collective content in the freedom of association (which is consistent with Dickson’s dissent addressed directly below) and expresses the desire that labour law is an inherently delicate balancing process and its best left to legislatures who deal with politics and policy
      * Indicates we should be exceptionally deferential when it comes to s. 2(d) because it is complicated and nuanced. He says there is no individual right to strike and therefore there can be no collective right to strike
    - Collective bargaining is a statutory right
    - Ruled that fundamental labour rights are not protected by freedom of association
    - Firm philosophical stance that freedom of association is a fundamentally individual right, just like the Charter is a fundamentally individual rights proclamation. He says, “People, by merely combining together, cannot create an identity which has greater constitutional rights and freedoms than they as individuals possess”.
    - He says that labour law is a difficult and hard won compromise between labour and management. It is forged and reflected in Legislation passed by Parliament or provincial legislatures. Because it is such a sensitive social area, it is wrong that courts use a constitutional tool to interfere with it. It should be left entirely to legislatures to deal with changes or determinations of labour or management rights.
    - He said judges are not good at understanding the culture and dynamics of labour relations.
  + Dickson dissent – extremely important (Lynk says the most important dissent in modern judicial history because it is the most influential dissent because this dissent influenced many majority SCC decisions in the years to come. It winds up forming the jurisprudential basis for the 3rd labour trilogy)
    - Rights based approach to labour rights
      * “Labour is not a commodity”
    - He says these are fundamental rights and should be included in the scope of 2(d)
    - Seven important points:
      * Endorses the importance of reading the *Charter* in light of international law and reading the *Charter* in light of international labour law in particular to understand section 2(d). He says international labour law is an influential tool to interpret the *Charter*. He said we should be using the *Charter* to claim that rights are at least as broad as they are in international law.
      * Rejects the argument endorsed by Le Dain and McIntyre that strikes cannot be constitutionally protected because they are statutory
        + Whether or not strikes or collective bargaining had only recently received statutory protection is not an indicator one way or the other of whether they are fundamental rights
        + He said the right to strike and collectively bargain are anchored in international law
      * Freedom of association protects some of the core activities of associations
        + Striking, engaging in collective bargaining
      * Freedom of association is fundamental to society and is as important as freedom of expression. He says freedom of association is a free standing right.
      * The *Charter* protects collective rights, as well as individual rights
        + See linguistic rights in later areas of the *Charter*
      * Collective bargaining is industrial democracy
        + Inserts the rule of law into the workplace
      * “Work is one of the most fundamental aspects of an individual’s life, providing the individual with a means of financial support and as importantly a contributory part of society”
        + Employment is an essential component of an individual’s sense of identity and self-worth
        + This phrase has been quoted by SCC so many times.
    - He finds that 2(d) was violated. He then would of applied s.1 analysis and would of found that the government did not succeed in presenting a persuasive argument for their infringement.
    - Adopts what is called a justice perspective re: entrenchment of right to strike and right to collectively bargain
      * They should be treated as fundamental rights because work is central to the way of life of every individual
      * The only effective way for most individuals at work to improve their workplace conditions is through association
    - Adopts a liberal definition of the right to strike, deriving it from international labour law
      * “I believe that the Charter should generally be presumed to provide protection at least as great as that afforded in similar provisions in international documents ratified by Canada”
      * Re: essential services, just as we interpret every other right definition should be broad while exceptions should be narrowly interpreted
        + We should have a broad expansive view of s.2(d) and if we have any restrictions that should be assessed in a s.1 analysis
    - Doesn’t accept the restricted definition of freedom of association that McIntyre had adopted
      * If freedom of association protected only the right to join an association as an individual but not the legal activities for which that association is formed for, then that freedom is indeed legalistic, ungenerous and vapid

##### Delisle (RCMP #1) (1999) – SCC – the right to organize is not protected by s. 2(d)

* **Facts:** Delisle was a staff sergeant for RCMP and he wanted to organize the RCMP into a trade union. In 1990’s, RCMP was the only police force in the country that did not have a right to unionize. He made an argument all the way to the SCC
* *Alberta Reference* stands for the fact that the right to strike and collectively bargain not protected by s. 2(d)
* This case states that the right to organize is not covered by s. 2(d)
* Judge said that following that there is no right to organize recognized under s. 2(d). Also said RCMP officers are well paid, they are state employees so they have a right to go after the government for employment complaint. Because they were privileged and not vulnerable, there was no inherent right for them to unionize.
* **Held**: Application struck down
* **Dissent:** Justice Iacobucci and Cory
  + Anchored their dissent on the Dickson dissent from 1987 saying that international labour law allowed them to unionize. This was a fundamental right and the court was taking an unduly restrictive version of 2(d).

#### The Second Trilogy (2001-2011): *Dunmore, Health Services* and *Fraser* – court is hesitant, confused and incoherent

* SCC is showing its hesitance and confused approach towards s. 2(d)

##### Dunmore v Ontario (Attorney General) (2001) – SCC – freedom of association can protect some aspects of employee organizing activity that are “inherently collective”; Demonstrates move towards Dickson’s dissent in the Alberta Reference

* **Facts:** s.80 of the *Labour Relations and Employment Statute Law Amendment Act*, 1995 excluded agricultural workers from the labour relations regime in the LRA. Dunmore brings an action claiming that this legislation infringes their ss. 2(d) and 15(1) Charter rights. Ontario was one of the only provinces that did not allow farm workers to unionize but for a fleeting 20 minutes in 1994 and 1995, the NDP government in power had granted the workers the right to unionize and collectively bargain but had denied them the right to strike.
* **Issue:** Why was there this exclusion of agricultural workers?
* **Holding:** Appeal allowed; legislation is unconstitutional
* **Analysis:** Justice Bastarache
  + Everyone has the s. 2(d) freedom, and it may be operationalized through a particular statutory regime, but that doesn’t mean that what is at issue is access to a particular regime
  + He said freedom of association does not have to be limited to individuals. He says the law must recognize that certain union activities, making collective representations or adopting a platform, may be central to freedom of association even if they are inconceivable at the individual level
  + He says that the absolute exclusion of agricultural workers from labour legislation is a violation of 2(d) and is not justified under s.1.
  + Have the 2(d) freedoms been substantially interfered with is the question that must be asked; not necessarily person’s access to a particular regime
    - Charter isn’t so much about the regime, but substantive interference with the particular right
  + s. 2(d) does not guarantee access to a particular labour relations regime where the claimants are able to exercise their s. 2(d) rights independently
    - Purpose of 2(d) is to allow achievement of individual potential through interpersonal relationships and collective action
  + Has the State precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals (developed citing Dickson’s dissent in *Reference Re Public Service*)?
    - Unions have needs/priorities distinct from their members, cannot function if law protects only the lawful activities of individuals
      * The RCMP were not vulnerable workers but agricultural workers are and so that is why their exclusion requires protection from state action
    - The law must recognize that certain union activities are central to freedom of association even though they are inconceivable on the individual level
    - 2(d) may impose positive obligation on the state to extend protective legislation to unprotected groups
      * There are not just negative limitations on the state under the *Charter* but there are also positive duties on the state to protect vulnerable people in society
  + Claims of under-inclusion under Charter s. 2 must:
    - Be grounded in Charter freedoms rather than in access to particular statutory regimes
    - Have an evidentiary burden demonstrating that exclusion from the statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity; and
    - Link the alleged Charter violation to state action, context must be such that the state can be held accountable for inability to exercise a Charter right
  + Dunmore’s claims fall squarely within the protected ambit of s. 2(d)
    - The LRA is meant to safeguard the freedom to associate; not to provide a limited entitlement to certain classes of citizens
    - The inability of Agricultural workers, etc. to associate/strike can be directly linked to state action
    - The wholesale exclusion of Agricultural workers from the LRA regime does not minimally impair their right to freedom of association; fails s. 1 Charter analysis

##### Health Services and Support – Facilities Subsector Bargaining Association v British Columbia (2007) – SCC – recognizes the procedural “right” to collective bargaining; s. 2(d) should be interpreted broadly

* **Facts:** There was already a well-established collective bargaining relationship between the provincial government of British Columbia in both public and private sector (healthcare sector specifically). When the new government came into power, there were substantial changes to labour relations which largely pertained to cost cutting. The impact of the legislation was that it stripped employees in health services of rights that had been bargained for in collective agreements. The new government passed the legislation very quickly.
* **Holding:** Unions win and s. 2(d) does protect collective bargaining
* **Analysis:**
  + s. 2(d) does protect collective bargaining
    - Reverses decision in the first labour trilogy
  + This case rejects a number of propositions put forward in the Alberta Reference case:
    - Reject arguments made in the Alberta Reference case that they are modern rights and not fundamental rights
      * This right has been around for a long period of time and is central to the right to associate.
    - At least when it comes to s. 2(d), the court should always bow to legislations
      * Policy should reflect the Charter rights and values and judge accordingly
    - Rejects that s. 2(d) only protects the rights that an individual could do in their own capacity
      * It would empty s. 2(d) of all meaning
      * This is too broad of a limitation
    - Rejects that s. 2(d) does not protect the goals of a collective organization
      * As above, this is too broad of a limitation
  + SCC recognizes that there is a procedural right to collective bargaining
    - No protection for bargaining outcomes
  + *Charter* values are reflected in collective bargaining
    - Ensuring the ability to bargain and for vulnerable employees to have adequate representation are important to a free and democratic society
  + Praises *Dunmore* as it recognizes that there is some access to rights protected under s. 2(d) and that there are some positive duties on part of the government that requires them act and protect
  + Adopts what Dickson said in dissent in the *Alberta Reference* case with regard to the approach of international definitions being used (at a bare minimum)
    - Convention 87 of the ILO states that the right to collectively bargain is a fundamental human right and says that the right to collectively bargain is a broad right
    - It’s reasonable to infer that s. 2(d) provides at least the same level of protection as that provided in international labour law
      * Concepts of human dignity, liberty and equality and the enhancement of democracy underlie the *Charter* which was seemingly a factor in their decision in that they took issue with the fact that there was no notice given to the respective union the ineffective nature of many of the contractual provisions that they are bargained for
      * It is seemingly unfair that the government can bargain with the union and then take those rights away from them by way of legislation

##### Ontario (AG) v Fraser (2011) – SCC – Individual’s freedom of association under s. 2(d) includes an obligation on employers to bargain in good faith on workplace issues; There is seemingly a high threshold in order to establish a violation of s. 2(d) as workers would have to show that the employer made access to collective bargaining effectively impossible

* **Facts:** Appeal raised the issue of the constitutionality of the labour relations regime of farm workers in Ontario, which has excluded them from the application of the LRA. Agricultural Employees Protection Act (AEPA) was a response to *Dunmore v Ontario 2001 SCC*, which found previous legislative scheme violated s. 2(d) of *Charter.* SCC is now revisiting *Dunmore*. In *Dunmore*, SCC said that the absolute disqualification of agricultural workers from the right to form a union is a breach under s. 2(d). New legislation was passed which gave agricultural workers the right to join a union, the right to develop workplace requests (things they want to see improve such as benefits and wages), and the right to present it to the employer and the employer has the obligation to receive it and that it is. There was no obligation to bargain, to reach a collective agreement or anything. All the employer has to do is receive it and think about it which is so far below the structure of the Wagner act.
* **Issue:** Whether Ontario's latest attempt to frame a separate labour relations regime for the farming sector respects the constitutional guarantee of freedom of association, or violates it by failing to safeguard the exercise of collective bargaining rights.
* **ONCA Ruling:** Struck down the legislation saying that it was inconsistent with section 2(d). This then gets appealed to the SCC.
* **Held:** 8 -1 decision. AEPA has not been shown to be unconstitutional. They said it was not inconsistent with s.2(d). AEPA meets requirements for a process of engagement that permits employee associations to make representations to employers, which employer must consider and discuss in good faith.
* **Analysis:** 
  + The Freedom to Associate as it relates to “collective bargaining” protects the right to associate in order to achieve workplace goals through collective action
    - The legislature’s constitutional obligations will be met if the employer listens to representations from an employee association, and considers the representations in good faith.
  + AEPA does not violate 2d, as it does not guarantee access to any particular model of labour relations
    - Upheld *BC Health Services*
      * Individual’s freedom of association under s. 2(d) includes an obligation on employers to bargain in good faith on workplace issues
  + Most generous way of reading the majority decision was that they said the union did not come up with enough evidence to be able to show that the process devised by the AEPA was not working. It did not matter that there had been no complaints, or that there was no collective agreements in that period of time. They said that the union did not give it enough chance to actually work.
  + What should be protected is meaningful access (arguably provided for in the new legislation)
    - Because this meaningful access has been provided, they can’t make agricultural workers use the mechanism
  + There is seemingly a high threshold in order to establish a violation of s. 2(d) as workers would have to show that the employer made access to collective bargaining effectively impossible
  + There may be some limits to the broad language that the they had originally indicated existed in the *BC Health Services* and that it would require fairly substantial evidence to show breach of s. 2(d)
  + *Health Services* affirmed that bargaining activities protected by s. 2(d) in the labour relations context include good faith bargaining on important workplace issues
    - This is not limited to a mere right to make representations to one’s employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer
  + The protection of collective bargaining in the sense affirmed in *Health Services* is a necessary condition of meaningful association in the workplace context
    - Purpose of Section 2d: Individual vs Collective Rights
      * 2d is an individual right that may require the protection of group activity (*Health Services*)
      * Fundamental inquiry is whether the state action would substantially impair the ability of "union members to pursue shared goals in concert"
    - Argument that s. 2(d) is a freedom, not a right
      * Majority in both *Dunmore* and *Health Services* held freedom to associate may require state to take positive steps
      * A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities
    - Have the respondents established a breach of s. 2d?
      * Right of employees' associations to make representations is in s. 5-7 of AEPA, which say employer shall listen to oral representations, read written ones, and acknowledge having read them – do not expressly refer to a requirement that the employer consider representations in good faith, but nor do they rule it out.
        + By implication, they include such a requirement
      * The AEPA, correctly interpreted, protects the right of employees to make submissions to employers on workplace matters but also have the right to have those submissions considered in good faith by the employer
  + Charron & Rothstein: Wants SCC to overturn *Health Services*, which incorrectly expanded scope of freedom of association, which should be more limited
    - S. 2d protects the freedom of workers to form self-directed employee associations to improve wages and working conditions. It does not impose duties on others, such as the duty to bargain in good faith on employers
    - What particular labour relations regime should apply is best left to the legislature
    - If *Health Services* was overruled it would dispose of the constitutional challenge in this case.
    - Deschamps: would have expressly narrowed the finding of *Health Services* to its particular facts. Should be limited to what was set out in *Dunmore*.
  + **Dissent:** Abella dissented, would have upheld the ONCA decision.
    - *Health Services* created "a completely different jurisprudential universe"
    - She would have found that the AEPA did not include any obligation on the employer to respond, thus it could not satisfy the good faith bargaining obligations imposed by the Charter
    - ONCA correctly identified the minimum constitutional requirements needed to ensure meaningful collective bargaining
    - Agrees with Dickson that 2(d) covers the right to organize as well as the right to collectively bargain
    - The purpose for passing the AEPA is that while an agricultural employee may join a union, the legislation does not allow them to collectively bargain. They have a right to associate and not that they have a right to collectively bargain.

#### The Third Trilogy (2015): MPAO, Meredith and Sask Fed – liberal approach with more coherence in understanding

* Each of these decisions tackled one of the three fundamental rights. ILO has said there are 4 fundamental rights.
  + The right to organize
  + The right to collectively bargain
  + The right to strike
* Important points from this trilogy
  + 1) SCC repudiates the individual rights reading of freedom of association. It clarifies some of the past confusion that came from *Dunmore* and *BC Health*.
  + 2) Provides a strong endorsement of international labour law and the standards of the ILO as a vital means on how to read and interpret s. 2(d)
  + 3) The third labour trilogy is a formal endorsement of all three of the ILO rights; the right to organize, the right to strike and the right to collective bargain
  + 4) Opens the door to figure s. 2(d) litigation challenging either provincial or federal legislation which restricts rights or restricts collective bargaining or restricts the right to organize
  + 5) SCC said
  + 6) SCC reaffirmed that labour law guarantees a process, it does not guarantee an outcome.
  + 7) SCC did not say this but was implied. At the end of the day, labour rights are human rights. Labour rights are anchored in international law.

##### Mounted Police Association of Ontario v Canada (AG) "MPAO" (2015) – SCC – 2(d), viewed purposively, protects three classes of activities: (1) right to join with others and form associations, (2) right to join with others in the pursuit of other constitutional rights, (3) right to join with others to meet on more equal terms the power and strength of other groups or entities; S. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining; employer must provide sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace

* This is the re- litigation of the *Delisle* decision in 1999 but now we have new SCC principles arising from *Dunmore* and *BC Health*. Has to do with right to organize.
* **Facts:** A charter challenge brought by several associations of members of the RCMP who argued the organization's labour system (the SRRP) violated their s. 2d right to collectively bargain. RCMP is under a non-unionized labour relations regime. Under SRRP they could not engage in traditional collective bargaining with management, cannot unionize. SRRP represented them and provided elected reps to engage and consult with mgmt. on workplace issues. In previous case, *Delisle,* held that it is not inconsistent with Charter to exclude members of the RCMP from the federal *Public Service Staff Relations Act*. Up until 2015, RCMP officers were the only police force in the country that were not unionized and did not have a right to organize. They were expressly excused from the Labour Code and Labour Act.
* **Issues:** (1) Exclusion of members of the RCMP from any protective regime (2) Imposition of the SRRP 🡪 underlying issue is how broad is the scope of s. 2(d)
* **Holding:** Both the exclusion and the imposition of the SRRP were held to violate s. 2(d) and cannot be saved under s. 1. Most of the analysis focuses on meaning of s. 2(d), returning to Dickinson's dissent in 1987.
* **Remedy:** Court does not mandate a particular labour relations regime – Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce within the constitutional limits. Unions are only now involved in negotiations with RCMP for first collective agreement. It doesn’t allow them to strike but it does allow them the right to organize and the right to collectively bargain.
* **Analysis:** 
  + Expressly overturned the first Labour Trilogy. Also overturned Bastarache’s distinction between employees who are less vulnerable and more vulnerable
  + 1) Two main periods of jurisprudence on freedom of association: (1) a restrictive approach, (2) purposive approach
    - Reaffirms and broadens the rights of employees to organize in a union and to form employee organizations protected under s.2(d)
    - Purposive approach was affirmed in *Dunmore*, renewed focus on the collective aspect and led to 2(d) giving a right to collective bargaining in *Health Services*
      * A purposive interpretation of s. 2(d) was found to require constitutional protection for the right of employees to engage in a process of collective bargaining, a meaningful association in pursuit of workplace goals (*Fraser*)
      * Jurisprudence has evolved to affirm a generous approach to 2(d) – for the purpose of encouraging the indv's self-fulfillment and the collective realization of human goals, consistent with democratic values
  + 2) Defining the Scope of the s. 2(d) Guarantee
    - Giving it a purposive, generous and contextual approach is consistent with how the court deals with other freedoms given by the charter. This is a direct comment coming from Dickson in 1987. 28 years later, the SCC gives his declaration it’s full endorsement
    - In dissent of *Alberta Reference*, Dickson identified three possible approaches to interpreting 2(d): constitutive, derivative, purposive
      * This court concluded that s. 2(d) protects each of the aspects of freedom of association with which these approaches are concerned
    - S. 2(d) protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering indvs to achieve collectively what they could not do individually
    - Follows that associational rights protected are not merely a bundle of indv rights, but collective rights that inhere in associations
    - Charter does not exclude collective rights and recognition of a collective aspect will not undermine indv rights
    - **Ratio:** 2(d), viewed purposively, protects three classes of activities: (1) right to join with others and form associations, (2) right to join with others in the pursuit of other constitutional rights, (3) right to join with others to meet on more equal terms the power and strength of other groups or entities
    - Implies that there is a positive duty on governments to ensure that employees have the right to organize and collectively bargain. Recognize the profoundly social human endeavors and protect individuals from state intervention in pursuit of their ends. For a government to exclude an employee occupational group from any access to collective bargaining would require a high justification from the government
  + 3) The Right to a Meaningful Collective Bargaining Process
    - The right to a meaningful process of collective bargaining is a necessary element of the right to collectively pursue workplace goals in a meaningful way
    - A process of collective bargaining will not be meaningful if it denies employees power to pursue their goals
    - Court disagrees that collective bargaining is protected only if state action makes it effectively impossible to associate for workplace matters
    - Case law shows substantial interference is the legal test for infringement of freedom of association
    - Collective bargaining is not a "derivative right" in the sense that it is secondary to other aspects of the right of association
      * That term ("derivative right") should be avoided.
    - **Ratio**: S. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining
    - There must be genuine employee choice and genuine employee independence in the ability to associate with each other
  + 4) Essential Features of a Meaningful Process of Collective Bargaining Under s. 2(d)
    - Meaningful process of collective bargaining is one that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them
    - The degree of choice afforded to the employees required by the Charter is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association
    - Degree of independence required by the Charter for collective bargaining is one that ensures the activities of the association are aligned with the interests of its members
    - **Ratio**: Does not have to be an "ideal" model of collective bargaining, but rather one that provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace
  + 5) Application to whether SRRP infringes s. 2(d): does the employee voice mechanism set up my RCMP management constitutionally compliant with s. 2(d) or does it fall short of s. 2(d). SSRP does allow for some employee choice as there are elections and it does allow some employee voice in that they are entitled to be consulted on human resources issues. SCC says applying these broad principles, the SSRP system falls short of complying with s. 2(d) because it does not allow meaningful access to express employee voice.
    - 1) There is a lack of employee choice. RCMP members cannot genuinely advance their own interests without interference by management,
    - 2) Lacked genuine employee independence
    - 3) This lacked any balance of power between the employees and the employer. No meaningful collective bargaining taking place.
    - 4) It was created for an impermissible purpose which was to prevent unionization. Purpose of SRRP seems to be to prevent collective bargaining through an independent association = unconstitutional
    - SRRP process fails to respect RCMP members freedom of association in both purpose and effects
    - RCMP Regulations imposed the SRRP as the sole means of presenting their concerns to management
    - RCMP are represented by an organization they did not choose nor control. Must work within a structure that lacks independence from management
    - Process fails to achieve balance between employees and employer that is essential to meaningful collective bargaining
  + Did not overturn *Fraser* and avoided whether *Fraser* is incorrect. The find ways to say that 2(d) has a broad meaning without tackling this case
  + **Dissent:**
    - Would not have overturned *Deslisle*, he would of said it was good law and there was no justification for overturning it
    - He would have kept the effectively impossible test that was devised in *Fraser*
    - He said that Parliament and the RCMP chose a collaborative model for collective employee voice through the RRSP system and that should be satisfactory

# The Right to Strike

##### Saskatchewan Federation of Labour v Saskatchewan (2015) – SCC – s. 2(d) protects right to strike as its own right and not a derivative of right to collectively bargain

* **Facts:** PSESA was introduced by provincial government in 2007 to limit ability of certain employees from going on strike by enabling public sector employers in SK to designate certain employees as "essential.” "Essential services employees" were prohibited from participating in any work stoppage against their public employer – had to continue duties of their employment in accordance with last collective agreement and can't refuse to perform without lawful excuse. Contravention of PSESA can result in increasing fine with each day. Public employers and unions were to negotiate an "essential services agreement" to decide how public services are to be maintained in work stoppage event – but public employer can unilaterally designate which public services it considers essential, and number of needed employees. SK Labour Board had limited jurisdiction to review employer's decision. Saskwatchewan government passed the PSESA which had a very broad definition of essential service which mean that you were an essential service forever or if there was a partial strike allowed, there was a widened definition of designations as to who had to work and who could so on strike. The designation system meant that the exclusive decision to decide how many could strike was in the sole hands of the employer. There was no meaningful appeal from the employer’s designation.
* **Issue:** Does a prohibition on designated employees participating in strike action for the purpose of negotiating the terms and conditions of their employment amount to a substantial interference with their right to a meaningful process of collective bargaining and violates s. 2d of the Charter
* **Prior Proceedings:** Union won at Court of Appeal.
* **Held:** PSESA violates s. 2(d), which protects right to strike and it was not justified under s. 1. Union challenge one.
* **Analysis:** 
  + Right to strike is not derivative of collective bargaining, but is an indispensable component of that right
    - Applies also to public sector employees – you need alternative mechanism for these workers for them to be able to exercise this right
  + *Fraser* – meaningful process must include employees' rights to join together to pursue workplace goals, make collective reps to the employer, and to have those reps considered in good faith – including recourse should the employer not do bargain in good faith
  + Striking promotes equality in the bargaining process between unions and employers. The right to strike advances Charter values of equality, dignity, liberty and democracy by enabling workers (more vulnerable party) to band together to protect their work interests.
  + Given the breadth of essential services the employer is entitled to designate unilaterally without an independent review process, and absence of an adequate alternative mechanism for resolving collective bargaining impasses, the scheme is not minimally impairing and violates 2(d)
  + Based on ILO definitions
    - Strikes should only be banned where the health, safety, life, or security of some or all of the population is threatened
    - She expressly endorses prior reference by the SCC in 2(d) cases and looking specifically at international labour law, she says that the right to strike is part of the fundamental right of freedom of association
  + Charter must be presumed to provide at least as broad a range of protection as International law.
  + She defines what we mean by essential services: When we understand what essential services mean we have to pay attention to the definition from the ILO. Essential services from ILO means that strikes should only be prohibited where the health, safety or security of some or all of a population is threatened.
    - SCC adopts this definition.
  + **Dissent (Rothstein, Wagner):** 
    - Legislatures are better placed to undertake the complex balancing between public, employer and employee interests
    - Court must not constitutionalize political positions in labour relations
    - Right to strike is not an indispensable component of collective bargaining – it is not the threat of work stoppage that motivates good faith bargaining
    - What is protected is associational activity, not a particular process or result (*Fraser*)
  + This did not majorly change the law re the right to strike
  + It did say in those particular cases involving public sector workers, where there are restrictions on how you can strike, those restrictions need to be demonstrably justified under the *Charter*

##### Meredith v Canada (AG) (2015) – SCC – actual outcomes of collective bargaining are not determinative in a s. 2(d) analysis; this case is an anomaly and distinguishable.

* **Facts:** members of the National Executive Committee of the SRRP brought a constitutional challenge on behalf of all members of RCMP, arguing the Dec 2008 decision of the Treasury Board and legislation (*Expediture Restraint Act – ERA*) violated their constitutional right to collective bargaining by rolling back scheduled wage increases for RCMP members without prior consultation. Meredith was an RCMP officer who was hoping to seek a greater pay increase than what was being offered by the federal government. Claim was not fought by a union but by individual RCMP members. They challenged the federal government legislative pay restrictions. The legislation imposed a cap of 1.5% wage increase in the public sector in 2008, 2009 and 2010. Before the legislation, the RCMP Pay Council adopted wage increases of RCMP officers of 3.5%. Before those went into effect, the government intervenes with wage restrictions and rolls them back to 1.5%. Two members challenged this and argued that the statutory roll back of wage increases violated the right to collective bargain because there was no consultation with RCMP members but there was no collective bargain or union representing the RCMP members.
* **Held:** Claim failed. 6-1 decision. Found for the government, there was no substantial interference with any 2(d) protected activity for 3 reasons: (1) the wage restrictions of the RCMP officers were the same for all federal public servants, (2) they were consistent with the wage increases that public sector unions in the federal sector were able to achieve for their unionized members and (3) this did not preclude consultations on other compensation features, you can try to get better dental benefits or eye glasses that was not covered by the 1.5% wage increase gap
* **This case will probably not create much of a precedent and this case adds very little**
* **Analysis:** 
  + For the affected RCMP workers, the ERA resulted in rollback of scheduled wage increases
  + Wages are important, but the limits imposed were time-limited in nature, shared by all public servants and did not permanently remove subject of wages from collective bargaining
  + Importance of the wage restraints does not rise to the level of 2(d) violation
  + ERA did not prevent the consultation process from going forward
  + Actual outcomes are not determinative of a s. 2(d) analysis, but in this case the evidence of outcomes supports a conclusion that the enactment of the *ERA* had minor impact on the appellants' associational activity
* **Dissent:** Unilateral rollback of three years of agreed-upon wage increases without prior consultation is a substantial interference with the bargaining process and infringes 2d. Similar to *Health Services*. Failure to engage in any discussion meant RCMP was denied right to a meaningful negotiation process about wages.

# Conclusion: What is the current and future legal content of s .2(d)?

* 1) s.(d) has constitutional legs. It’s exact scope is not determined but it is going to be robust, generous and liberal
* 2) International labour law now has secure constitutional legs in Canada.
* 3) 2(d) differs from 2(a) and 2(b) in terms of the standard to trigger a violation. The standard of 2(d) is substantive interference (*Mounted Police* and *Sask Fed*)
* 4) 2(d) is still capable of producing confusion and caution
* Two fundamental lines of cases:
  + *Alberta Reference; Health Services*: constitutional complaint that the state has interfered with exercise of freedom
  + *Dunmore*; *Fraser*: complaint that the state has not constrained private actors (employers) who are interfering with the exercise of the freedom
* Summary of the current jurisprudence on s. 2(d) articulated by BCCA in *BCTF v British Columbia (2015)* 
  + 15 year legal dispute between BC and BCTF (Teacher's Federation) regarding constitutionality of legislation that narrowed the scope of collective bargaining in the province's public education sector

##### BCTF v British Columbia (2015) – BCCA – two part test for the presence of good faith in bargaining from dissent

* **Background:** 2002 – BC wants to roll back power of Unions, roll back collective agreements in healthcare and education sector. Teacher's federation after 2002 launches Charter based on *Dunmore* saying there's a right to collectively bargain. They wait until *BC Health* is decided. In 2011, BC supreme court says the stripping of rights in teacher's collective agreement by legislation without meaningful consultation was a breach of s. 2(d). Then, BC government in 2012 reintroduces new legislation with teachers collective bargaining which ends a teacher's strike, and re-adopts most of the offensive legislation stripping the collective agreements in 2002. BC Government was not listening to the BC supreme court. BCTF goes to BC supreme court and wins. Loses at BCCA. Win at 2016 after the new labour trilogy at the SCC.
  + SCC majority just said "we agree substantially with the dissenting opinion of Justice X and the BCCA" in a 2-line judgment.
  + SCC dissent said we agree with the majority of the BCCA judgment.
  + They did not really clarify the law by doing this
* **Held:** Upheld the constitutionality. As long as the BC government met with the teachers union, listened to them and was prepared to think over its decision before they passed legislation, even if some of the provisions would be substantially interfering with 2(d) rights, there is no violation of 2(d) because they consulted.
* **Dissent (which SCC adopted):** Good faith negotiation has been described by SCC as requiring parties to meet and engage in meaningful dialogue where positions are explained and each party reads, listens to and considers representations made by the other. He would of found that stripped the collective agreement was in breach of s. 2(d) because the parties have to engage in good faith negotiations (meaningful dialogue).
  + A single test for good faith would be inflexible and unable to assist in this assessment
  + Court has said it is "inappropriate…for a court to investigate the factual basis and internal logic of an employer's substantive bargaining proposals" when conducting good faith analysis
  + This is wrong because:
    - Decisions of the Labour Relations Board were not made in a constitutional context but within context of Labour Relations Code. *Health Services* did not constitutionalize traditional Wagner-style bargaining.
    - Inapplicability of the "hands off" principle taken from labour decisions is clear
    - Inconsistent with the history of judicial review for *Charter* compliance
  + Constitutional test for bad faith on the part of gov should be same language as *Health Services* and *Fraser*
  + Parties are required to meet and engage in meaningful dialogue where positions are explained and each party listens to, reads, and considers representations by the other party.
  + Positions must not be inflexible, parties must honestly strive to find middle ground
  + To determine whether gov bargaining in good faith, may be necessary to probe and consider the gov's substantive negotiation position
* Two part test from the dissent
  + The parties, including the government, have to engage in good faith negotiations. There must be meaningful dialogue, exchange of positions, active listening to the other side, can't be any inflexibility in your positions and there must be honest good faith efforts to reach the middle ground
  + If there must be back-to-work legislation, we must keep in mind that this amounts to re-asserting a power imbalance because the government as the employer has unilateral right to induce back-to-work legislation. So we have to ask if this amounted to substantial interference with the right to collectively bargain?
    - Ask whether it complies with the standards set by Intl labour law (i.e. can we prove that the strike was causing significant economic, health, and//or safety consequences to some or all of the public).
    - Regarding the terms that were set out in the back-to-work legislation for resolving the outstanding differences between the parties at the arbitration table through mandatory arbitration – were these terms fair and balanced? Or were they tilted to one side?
* 1) Whether the strike has proven to have caused harm to some or all of the population?
* 2) Whether the terms for ending the dispute are fair and balanced or whether or not they are tilted to one side

#### Takeaways

* SCC made it clear there should be a liberal, generous and purposive interpretation of s. 2(d) with respect to each of the three rights that seem to be given a broad interpretation with respect to what the court said in Mounted police
* If a relatively sophisticated non-unionized representation system could be struck down by SCC as being insufficient to satisfy s.2(d) because employees had no real choice and because the system was not meaningfully independent from RCMP management, then it raises the question of what is left standing for *Fraser* and what about any other employee occupation classification which is presently excluded from coverage from any labour relations act

# What has not been resolved by the third labour trilogy

* What is substantial interference? Will this test survive in the future? 🡪 2a and 2b have lower thresholds to prove a violation. Will substantial interference, a higher test, survive a subsequent argument?
* Even if it does survive, will the two-part test created by Lynk above survive?
* Will *Fraser* remain good law? It is on shaky legs. There is little left of *Fraser* after *MPAO* but the SCC has not held a funeral for it yet.
* How broad is the right to strike? What does it protect and what does it not protect?
* What about s. 33 (notwithstanding clause)? We just assumed this would never be used. Ford has opened up a bucket of worms

# Union Democracy and Individual Membership Rights

* In principle, the individual employee’s freedom of choice is given legal expression only through her vote for or against an applicant union
* Once that vote and those of the other members of the bargaining unit have determined that there will be a bargaining agent, individual freedom is suspended for a substantial period
* Some have argued that the *Wagner Act* model in Canada needs to be supplemented by a graduated freedom of association what would offer a “thin” model of freedom of association to the minority of employees in a workplace who wish to have union representation where they work
  + Graduated freedom of association

# The Primacy of the Collective Agreement

#### Bargaining with other Unions or with Individual Employees

* Once a union has acquired majority support and has been certified or recognized as bargaining agent, the employer is precluded from bargaining with any other union or any other person or organization on behalf of any employees in the bargaining unit, unless and until union’s bargaining rights are terminated pursuant to statute
* Employer may not bargain directly with individual employees where there is a statutory bargaining agent (*Syndicat catholoque des employes de magasins de Quebec Inc v Compagnie Paquet Ltee*)
  + The one exception to this blanket provision is in sports in North America
    - Professional athletics have strong player unions that bargain collective agreements with team owners to set a minimum floor for salaries and working conditions, but allow athletes to bargain individual contracts with their teams that improve upon the collective agreement minimums

# The Eclipsing of the Individual Contract of Employment

##### McGavin Toastmaster Ltd v Ainscough (1976) SCC –common law principles of individual employment contract law do not apply to collective agreements

* **Facts:** The respondent employees worked at the appellant company’s Vancouver plant. The collective agreement provided that any employees who lost their jobs due to a plant closure would be entitled to severance pay. The company closed the plant. The employees went on strike while the plant was still open to protest. The strike was illegal as it occurred during the lifetime of the collective agreement. Once the company closed the plant, the company refused to pay severance pay because it claimed that under the contract law doctrine of repudiation that the act of striking illegally disentitled the employees to severance. The employees sued and won in the BC courts. The company is appealing
* **Holding:** Appeal dismissed. SCC said a collective agreement is a contract of a special nature and one of the things that makes collective agreements different is that there is no such thing as repudiation for a fundamental breach. The collective agreement stays in place even if one side commits a significant breach.
* **This case decided several important things.**
  + There is no individual contract of employment once a collective agreement enters into the workplace. All of my employment rights would be bound either in the collective agreement or the pieces of legislation that apply to my workplace. Any individual agreements no longer exist unless approved by union
* **Analysis:**
  + In the face of labour relations legislation, it is not possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships
  + Individual relationships between the employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements
    - The common law as it applies to individual employment contracts is no longer relevant to those relations governed by a collective agreement which deals with discharge, termination, severance, and other matters
      * Lynk says exception to this is in pro sports teams where they use minimum standard agreements and individuals can negotiate their own terms on top of that
  + The collective agreement in the present case is clear
  + Repudiation and fundamental breach are inapplicable in the face of legislation that governs labour-management relations
    - The *Mediation Services Act* and *Labour Relations Act* could not operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists
  + The unlawful strike did not terminate the employer-employee relationship

# The Pre-eminence of Grievance Arbitration

* Where disputes arise about the enforceability of rights arising from individual employment relationships, they raise both a question of forum and a consideration of whether the collective agreement can be bypassed
* The courts have increasingly tended to foreclose the possibility of bypassing the collective agreement through reliance on provisions in labour relations statutes requiring final settlement of disputes between the employer and the union
  + SCC has held that grievance arbitration is appropriate legal forum for resolution of employment disputes arising in unionized workplace (*Allen v Alberta*)
    - However, this principle has been held to not apply where the employee and employer has made an individual contractual arrangement before entering into the employment relationship
    - Employee can bring civil action in court to enforce pre-employment contract (*Goudie vOttawa (City)*)

##### Bisaillon v Concordia University (2006) – SCC – restated the rule regarding the primacy of labour arbitration as the presumptive legal forum for resolution of workplace disputes in the unionized employment relationship

* **Facts:** The majority of the employees at Concordia University were represented by unions and were covered by nine different collective agreements. Mr. Bisaillon initiated a motion before the Superior Court of Quebec seeking permission to launch a class action against the university to challenge its decisions regarding the administration and use of the employee pension plan. One of the unions opposed the class action arguing that the courts had no right or jurisdiction to adjudicate this matter because it was a collective agreement but the other eight supported the motion. The Superior Court allowed the challenge and dismissed the motion, stating that the proper legal forum was the labour arbitration board. The Court of Appeal held that the pension plan existed independently of the collective agreements and the courts were therefore the appropriate forum.
* **Holding:** Appeal allowed, restored ruling of the Superior Court. SCC said this is a collective agreement dispute and so it belongs in front of an arbitrator.
* **Analysis**
  + The system of collective representation takes certain individual rights away from employees
    - Employees are denied to possibility of negotiating their conditions of employment directly with their employer and lose control over the application of those conditions
      * In return, by negotiating through their union, employees improve their position in the balance of power with the employer
  + The monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employee-employer relations
    - The union’s monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on the certification of the union
    - Any negotiations regarding conditions of employment not mentioned in the collective agreement must be conducted by the certified union
    - No other union can be involved and individual agreements evaporate to be replaced by this collective agreement negotiated by the union to represent all employees.
    - Employer has to recognize the union and enter into good faith negotiations with them. The benefit to the employer is that they have the right to expect industrial peace when the collective agreement is in effect;
  + The grievance arbitrator’s jurisdiction depends on two factors
    - Subject-matter aspect of the arbitrator’s jurisdiction
      * Includes the power to grant an appropriate remedy
      * *Labour Code* gives the grievance arbitrator exclusive jurisdiction over “any disagreement respecting the interpretation or application of a collective agreement”
      * To determine whether a dispute arises out of a collective agreement, the question is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement”
        + In identifying the essential character of the dispute, the court must take into account all of the facts surrounding the dispute and not just the legal nature of the dispute
        + Then, it must be determined whether the factual context falls within the ambit of the collective agreement
        + The court takes a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement
    - Personal aspect of the arbitrator’s jurisdiction
      * Relates to the persons who are parties to the dispute
  + If there is a monopoly of power granted to a union to represent everyone, what individual rights to individual members have if they think the union’s representation of their interests is not adequate.
  + In the current case, granting the motion for a class action would be incompatible with the legal mandates of representation within the *Labour Code*
    - The Pension Plan, having been negotiated and incorporated into the collective agreement, became a condition of employment in respect of which the employees lost their right to act on individual basis, independently of the union
    - To authorize a class action in the case at bar would be to deny the principles of the exclusivity of the grievance arbitrator’s jurisdiction and of the union’s monopoly on employee representation

# The Duty of Fair Representation

* Duty of fair representation: Allows employees, members of the bargaining unit whether or not they are a union member, to challenge the decisions or actions or inactions on a union to the Labour Relations Board.
* **Section 74 of the Labour Relations Act**: Unions should not act in a manner that is arbitrary, discriminatory or in bad faith to anyone in the bargaining unit, whether or not they are members of the union.
* Under *Wagner Act*, unions are given exclusive power to represent all members of bargaining unit regardless of if they are union members. The only curves on their power were contractual.
* In the late 1960’s Canadian jurisdictions proposed amendments which formally recognized the duty of fair representation
  + Unions had to represent their members in a way that was not arbitrary, discriminatory of in bad faith
* Unions had to represent everyone the same, regardless if they were members of the union or not
* Arises in two different circumstances:
  + During the negotiation of the collective agreement
    - Ensuring that provisions in CA are not acting in a way that is discriminatory arbitrary or in bad faith
  + During for the life or during the administration of the collective agreement
    - Almost all happen here
    - If there is a different that arises over overtime pay or discipline or human rights, the union has to turn its mind to the grievance, do a satisfactory investigation into it and to be fair in how it made up its mind as to whether or not to advance the grievance
* It is a fairly low standard. Unions are not often found to be in breach of the DFR. Not many claims of a breach of this duty win. (Lynk estimates 2 out of 100). Out of 100 cases that go to the board, 93-95% are withdrawn or they are settled before they get to the Board or the member loses in front of the board
  + Unions are entitled to make mistakes and not be in breach of the duty of fair representation. If they made an honest mistake, that may be enough to clear them
* Definitions:
  + "Bad Faith": union leadership has a hostile attitude toward a particular member,and decides not to represent him when he has a grievance. Note – unions are allowed to make mistakes without being in breach. Just has to be an honest mistake (no malicious intention).
    - When the union is motivated by ill will or malice or hostility towards a member or groups of members in the bargaining unit
    - When the union has hostile intent towards a member for its refusal to represent them fairly
    - E.g. I ran for president and I won, the person that ran against me I don’t think and he has just gotten in trouble with the employer and has to us for help and I say not to represent him because I want to punish him
  + "Discriminatory": treating an individual or group of union members different than other members for no justifiable industrial relations reasons
    - Would include if union was discriminatory in HR sense but it is broader than the human rights sense
  + "Arbitrary": actions that are careless, grossly negligent, lazy or uncaring. Most complaints under this duty are alleging this.
    - Most commonly complained about provision from launching a duty of fair representation claim (probably about 80% of these cases are alleging arbitrary treatment by the union)
    - Means that the union is not doing something maliciously but rather thoughtlessly and in a competent fashion
    - These are actions when the union has not shown diligence in how it conducted an investigation
* Analysis of whether the union has met the DFR:
  + Actively turned their mind to the issue at hand,
  + Conducted a reasonable investigation as to whether the person has a strong case,
  + They gathered all relevant facts, and
  + They came to an honest conclusion and based their decision on acceptable labour relations reasons
* It is a fairly low standard. Unions are not often found to be in breach of the DFR.
  + Complaint is either withdrawn, settled to dismissed most of the time
  + Only between3 and 5% of complaints are successful
* When the issue being raised involved a HR issue, the duty of fair representation onus on the union is raised. Unions have to make a greater effort to go the extra mile in a human rights complaint.
* **Remedy where duty of fair representation has been breached:** Member is usually looking to have their grievance proceed to arbitration. If there is a finding that the union has breached their duty of fair representation that is the remedy offered. LRB will not decide on the merits of the grievance but only if the union has met its duty of fair representation.

##### Steele v Louisville & Nashville Railroad Co (1944) – USSC –first formulation of the duty of fair representation (common law origin)

* **Facts:** The Brotherhood of Locomotive Firemen and Engineers was certified as a bargaining agent for all railway workers employed by the defendant railway. The majority of whom were white. Under the union’s constitution, black employees were explicitly denied the right to be members of the union and collective agreement. New collective agreement provisions were negotiated limiting the percentage of black firefighters and limiting their seniority rights and employment opportunities. The plaintiff, a black railway worker, sued for an injunction against the implementation of the collective agreement and for damages. His action failed in the Alabama courts and he appealed to the USSC
* **Holding:** Appeal allowed. Unions must represent all of their members fairly, in good faith and without any arbitrary or discriminatory conduct.
* **Analysis:**
  + While bargaining agents are entitled to enter into contracts which may have unfavorable effects on some members of the craft represented, the discrimination here is based on race alone and congress did not undertake to authorize the bargaining representative to make such discriminations
  + The representative which thus discriminates may be enjoined from doing so and its members may be enjoined from taking the benefit of such discriminatory action
  + While the statute does not deny to a bargaining unit the right to determine eligibility to its membership, it does require the union to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith
    - The union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action
    - The duty which the statute imposes on a union representative is to represent the interests of all its members stands on no different footing

# The Duty of Fair Representation in the Negotiation of a Collective Agreement

* In Canada, most DFR complaints have been about collective agreement administration but some of the most difficult DFR cases involve decisions made by unions in the negotiation and renegotiation of collective agreement provisions

##### Bukvich v Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304 and Dufferin Aggregates (1982) – OLRB – in determining whether the union met its duty of fair representation, the board should ask whether the union made a decision that could reasonably be made in all circumstances, even if the Board might itself be inclined to disagree with it; a reasonable decision means one involving the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors

* **Facts:** Union represents truck drivers. Current collective agreement says all work must be divided evenly between the drivers. Work is declining, the drivers own their own trucks and this means each driver is only getting 60% of the work they had before, they can barely earn enough money to pay for the trucks or earn a wage. Senior workers initiate a drive to renegotiate a collective agreement on this term and they want to bring in a standard seniority clause which means that if there is a lack of work the more junior workers will be laid off. They negotiated this mid term amendment and once it is in effect the company lays off some of the junior workers so the senior workers now have full time work. The five grievors were laid off from their jobs as dependent contractor owner-operators working out of a quarry at Milton operated by Dufferin Aggregates. The union initiated the layoffs. The union had allowed the insertion of a lay off provision allowing the company to lay off junior drivers and distribute available work among a smaller pool of senior drivers. The grievors claim that the actions which resulted in their layoffs were in violation of its duty of fair representation described in section 68 of the *Act*.
* **Issue:** Do unions have a duty to represent its members during negotiations for a collective agreement. Was this move by the senior workers which laid off 30% of the workforce was it favoring one group of workers over another discrimination as understood by s. 74?
* **Holding:** Complaint dismissed. The answer to the above question is yes both during the negotiations of a collective agreement and during the administration of it. But they held it was not discrimination and not a breach of the duty of fair representation because the union cannot be faulted for making a choice of favoring one group over another if it is a traditional or standard industrial relations practice. LRB should only be asking if it is reasonably in all the circumstances, not if it was right or wrong, and they found it was reasonable and no bad faith or discriminatory or arbitrary behavior by the union because seniority clauses are common.
* **Analysis**
  + In discharging its duty to fairly represent all of the employees in a bargaining unit a union must address its mind to the circumstances of those who may be adversely affected by its decisions
  + It has a duty to weigh the competing interest of the employees it represents and make a considered judgement the procedure and result of which must be neither arbitrary, discriminator, nor in bad faith
  + In bargaining changes that affect the competing interests of employees a union has a two stage involvement
    - Firstly it must be the forum for resulting the conflict between sometimes irreconcilable employee interests
    - Secondly it must act as the spokesman for the interests that carry the day
  + Once the internal choice is made, the union must approach the employer with the force and conviction of a body with a single voice
  + Special considerations attach to any decision by a union that alters or abrogates the job security of employees
  + The Board should not ask whether the decision is right or wrong or whether it agrees with it
    - Rather, it should ask whether it is a decision that could reasonably be made in all circumstances, even if the Board might inclined to disagree
    - Used in this sense “reasonable” must mean the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors
  + In the current case, the deteriorating economic conditions for the union justified the decision to renegotiate the work sharing provision

##### Atkinson v CLAC, Local 66 (2003) – BCLRB – It is not enough to say a decision was based on the will of the majority

* **Facts:** There were two separate companies dealing with waste materials. Both were unionized and had seniority clauses. McRae was sold to a competitor, Northwest. McRae’s five employees has been represented in a bargaining unit by the International Union of Operating Engineers (IUOE). Twenty-five employees of Northwest were represented by CLAC. The union representing the large company said that when the workers from the smaller company were going to be merged, they are going to be end-tailed, rather than dove-tailed. End tail means the 5 workers in the small company, even though they had a range of seniority they will be put at the bottom of the seniority list of the larger company. Dove tailing means just putting it together based on their seniority from the prior company. As a result of the sale, the five McRae employees became employees of Northwest and launched a claim under s. 74. It became necessary to determine where the five should be placed on the seniority list. CLAC called a union meeting and a vote was held to determine whether the seniority of the employees should be “dovetailed” or if the McRae employees should be put at the bottom of the seniority list (“end-tailed”). All five of the McRae employees attending the meeting. The vote was 24-5 in favor of end-tailing. Afterwards Northwest reorganized its routes based on seniority. None of the McRae employees had enough seniority to earn a regular route and so they worked only sporadically. They complained to the BCLRB that CLAC had violated its duty of fair representation. LRB looked at what is the general practice.
* **Holding:** Having assumed the role of exclusive bargaining agent, and being recognized by Northwest in that capacity, CLAC was statutorily obligated to act on behalf of all employees in accordance with the duty of fair representation
* **Analysis:**
  + - Dove-tailing had been the practice
    - Instead of taking a reasoned view of the problem and making a thoughtful judgment about what to do, CLAC let the employees decide
      * The outcome of this was a foregone determination based on self-interest
  + It is not enough to say a decision was based on the will of the majority
  + Evidence does not disclose a rational for end-tailing the Complainants’ seniority aside from the vote

# The Duty of Fair Representation in the Administration of a Collective Agreement

##### Rayonier Canada (BC) Ltd v International Woodworkers of America, Local 1-217 (1975) – BCLRB – The employee does not have an absolute right to have his grievance arbitrated; The union is permitted to ration its own limited resources by arbitrating only those cases which have a reasonable prospect of success; circumstances to consider in determining whether the union was right to deny a grievor access to the arbitration process; the more serious the workplace issue, the higher the onus on the union to satisfy the duty to fair representation standards

* **Facts:** An employee, Anderson, complained that Rayonier had violated the collective agreement by denying him certain seniority rights due to him under that agreement, and that the union had breached its duty of fair representation by not carrying his resulting grievance to arbitration. Union decides it does not favour his position, it takes the position that the companies’ interpretation of the seniority provision was justified and in accordance with the union’s interpretation. Anderson files a DFR complaint with the LRB board.
* This case lays out the reasons why LRBs will give unions the benefit of the doubt when they are interpreting collective agreement provisions.
* **Holding:** Complaint dismissed. Union struck appropriate balance. Advancing Anderson’s interests would be going against its own position with respect to seniority.
* **Analysis:**
  + Section 7(1) requires that a trade union not “act in a manner that is arbitrary, discriminatory, or in bad faith in the representation of any of the employees”
    - The union must not be actuated by bad faith in the sense of personal hostility, political revenge, or dishonesty
    - There can be no discrimination, treatment of particular employees unequally on account of race and sec or simple, personal favoritism
    - A union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory matter
    - It must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations
    - He says the union is a gatekeeper for the number of claims that go through. A union has an industrial relations responsibility to filter out bad grievance and only take good ones
  + The employee does not have an absolute right to have his grievance arbitrated
    - Administering the collective agreement involves significant group interests which the union may represent even against the wishes of particular employees
    - The union is permitted to ration its own limited resources by arbitrating only those cases which have a reasonable prospect of success
    - It is an important matter of industrial relations policy that a union must be able to assume the responsibility of saying to an employee that his grievance has no merit and will be dropped
    - When the employer goes to the union to bargain something it is important that the union has the final say on the issues so that the employer knows they are dealing with someone who does have the final say
  + There are a number of circumstances to consider in determining whether the union was right or wrong to deny a grievor access to the arbitration process
    - How critical is the subject matter of the grievance to the interest of the employee concerned?
    - How much validity does his claim appear to have, either under the language of the agreement or the available evidence of what has occurred, and how carefully has the union investigated these?
    - What has been the previous practice respecting this type of case and what expectations does the employee reasonably have from the treatment of earlier grievances?
    - What contrary interests of other employees or of the bargaining unit as a whole have led the union to take a position against the grievor and how much weight should be attached to them?
  + Here, it was perfectly proper for the union to drop the individual grievance
    - The individual claim of Anderson was over-rode due to the legitimate reason of advancing the more pressing needs of other employees

##### Lucyshyn v Amalgamated Transit Union, Local 615 (2010) – Sask LRB – The question that the Board must determine is whether or not, on an objective standard, the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof; outlines process to demonstrate that the Union fulfilled its duty

* **Facts:** A transit driver in Saskatoon was reassigned job duties after suffering a work-related injury. He filed a number of grievances against his employer, alleging breaches of the collective agreement pertaining to job postings and call-in procedures but he was not given job opportunities that he could fulfill not withstanding his injuries. The driver’s union acknowledged during the DFR hearing before the Sask LRB that it had not advanced the grievances. Eventually, the union told the driver that it had withdrawn all his grievances with no explanation for its decision. The driver filed a DFR complaint with the Saskatchewan board against his union.
* **Holding:** The union had breached its duty. There was no meaningful investigation of the complaint, no record maintained by the union of the grievances and the union communicated nothing to the member as to why he was refusing to take his grievances forward.
* **Analysis:**
  + The duty of fair representation requires the Union to act in a manner that does not demonstrate bad faith, arbitrary treatment, or discrimination
    - The representation by the Union must be fair, genuine, and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employees”
    - The onus of showing a breach of the duty of fair representation falls upon the Applicant
      * Must demonstrate that the union’s actions were
        + Arbitrary

Flagrant, capricious, totally unreasonable, or grossly negligent

* + - * + Discriminatory

Based on invidious distinctions without reasonable justification or labour relations rational

* + - * + In bad faith

Motivated by ill-will, malice hostility, or dishonesty

* + The question that the Board must determine is whether or not, on an objective standard, the Union has taken steps to investigate a potential grievance and has taken a measured view of that grievance and made a reasoned decision in respect thereof
  + There should be a clearly defined process followed by the Union which could include the following steps
    - Upon a grievance being filed, there should be an investigation conducted by the Union to determine the merits or not of the facts and allegations giving rise to the grievance
    - The investigation conducted must be done in an objective and fair matter, and as a minimum should include an interview with the complainant and any other employees involved
    - A report of the investigation should go forward to the appropriate body or person charged with the conduct of the grievance process within the Union
      * A copy of that report should be provided to the complainant
    - The Union, Grievance Committee, or person charged with the conduct of grievances, should determine if the grievance merits being advanced
      * Legal advice may be sought at this time to determine the prospects for success based on prior arbitral jurisprudence
    - The Union may determine here whether to proceed or not with the grievance, being cognizant of the duty imposed upon it
    - At each stage of the grievance procedure, the Union will be required to make a determination as to whether to proceed with the grievance or not and this decision must be made in accordance with its duties
    - It must also be recognized that the Union has carriage of the grievance, not the grievor
      * There may be instances where the common good outweighs the individual grievor’s interests in a matter
      * Where such a decision is made which is not arbitrary, discrimination, or in bad faith, that decision will undoubtedly be supported by the Board
  + In this case, the Union’s conduct was arbitrary
    - There was no meaningful investigation into the complaints
  + Lynk notes about what this case says!
    - 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 Nackawic*) (unless the issue is a human rights issue, where the human rights tribunal might take jurisdiction)
      * Thus DFR provisions (s. 74 of the OLRA) compel 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 the employees who are union members
      * Note the specific definitions given to arbitrary, discriminatory and bad faith
    - Arbitrariness is the most common of the three headings that unions are likely to breach
    - Unions may make an honest mistake or act negligently when representing an employee – this won’t necessarily be a breach of the DFR, unless it amounts to conduct that is arbitrary, discriminatory or in bad faith
      * Gross negligence is the accepted standard

##### Sask Tel

* **Facts:** Employee had been fired from a telephone company. He had difficulties with his mental health and had clashes with his union. He was fired and the union dropped his grievance after the 2nd or third step after deciding it would not win. He filed DRF claim with Sask LRB.
* **Held:** Sask LRB says that when it comes to a potential human rights issue, a union has a heightened responsibility to make an additional effort, it must go the extra mile to advocate for that employee in order to meet its duty of fair representation. It has to be more careful and assertive and take the additional step in its investigation because human rights are a cornerstone in our judicial system and in workplace law and therefore a higher duty of fair representation standard is warranted.

##### Bingley – when dealing with a human rights issue, the union is required to take extra measure of care and provide the extra measure of assertiveness

* **Facts:** This involved an employee complaint that the employer did not sufficiently address the employee’s human rights concerns (a disability arising from skin cancer). When she came back, she needed accommodation to work 7 hours instead of 9. Employer said no because you could not get a full mail route done in that time. She went to the union. The union did not advance the employee’s grievance and thought the employer had the better case. She filed a DFR against the union
* The CIRB ruled that human rights issues raise the level of fair representation that a union must provide to its members, and it is required to take “the extra measure of care” and provide the “extra measure of assertiveness”  in its representation efforts on human rights concerns
* 4 standards LRB will apply when conducting a hearing into a DFR claim where the issue has to do with human rights:
  + 1) Whether the union intervention was reasonable
  + 2) Where the employer failed to incorporate accommodation measures
  + 3) Where the quality of the process that allowed union to come to conclusion as reasonable
  + 4) Whether union went beyond its regular procedures and applied an extra measure of care, whether they applied an extra measure of assertiveness
* **Held:** Union had not taken the additional step or showed the extra measure of care to determine whether the employer satisfactorily accommodated the employee with a disability. Union took employers word as face value and did not take the extra measure of assertiveness.

#### Bernard Adell, “Collective Agreements and Individual Rights: A Note on the Duty of Fair Representation”

* Considers whether individuals should have the right to carry their grievances to arbitration over the objections of their bargaining agent
  + Employees should have control over critical job interests
  + Could at least allow employees to carry their grievances to arbitration when they are discharged
  + European countries allow individuals to bring grievances even when their union does not want to bring that grievance

##### Judd v CEP, Local 2000 (2003) – CLRB – Case is from BC but same standard in Ontario

* **Holding:** Where once upon a time LRB would get a hearing in every case alleging the breach of the duty of fair representation, now, in order to make their operations more efficient and make sure they don’t have a back-log of cases, now they say they will treat most duty of fair representation complaints on the documentary record. The written complaint that comes in from the member and the written response coming from the union. Employers have a right to participate in a duty of fair representation complaint, usually a small role but the Board will consider their argument. Increasingly, these complaints are being dealt with only in writing and the standard is usually if there is sufficient evidence for this matter to be heard.
* **Analysis:**
  + Discussing the BC mechanism for ensuring that unfounded complaints are filtered and disposed of before oral hearing to ensure no draining of resources of labour boards, unions, and employers
  + When receiving a complaint alleging a breach of Section 12, the Board must make an initial determination under Section 13 of the Code as to whether the complaint discloses an apparent breach of Section 12
  + The Board may only proceed with a Section 12 complain if there is “sufficient evidence” that Section 12 has been breached
    - If there is sufficient evidence of S. 12 breach, Board must then proceed to adjudicate matter on its merits
  + This process enables them to limit delays, but also allows them to make an effective efficient decision because they say that delay is corrosive of good labour relations. Everyone would be served better if there was a quick decision in these matters.

# Ontario Labour Relations Board, “Duty of Fair Representation Applications”

* A consultation is meant to be more informal and less costly to the parties than a hearing, and the Vice-Chair plays a much more active role in consultation than hearing
* Goal of consultation is to allow the Vice-Chair to expeditiously focus in on the issues in dispute and determine whether employee’s statutory rights have been violated
* The format of a consultation varies depending on the nature of the case and the approach of the individual adjudicators but there are some universal features
  + Vice-Char may
    - Question the parties and their representatives
    - Express views
    - Define or re-define the issues
    - Make determinations as to what matters are agreed to or are in dispute
* The union and the employee (and employer and any other affected party that participates) are required to provide in their application and response all of the material facts that they intend to rely on

# Trade Union Structures

#### Intro to Trade Unionism in Canada (Ross, Savage, Black, Silver – Halifax)

* Labour movement is built on local unions
* Some local unions have several bargaining units at a given workplace which share a union executive and other decision-making structure (e.g. universities)
* Others have broader regional locals that bring together workers in diff workplaces under a centralized executive – a "composite local"
* Local's general membership meeting (GMM) is highest authority in union and has exclusive right to make important decisions (election of officers, policy ratification)
* Issue: most of the membership do not participate and turnout at meetings is low, unless the meeting discusses issues that affect everyone
* Low attendance does not signify lack of support of the union
* Conduct of a local union is prescribed by a union constitution and bylaws that set out the rights/responsibilities of members, define roles, set rules, etc
* Depending on size, complexity and financial resources, some local officers have full-time duties (go on union leave and are paid a salary to replace wages from regular job), some serve part-time (while keeping regular job) and some unions may hire own paid staff
* Almost all local unions are affiliated with a parent union – a national/international union that brings together many locals
* Local unions pay big portion of their dues to the parent union, usually a "per capita" charge
* Parent union provides locals with various kids of support – expertise for negotiations, legal assistance, strike fund, union staff, lobbies governments
* Conventions happen every few years to chart the union's course and develop policies

# Union Liability for Actions of Members

##### Fullowka v Pinkerton's of Canada (2010) – SCC – separate legal status of union locals and their parent union

* **Facts:** During strike at the Giant Mine in Yellowknife in 1992, a striking miner (Warren) placed a bomb in an underground car carrying miners who were crossing the union picket line to work during strike. Killed 9 miners, some of whom were replacement workers and other were union members who deiced to go back to work in defiance of their union. They were in a small rail cart that went over dynamite that a striking worker had laid. Warren was convicted of nine counts of 2nd degree murder. Surviving families sued union for damages. Families of the murdered miners wanted to sue the union and employer for the loss of their family. Procedural issue that arose had to do with the fact that the members of the family were seeking to sue the parent union, the autoworkers and were seeking to establish liability against them.
  + At time of strike, they were rep'd by CASAW, Local 4, which was affiliated with CASAW National. After explosion, CASAW merged with Canadian Auto Workers, and "CASAW Local 4" became "CAW, Local 2304"
  + Families sued CAW National, some union officials, and members of CASAW Local 4 for failing to control Warren and inciting him
  + Successful at trial, but dismissed by the NWT Court of Appeal which found local and national unions were separate legal entities. And if CASAW Local 4 is liable, it does not extend to CASAW National or CAW.
* **Prior Proceedings:** TJ found in favour of the families and said that the aprent unions were liable for the damages being sought by the family members. This was appealed to CA who overturned the decision and said that the families could not sue the parent union as it bared no responsibility or liability. This was then appealed to SCC.
* **Issue:** Were CASAW Local 4 and CASAW National separate legal entities? If yes, then CAW National did not assume the liabilities of CASAW Local 4 when it merged with CASAW National? What is the legal relationship between the local union, the union that actually represents the bargaining unit, and the parent union? Are they one legal entity for the purposes of Labour Relations law or are they two distinct units of legal personalities even though they have a connection? Could whatever negligence that had been committed by the local union be attributed to the parent union?
* **Held:** Union constitution and merger agreement support the view that CASAW National and CASAW Local 4 are separate legal entities and CAW National did not inherit CASAW Local 4's tort liabilities after the merger. SCC said that while there is an organic relationship between the locale union and its parent, they are two separate legal entities for the purposes of the law. No negligence because the local union had not encouraged Warren to lay the dynamite on the rail track.
* **Ratio:** Local unions separate legal entities (*International Longshoremen’s Association v Maritime Employers Association*)
* **Analysis:** CAW National is a legal entity capable of being sued. Union locals may have an independent legal status and obligations separate from their parent, depending on their relevant statutory framework, constitutional documents and their CA's . CASAW Local 4 is a local entity capable of being sued in actions related to its labour relations role – it was the exclusive certified bargaining agent for the killed miners as set out in the Code and the collective agreement. Nothing in the constitution or merger agreement supports the view that the local and national unions are simply branches of the same entity

# Legal Protection of Union Membership Rights

* Duty of fair representation allows any employee in the bargaining unit (even if not a union member) to bring a complaint against the union if the employee feels it has not fairly represented her interests with the employer
* But different when the complaint is for an internal union matter
* Legislatures have refrained from regulating internal union affairs so it's dealt with the courts through contract law
* SCC 1957 *Orchard v Tunney –* held that the union's constitution was not a contract between member and the union, but its provisions were incorporated into a network of indv contracts between the member and each other member. "Web of contracts"
  + Criticized in the following excerpt:

#### Neil, Lynk, Engelmann "Trade Union Law in Canada"

* Legal status of trade unions arises in two contexts: (1) Relation between union and external actors (employers, state) and (2) Relation between union and its members
* The fiction/concession theory describes the personality of the group as artificial, the product of authority given by its members or the state
* The group is seen as having only those powers given by the state, and without the power they are just a collection of individuals who cannot claim rights other than those of indv members
* This theory best explains judicial and legislative approaches to the legal status of trade unions in Canada
* Consequence of treating the relationship as contractual is that it invites the courts to act as appellate bodies – interpreting contracts and providing relief to a member for any violation of constitution
* It's a threat to union autonomy

##### Berry v Pulley (2002) SCC – Eliminated fiction of web of individual contracts of membership. Sets out trade union legal personality.

* **Facts:** Dispute between pilots of Air Ontario and Air Canada. Belonged to same union – Canadian Air Line Pilots Association (CALPA) an unincorporated association. Employers were engaged in merger talks. Union constitution provided that in the event of a merger, the two groups of pilots were to negotiate an integrated seniority list. Air Canada pilots insisted Air Ontario pilots should be "end-tailed" on the new seniority list. Ontario wanted the two seniority lists be "dovetailed" so that the service they accumulated with Ontario would be fully recognized after the merger. Arbitration award: 15% of Canada pilots should be dovetailed with the most senior Ontario pilots, but the Canada pilots should be higher on the seniority list than their years of service would indicate but he did not allow a straight dove-tailing between the two. Air Ontario sued their union and they had their motions dismissed/
  + Air Canada refused to accept award, insisting on no dovetailing at all. Left CALPA to form own union (ACPA).
  + Air Ontario pilots brought class action against Air Canada pilots, suing for damages in contract and tort bc of refusal to accept arbitral award. Argued each CALPA member was a party to a contract with every other member and the refusal to abide by the award breached those contracts.
  + Motion by Air Canada to dismiss the action was granted. Upheld by OCA. Appeal to SCC by Air Ontario.
* **Issue:** Whether the seniority of Air Ontario would be end-tailed or dove-tailed with the seniority list of Air Canada?
* **Ratio:** Union constitutions in the modern era are not this bundle of individual contracts, they are standalone viable legal documents of which a member can sue on if they have a difficulty with how the union has treated their internal rights under the Constitution.
* **Holding:** Appeal dismissed. Found for Air Canada. SCC clarified the status of a union constitution because the Constitution as drafted favored the Air Canada pilots.
* **Analysis:** 
  + Since *Orchard v Tunney*, statutory rights have been granted to trade unions and Court has view that a trade union is a legal entity that can be sued in its own name – confirmed by *International Brotherhood of Teamsters v Therien* (1960 SCC)
  + By conferring rights and obligations on trade unions, legislatures intend to bestow legal status to sue and be sued
  + When a member joins a union, relationship arises between the member and the trade union as a legal entity – both of them agree to be bound by the terms of the union constitution
  + Factors that make this contract unique:
    - Essentially an adhesion contract (applicant has no bargaining power with union)
    - Union membership is often a prerequisite to employment (indv has no choice but to accept terms)
    - Statutory labour relations scheme is superimposed over the K between the member and union which creates legal obligations beyond the K
  + Issue: Is there still a web of contracts between each of the union members and can they be breached?
    - Held: "The legal fiction of a web of contracts between members is no longer necessary". Union members not contractually connected to each other
  + Union constitution only deals with individuals' obligations to the union, not to each other
  + At the time of the wrong, Air Can pilots were still part of CALPA and internal remedies were available to Air ON pilots which then could have been appealed before the CIRB
  + Or tort claims could have been brought against other union members
  + Further, it is problematic for a court to fill legislative gaps in the labour relations scheme by fashioning a breach of contract action between members
* **Ratio**: Union members are not contractually connected to each other.Exposing personal assets of dissenting union members to liability would be antithetical to the "unqualified right" of union members to speak out against the agenda of their bargaining agent. (cited *Tippett v International Typographical Union 1975 BCSC)*
* Canadian legislatures, unlike US and Britain, have refrained from enacting legislation that intrudes deeply into internal union affiairs
* Article below explains it's because Canadian unions are democratic and not corrupt, so close public regulation is not needed to ensure their affairs are kept in order:

#### Mac Neil, Lynk and Engelmann "Trade Union Law in Canada"

* Canadian approach of statutory abstinence from regulation of internal union election and union officers is product of **four factors:** 
  + Canadian unions have historically encouraged a culture of democratic practices, and have been able to give voice to both the employment and social aspirations of their membership
  + Unions in Canada have generally avoided both the stain of corruption that has tainted some parts of US labour movement, and the spectra of militancy that has characterized British unions
  + There has never been a sustained demand in Canada for a significant legislative intrusion into internal union affairs
  + Traditional British common law concept of unions as voluntary organizations (entitled to self-government) has influenced Canadian legislators and courts
* Any legislative judgment in the future regarding whether statutory intervention is warranted to regulate trade union elections and officers should be determined with three things in mind:
  + Efficacy of judicial oversight
  + Ability of trade unions to provide democratic self-regulation
  + Necessity for the internal democracy of trade unions to be statutorily regulated in comparison to other socially influential organizations (corporations, political parties, religious institutions)
* Most serious obstacle to greater democracy in unions is in the low participation of the membership in the political life of unions, except in moments of conflict/crisis

# The Protection of Local Union Officers when Representing Members

* Integral feature in labour law is the right of unions to select their own leaders and reps without interference from mgmt
* Local union officers can freely represent their membership when dealing with the employer on industrial relations matters
* *CEP, Local 911 and ISM Information Systems 1998 Sask LRBR –* union representative must be dealt with on an equal footing with the employer when functioning as union representative. – can engage in conduct as a union leader that might otherwise attract discipline
* General immunity from employer discipline extends to activities within the reasonable performance of their union responsibilities
* Authors of above article ^ found union officers maintain legal protection for their comments as long as their conduct satisfies:
  + They were acting in good faith
  + Their comments were not malicious, reckless, or patently untrue, and
  + Their comments were broadly linked to issues of concern to the union and its membership, not the personal concerns of the union official
* If you are acting on behalf of a union and representing your members, and you become beligerant, insubordinate, saucey, rude or defiant, ordinarily this will be an exception to the rule of being punishable behavior. Your behavior will be within the limits accepted because you are performing your union duties.

##### Canada Post Corp and CUPW, Re (2013) – Can Lab Arb - There's a high value placed on right of union officials to freely lobby and challenge management, even in strong and unwelcome language

* **Facts**: Employer imposed 1-day suspension on local union steward for using vulgar language towards management: "You guys have your heads so far up your ass…". He refused to apologize after, he did express regret that this was not an effective way to represent his members but he would not apologize. This 1 day suspension was grieved all the way to arbitration.
* **Held:** For the employee. Arbitrator noted that as an ordinary employee there would have been grounds for disciplining him on grounds of insubordination, but he was allowed to express his strong displeasure with management's position. The comments made by the union official fell within his representational role and therefore the 1-day suspension was overturned and his record was cleared.
* **Analysis:** if an ordinary employee did this that would be justifiable termination, but there is a long tradition in the law protecting union officers when they are acting in their role representing union employees. This extends even when they may be expressing strong disagreement with the employer even if it is in strong language.
* **Ratio:** There's a high value placed on right of union officials to freely lobby and challenge management, even in strong and unwelcome language

# Union Security and Union Discipline

* AB, BC and SK explicitly require by statute that internal union disciplinary hearings comply with the requirements of natural justice
* BC Case law that upholds s. 10 of their Labour Relations Code (internal union disciplinary hearings comply with the requirements of natural justice:
  + *Office and Technical Employees' Union, Local 378 CLRBR 1995 ("Coleman")*
  + *Gould (Re), 2010 BCLR*
* A number of Canadian labour relations statute stipulate that trade unions cannot impose disciplinary penalties against members in a discriminatory manner
* If an employee has engaged in strikebreaking activity, union has the right to refuse membership to that employee, expel membership, or impose discipline on her
  + But s. 95 of Canada Labour Code means this expelled employee cannot be dismissed from her job for that reason – even if CA requires union membership as a condition of employment

# Union Security Clauses

Five types of union security provisions:

* **The Closed Shop** – One must be a union member before being hired.
* **The Union Shop** – Employees must become union members to keep their jobs. Does not use union membership as screening device to determine hiring eligibility see
* **Maintenance of Membership** – Does not require an employee to join the union. But once they join, must remain a member or will lose job.
* **The Agency Shop, or "Rand Formula"** – Does not require employees to be members of the union, but does require them to pay to the union union dues.
* **Voluntary Checkoff** – Weakest form. Requires employer to deduct union dues from employee's wages, if employee so authorizes, and remit those dues to the union.

##### Speckling v Communications, Energy and Paperworkers' Union of Canada, Local 76 (2003) – BCLRB – A union is well within its rights to take a position against an indv employee based on its interests of the bargaining unit as a whole

* Case that considers whether a union have an employee dismissed by an employer if the employee has been expelled from the union for failure to pay fine:
* **Facts:** Union had a policy prohibiting OT when laid off employees were available to work. Speckling was an employee and union member, charged by other union members with violating union's constitution by refusing to abide by the union's policy. Speckling fined at a disciplinary hearing. Refused to pay. CA had a union security clause – required employees to maintain membership in union as condition of continued employment. Employer refused to fire Speckling. Agreed with Union as long as he paid the fine, union would readmit him, and employer would not let him return to work until he was readmitted. Never paid the fine, employer fired him eventually. Speckling brought a duty of fair representation complaint against the union before BC Labour Board.
* **Issue:** Did the union use its exclusive bargaining agency to apply the security clause in a way that was arbitrary, discriminatory, or in bad faith when they demanded Speckling's dismissal? (s. 12 of BC Code)
* **Analysis:** Common for union security clause to require employees to maintain membership in good standing in the union as a condition of continued employment
  + Union obtains its power to discipline its members through its constitution
  + Issue of whether the power is validly exercised under union's constitution and whether employee has thus lost membership in good standing is ultimately a question of contract law for courts
  + A union is well within its rights to take a position against an indv employee based on its interests of the bargaining unit as a whole
* **Holding:** Union acted reasonably, for a legitimate and compelling purpose (to provide work for the laid off employees) and not in a discriminatory fashion or for any improper purpose. Dismissed.

##### Birch v Union of Taxation Employees, Local 70030 (2008) – ONCA – single test for unconscionability - Need to (1) find inequality of bargaining power and (2) find the terms of an agreement have a high degree of unfairness

* **Facts:** Birch and Luberti fined by appellant union for crossing picket line to attend work during legal strike. Refused to pay. Union sought to enforce payment at small claims court. Held that the provision in the constitution authorizing the fines was an unenforceable penalty clause.
* **Issue:** Whether a trade union may invoke the jurisdiction of the court to enforce fines it has imposed against its members for crossing a picket line
* **Holding:** Appeal dismissed. Clause is unconscionable and unenforceable.
* **Analysis:**
  + No single test for unconscionability, but most refer to the inequality of bargaining power of the parties
  + But in *Fraser v Dominion (1997) ONCA,* noted that the inequality of bargaining power alone does not render a contract unconscionable or unenforceable
  + Must (1) find inequality of bargaining power and (2) find terms of agreement have high degree of unfairness
  + There is no fixed set of criteria that establishes inequality of bargaining power
  + Union submitted the fines were a pre-estimate of damages suffered by union, but actual amount of the fine was much greater than union's estimate
  + The fines provided under the constitution are not justified in order to deter members from taking benefits of membership without accepting the burden of a work stoppage due to strike – suspension from union membership is already a strict penalty

# Union Security Provisions and the Role of Unions in Society

##### Lavigne v Ontario Public Service Employees' Union (1991) – SCC – Union may only compel the payment of dues after a majority of those employees have agreed to be repped by the union, all employees are free to join or not join union, etc.

* This case has to do with union security clauses. There are provisions in s. 47 of Labour Relations Act which says that he union has the right to collect Rand Formula dues for every member in the bargaining unit
* **Facts:** Lavigne was a teacher in a community college that had a CA with the Ontario Public Service Employees Union. Agreement had a Rand Formula provision, required teachers to pay equivalent of union dues, do not have to join union. L claimed his Charter 2b and 2d rights were violated by the union's use of some of its funds for purposes other than bargaining (ex. support of the NDP). He did not agree with his money going to extraneous issues that the union might think are important as a social justice initiative. He said that under s. 2(d) of the Charter he had a freedom to associate and a freedom not to associate. He wanted to be able to opt out of not paying a certain percentage of his dues for causes he does not agree with. He only wanted the union to be their insurance agent, strictly looking after his collective bargaining and representation issues. This goes all the way to SCC.
* **Holding:** Finds against Lavigne and dismissed his claim. Rules that because unions are both an actor in broader society and in industrial relations, the two different roles they place reinforce each other. The role a union pays in lobbying the federal Parliament on a range of social issues reinforces its ability to bargain for better collective agreements with employers. Therefore, since these two different roles are intertwined with each other, they cannot be pulled apart and it would be wrong to allow members to opt out. Because Ontario colleges are under substantial gov control, held they are governmental actors within the meaning of s. 32 and provisions of the collective agreement therefore have to respect employees' Charter rights. Found his rights were not infringe under s.. 2(d) and if they were, it was justifiable under s. 1
* SCC compared unions to a government and while we pay disagree as tax payers where some of our dollars are spent, our democratic mandate is to curt that, not through opting out of paying but through the next round of elections. They said the same thing applies to unions. If a union member does not like how their unions dues are being spent, the option is not to opt out of paying dues but to be more politically active and vote for someone else next time.
* **Analysis:** 
  + Fact that appellant has to pay dues does not inhibit him from expressing a contrary view from the Union
  + It's a built-in feature of the Rand formula that union activities represent only the expression of the union as the rep of the majority of employees – it is not the voice of everyone in the unit
  + Union role does not need to be confined to narrow economic functions
  + The interests of labour do not end at some artificial boundary between the economic and political
  + Involvement in union locals to participation in the larger activities of the union movement advances the interests of working people
  + Union may only compel the payment of dues after a majority of those employees have agreed to be repped by the union, all employees are free to join or not join union, etc – it is a reasonable and fair compromise
  + It is for the union to decide by majority vote which causes it will support in the interests of influencing the political, social and economic environment in which bargaining and dispute resolution will take place

##### R v Advance Cutting & Coring (2001) SCC – Union members can act independently from union when expressing political choices

* **Facts:** Quebec Construction Act set up scheme of province-wide bargaining, named five union federations as recognized bargaining agents and required every construction worker to join one of the five in order to work in the industry. Several firms convicted under the Act for employing workers who did not join. Contractors brought claim under Charter 2d saying there's a right not to associate.
* **Holding:** Upheld legislation but split vote. 8 judges held freedom of association did include right of non-association, but 5 judges held had not been violated in this case. 4 dissent.
* **Analysis:** 
  + The obligation to join a union group by the Construction Act remains limited
  + The law does not impose much more than the bare obligation to belong to a union – no mechanism to enforce ideological conformity
  + Democracy underlies the particular form of union security provided by in the Construction Act – affiliation with union means they have gained the ability to influence the life of the association whether or not they choose to exercise that right
  + Union members can act independently from their union when expressing political choices
  + No evidence to support judicial notice of Quebec unions ideologically coercing their members
* **Dissent**
  + Necessity of considering the totality of the rights and values interrelated when dealing with forced association in the workplace point to the need to take a broad view of the Charter right not to associate
  + To suggest unions in this case are not associated with any ideological cause is to ignore the history of the union movement itself
  + Severe restrictions on the right of a person to join one of the 5 unions to work in the construction industry
  + They unduly infringe ability of workers to join a union, which is a prerequisite for working in the construction industry in Quebec

# The Union's Right to Communicate with its Members

##### Bernard v Canada (AG) (2014) – SCC

* **Facts:** Bernard was member of federal public service bargaining unit but chose not to belong to Professional Institute of the Public Service (PIPS) the union that was the exclusive bargaining agent. Rand Formula. 2005 – a federal act was amended that expanded the representational obligations of the union. PIPS requested the employer to provide the home contact information for members of the bargaining unit. Union would not have had this information by employer did. Employer refused. PIPS brought unfair labour practice complaint against employer and was able to secure this information. Board upheld complaint because refusal to provide the info interfered with the union's representation of the employees. Federal government was ordered to supply the home mailing address and home telephone number. So, employer agreed to provide the union with the information. Bernard objected the disclosure of home address to the union claiming that it breached her rights under the *Privacy Act.* LRB found that it’s earlier ruling was reasonable and that she had to comply, there was no breach of Privacy Act. FCA upheld Board's ruling that the requirement was reasonable and complied with Privacy Act. Appeal to SCC.
* **Bernard’s Argument:** Argued that her freedom of association had been comprised.
* **Holding:** Dismissed appeal. Compelled disclosure of home information in order to allow union to carry out its representational obligations to all bargaining unit members does not engage B's freedom not to associate with the union. The nature of the union’s representation duties is an important part of what a union ends up doing, therefore it is reasonable for the union to have this information in front of them.
* **Analysis:** Union must represent all bargaining unit employees fairly and in good faith. The new act (public service labour relations act) imposes duty to provide all employees in the bargaining unit with reasonable opportunity to participate in strike votes and notified of results of such votes. Union's need to be able to communicate with employees cannot be satisfied by reliance on the employer's facilities. The unions may have representational duties to employees whom it cannot contact at work
  + There must be equality of information between employer and the union
  + An employee cannot waive his/her right to be fairly and exclusively repped by the union
  + Union needed employee home information to represent interests of employees, a use consistent with the purpose for which the government employer collected the information (therefore complies with Privacy Act)
  + Union needs the home contact info to carry out its representational obligations quickly and effectively
* **Ratio:** Union, in being able to represent its members effectively, has a certain minimal right to information regarding members of the bargaining unit in order to be able to have an equality of information between what it can have access to and what the employer can have access to.