

LAW 555

Labour

Feth/Peterson

Labour Law

PART I – INDIVIDUAL CONTRACT EMPLOYMENT

1. What is the Employment Relationship?

- The employment relationship (Er-Ee) gives certain rights to the worker
- There is no single, universal test that defines what an 'Ee' is
 - **Context is critical! The employment status may vary depending on it**
- Many legislative rights are triggered **only** if an employment relationship exists
 - Key point: Employment relationship or independent contractor?
- **Main question: Is the relationship before you one of employment?**
- Despite there being no standard test, there is a common “core” meaning of ‘employment relationship’ that emerges

Core Meaning of ‘Employment Relationship’

- **1) Must satisfy the legal elements that apply to all contracts**
 - Things like consideration, intention to create legal relations, offer and acceptance
- **2) Freedom of contract is curtailed when legislation and common law affect the terms or substantive matter of the contract**
 - Starting point for employment relationships – parties can define their relationship except to the extent that this freedom is curtailed by legislation and common law
 - In practice, the exception often overrides the rule! Statute and common law determine the relationship more often than not
 - Intention of parties is still relevant and will be considered by courts – but it isn't determinative
 - Minimum standards legislation expressly defines certain terms
- **3) Freedom of contract is curtailed when ambiguous terms in the contract are interpreted along with human rights legislation and employment legislation**
 - E.g. maternity leave for Ees with less than a year of service
 - Human rights legislation is used to fill in certain ambiguities
- **4) Freedom of contract is curtailed when the law creates implied terms that are found in the contract**
 - Includes things like reasonable notice, anti-discrimination, good faith
 - Good faith: Notion that Er-Ee relationship has a foundation of trust and mutual reliance. Circumstances exist where the Er cannot solely rely on the black & white agreement; and vice versa
- Unlike regular contracts, courts and legislature mess with employment contracts all the time! Why?
 - Society has tried to protect the interests of the worker – Ee has historically been disadvantaged in Er-Ee relationship. Employment and labour law are reflections of societal pressures. These influences constrain and design the employment relationship

Tests for Determining if Relationship is for Employment or Independent Contractor

- No one test is determinative

- Main tests:
 - **i) The Control/Four Indicia Test**
 - **ii) The Four Point/Montreal Test**
 - **iii) The Business Integration Test**
 - **iv) The Modern Approach/Sagaz Industries Test**

Cormier v. Alberta Human Rights Commission (AB QB, 1984)

- Facts: Cormier filed complaint with AHRC alleging he was discriminated against based on race. Er brings jurisdictional challenge, saying that AHRC has no authority since there is no employment relationship. Say that Cormier is independent contractor
- Good review of employment relationship tests
- **1) The Control/Four Indicia Test:**
 - The 'four indicia':
 - **(a) Master's power of selection of the servant;**
 - **(b) Payment of wages or remuneration;**
 - **(c) Master's right to control the method of doing the work;**
 - **(d) Master's right of suspension or dismissal**
 - Don't need all four elements to satisfy the test
 - **Control is by far the most important factor!**
 - This test breaks down when dealing with the highly skilled Ee (e.g. doctors) – since there is no real control over them
- **2) The Four Point/Montreal Test:**
 - The 'four points':
 - **(a) Control;**
 - **(b) Ownership of tools;**
 - **(c) Chance of profit;**
 - **(d) Risk of loss**
 - This test focuses less on control and weights factors more evenly
- **3) The Business Integration/Organizational Test:**
 - Attempted simplification of the analysis
 - Note: English courts call an employment relationship a 'contract of service'; call an independent contractor relationship a 'contract for services'
 - **Asks how work is integrated into the business as a whole**
 - **Contract of service: Work is integral to the business**
 - **Contract for services: Work is not integral to the business**
 - Factors to consider: Who provides the equipment? Is the Ee part of an internal communication system? Where does the work take place? Does the Ee participate in organizational meetings?
 - Critique: Not much substance to this test!
- Key points from this case:
 - **I) Words used in stating the rule in one legal context may not mean the same thing in another context – Er, Ee mean different things in different contexts**
 - **II) Statutes will be liberally interpreted when they are ambiguous or doubtful – if courts err, it will be on the side of inclusion**
 - **III) Application of tests will be influenced by the type of work relationship involved**

- Professional person will look more to *Montreal* or Business Integration tests, as control test is not useful for them
- **IV) Purpose of defining the individual as an Ee or independent contractor is irrelevant – what is important is the context in which the definition is occurring**
 - Depending on context, different tests may be used. E.g. In some situations, Control Test will be useful. In other situations it will be useless

Sagaz Industries (SCC, 2001)

- Facts: Marketing company bribed Canadian Tire Ees to make a change in suppliers
- Issue: Is the new supplier vicariously liable for the actions of the marketing company?
- Modern approach for determining employment relationship is to look for the ‘total relationship of the parties’
- Emphasizes two elements:
 - **1) Control – will always have to be a factor to be considered, but can no longer be the determining factor**
 - **2) Whether person is performing services in business on his own account**
 - **Other (non-exhaustive factors): i) Parties’ own description of their relationship; ii) How person has been described for tax purposes; iii) Whether worker herself employs other people; iv) Whether worker works for several Ees; v-viii) *Montreal* factors**

Jurisdictional Issues

- Important to determine whether Ee is provincially or federally regulated
 - Vast majority of Ees will be provincially regulated
- **Federally regulated Ees: workers for Indian Band; federally regulated industries such as Canada Post, airlines, telecommunications, banks, interprovincial transport, shipping, etc.**
 - Federal court levels include: Federal Court; Canadian Human Rights Council; Canada Labour Code
- **Three possible forums to go through for a provincial Ee: i) Provincial Court/Queen’s Bench; ii) Alberta Human Rights Commission; iii) Employment Standards Branch**
 - There is overlapping jurisdiction between these three branches
 - E.g. Termination pay vs. severance allowance – Termination pay refers to entitlement to statutory compensation under the *Employment Standards Code*. Severance allowance refers to damages an Ee can refer to in court, such as in a wrongful dismissal claim. Judges rarely distinguish between these two terms!

2. Formation of the Employment Contract

- Need intention to create legal relations, consideration, and offer and acceptance to form a valid contract
- No requirement that employment contracts be in writing, with two exceptions:
 - 1) Collective Agreements – *Labour Relations Code* requires this
 - 2) Contracts that are impossible to perform in less than one year – *Statute of Frauds* requires this
 - **Applies to contracts of a fixed term for a period greater than one year**

- A fixed term contract for a period greater than one year that has a termination clause must still comply with the statute – termination clause doesn't make a difference
 - Agreement must be in writing if it extends beyond one year from time it is made. E.g. Agreement to article made in summer, to commence following summer. Must be in writing because it cannot be performed within one year – it won't even start for another year
- Normal employment contracts are for an indefinite period
 - Not caught by *Statute of Frauds* because there is no defined end date. It is possible that they could be completed within one year!

Enforceability of the Employment Contract

Whether a contract will be enforceable or not depends on three broad considerations:

- **1) Certainty of terms**
 - Essential terms cannot be vague or ambiguous
 - Things to be covered include: Place of work, time of work, core duties, salary
 - 'Agreements to agree' on key points won't be enforceable
 - Important to look for collateral documents or customs that have been incorporated into the agreement (e.g. policy manuals; industry practice; implied terms of confidentiality; etc.)
 - Terms can be imposed on the Ee after the relationship has come into effect through notice and other possible means
- **2) Compliance with fundamental legal rules that govern all contracts**
 - (a) *Statute of Frauds*
 - (b) Repugnancy for public policy and morality
 - Cannot have terms in the agreement that are illegal
 - (c) Unconscionability
 - Courts can find an employment contract oppressive or unconscionable
 - E.g. Penalty clause for Ee if they quit
 - (d) Presence of consideration
 - Compensation for services
 - If there is any change in the contract, must look for consideration for the change. If there is no consideration for the change, it will be unenforceable
 - BUT Er can change the employment contract without consideration if reasonable notice is given. Consideration in this circumstance is the employment from the time of the notice to the time of the change
 - **Key: Reasonable notice must be given!**
 - Two years is generally considered to be the outermost reach of reasonable notice
- **3) Compliance with special rules that are unique to employment contracts**
 - (a) Legislated minimum standards of employment
 - Provincially, this is the *Employment Standards Code*. Federally, this is the *Canadian Labour Code*
 - (b) The Substratum Rule

- Over time, the substrata of the employment relationship can change so fundamentally that the original contract no longer reflects the current agreement between the parties
- E.g. Man starts work in 1975 as mechanic. His contract says he is entitled to 3 weeks notice for dismissal. In 2005, he is CEO of the corp. Original contract and 3 weeks notice will not apply, since the employment relationship has changed so fundamentally
- The relationship will be defined by the conduct between the parties in recent years
- Every time an Ee gets a pay raise or new duties, the employment contract changes. Note that reasonable notice doesn't apply in these situations because there is mutual agreement to accept the changes!
- (c) Other statutory modifications
 - *Human Rights and Multiculturalism Act*
 - *Labour Relations Code, s.149(b)* – Er cannot impose a condition that restrains or has the effect of restraining an Ee from exercising any right conferred on them by the Act
 - Specialized legislation for different professions (e.g. *Schools Act*)

3. Terms of the Contract of Employment

Three types of terms in the contract:

- 1) Express terms
- 2) Statutory terms
- 3) Implied terms
 - Implied by operation of law
 - Most important category: Reasonable notice of termination in the absence of just cause

Reasonable Notice

- How is it determined?
 - No 'Golden Rule' or magic formula
 - **Key consideration: How long will it take this Ee to find comparable alternative employment?**
 - **Factors to consider (*Bardal v. Globe & Mail*):**
 - **Age** – Harder for older Ee to find employment, so higher reasonable notice period for them
 - **Education** – If Ee is highly skilled or educated, number of job prospects is probably fewer. Therefore, highly skilled Ees will have a higher notice period
 - **Length of service** – The longer the Ee has worked there, the longer the reasonable notice period will be. Has to do with the level of dependency that an Ee has on the Er
 - **Availability of similar employment** – Look to economy in general
- **Where there is a term in the contract regarding dismissal without cause, reasonable notice at common law doesn't apply**
 - Why? Because it is merely an implied term! It can be rebutted by an express term or by implied intention of the parties

- E.g. 'Two weeks of notice for every year of service' – as long as the agreement does not offend the *Employment Standards Code*, it is valid and overrides the reasonable notice common law presumption
- If you have just cause, Ee can be terminated immediately
 - In this case there has been a breach of a fundamental term of the contract by the Ee
 - De minimus infractions are not cause for termination
 - Could frame this as there being an implied term of the contract that minor infractions will be tolerated from time to time (e.g. coming to work late)

Employment Standards Code

- Most important piece of legislation in non-unionized setting
- Key sections:
 - 2 – Act doesn't apply to municipal police forces, agricultural workers
 - **4 – Parties cannot contract out of the Code**
- Civil remedies are not affected by the *Code*. Can enjoy greater remedies through the courts than you can through this legislation
- Three important issues for employment lawyers regarding the *Code*:
 - (a) Does a certain practice comply with the minimum standards set out in the *Code*?
 - (b) How are statutory rights created by the *Code* to be enforced?
 - Can go to Employment Standards Branch or to the courts
 - Used to be that had to go to courts for some reasons and to ESB for others (e.g. unpaid overtime)
 - Now argued that all employment standards are to be read into the contract as legal terms (*Valune*)
 - (c) Forums
 - ESB or courts?
 - E.g. Wrongful dismissal: some case law suggests finding of ESB can be binding on the courts (*Wong v. Shell Canada*)
 - Be mindful of whether going through ESB is the right move!

Machtinger v. HOJ Industries (SCC, 1992)

- Facts: Ees had been working for the Er in 1978. Machtinger was the credit manager, Lefebvre was the sales manager. Both of them had written employment contracts with a termination clause – Machtinger's employment could be terminated without notice; Lefebvre's could be terminated with 2 weeks notice. Both these notice periods were below the required statutory levels
- Issue: Were the Ees entitled to reasonable notice at common law or the minimal levels as prescribed by the *Employment Standards Act*?
 - Trial judge found they were entitled to reasonable notice at common law (7 and 7.5 months) instead of the 4 weeks minimum required by the *Act*
 - CA disagreed with trial judge – focused on intentions of the parties through the contract that had actually been created
- Court confirms that the *Bardal* factors are to be considered when determining what appropriate reasonable notice is
- **Reasonable notice at common law is the presumption**

- **Rebuttable by: i) express intentions of the parties, OR; ii) implied intentions that can be gleaned by the course of conduct or events that transpire between the parties**
- **REASONABLE NOTICE AT COMMON LAW IS ONLY AN IMPLIED TERM! IT CAN BE REBUTTED BY EXPRESS CLAUSES ON REASONABLE NOTICE OR BY IMPLIED INTENTIONS OF THE PARTIES**
- **If a term is null and void, then it is null and void for all purposes and cannot be used as evidence of the parties' intentions**
 - Can't look at illegal clauses for evidentiary purposes
 - In this case, since the notice periods in the employment contract are null and void, they cannot be used to determine the intentions of the parties
- There was no evidence of other intentions here – reasonable notice at common law presumption stands
 - No parol evidence here, but it can be used in certain situations (e.g. unionized settings)
- Court relies heavily on policy considerations:
 - **Unequal bargaining position between Ee and Er**
 - **Ees are vulnerable when they lose their employment**
 - Work is important to self-identity, self-worth, etc.
- If remedy for Ees is requiring mere compliance by Er, there is no deterrent to include terms that fall below minimum standards!
- **If an employment contract fails to comply with minimum standards legislation, the presumption of reasonable notice at common law will not have been rebutted**
- Note: *Shore v. Ladner-Downs*: Prospectively illegal provision requiring 30 days notice for termination. Although this did not offend the Act per se, Ee successfully argued that it had the potential to eventually offend the Act
 - There are ways to word the employment contract so that it will never offend minimum standards legislation

Employer's Obligations

- **Payment of Wages (ss.7-13)**
 - Overriding obligation is imposed by statute – *Employment Standards Act*
 - Minimum wage for both hourly and weekly remuneration (\$280/week)
 - Payments are not to be made more than one month apart, and must be made within 10 days of the end of the pay period
- **Hours of Work and Overtime (ss.16-24)**
 - OT to be paid for time worked over 8 hours a day or 40 hours a week, whichever is greater
 - OT rate is time and a half
 - There are circumstances where OT provisions don't apply for certain workers (e.g. shift workers, professionals, ambulance drivers, etc.)
- **Rest Periods**
 - A 30 minute rest period must be provided for shifts greater than 5 hours in length
- **General/Statutory Holidays (s.25)**
 - Rate for working on a statutory holiday is time and a half
- **Vacation Pay (s.34)**

- A worker is entitled to 2 weeks vacation pay after completion of 1 year of employment
- After 2-4 years of service, worker is entitled to 2 weeks of vacation pay. After 4 years of service, worker is entitled to 3 weeks of vacation pay
- **Miscellaneous**
 - Er must retain employment records for 3 years
 - To include things such as: hours worked, time off, wage rate and OT
- **Termination (s.56)**
 - Minimum notice periods:
 - Anything up to 2 years of service, Er has to provide 1 week's notice
 - After 2-4 years, it is 2 weeks; after 4-6 years, it is 4 weeks; after 6-8 years, it is 5 weeks; after 8-10 years, it is 6 weeks; after 10+ years, it is 8 weeks
 - Er has choice between giving required notice and paying termination pay in lieu of notice. Can also do a combination of the two
 - Termination pay is based on wages
 - At common law, severance pay is calculated based on wages and benefits
 - *Prince v. Eaton* – The 'Nightmare Principle': Ee was wrongfully dismissed, later became permanently disabled. Er had to pay him long-term disability for the rest of his working life
 - Common practice is to appraise lost benefits of Ee at 10% of wages
 - Commonly sought benefits by Ees include: loss of contribution to pension plan; loss of contribution to insurance; loss of company car, allowance, cell phone, etc.; mitigation costs such as job placement, resume preparation, etc.
 - **Recall: Termination pay is statutorily required; severance pay may be required under common law**
 - If termination pay has already been paid out, it is subtracted from severance pay so as to not be awarded twice
 - Whether there is cause or not, the Er can terminate the Ee at any time by giving reasonable notice
 - Subject only to discrimination – human rights legislation says that there can be no termination if it is linked to discrimination
- **Maternity Benefits (ss.45-53)**
 - Exist for Ee who has been employed for 52 consecutive weeks
 - No statutory minimum for Ee who has worked less than 12 months BUT human rights legislation might protect this Ee
 - At minimum under human rights legislation, Ee would likely be entitled to unpaid leave of absence. Would argue for paid leave though
 - *Woo v. Fort McMurray Catholic School Board* – Woman was canned for being pregnant; held to be discriminatory
- **Duty to Provide a Safe Workplace**
 - This is an implied term in any employment contract
 - Legislated mainly by the *Occupational Health & Safety Act*
 - Critical common law element: Ee can refuse to work in an unsafe condition without creating a cause for dismissal
 - This duty is constantly evolving at common law – may now include duty to provide a workplace free from harassment and abusive behaviour

- If an Ee is required to work in an unsafe environment, they can make a claim for constructive dismissal
- **Constructive dismissal: A unilateral change by the Er without reasonable notice that fundamentally alters an essential term or condition of the employment relationship**
 - Ee can take position that the Er's conduct has terminated the relationship
 - Fundamental changes: Demotion; substantial reduction in pay; exposure to unsafe working conditions
 - **Note: Er can make fundamental changes to the employment contract if reasonable notice is given!**
- *Lloyd v. Imperial Parking* (AB QB, 1996) – Lloyd hired; his supervisor was rude and abusive to him. Lloyd quit and sued for constructive dismissal. Court said a fundamental implied term in the employment contract is that the Er treat the Ee with respect, dignity, and civility; this term had been breached here
- **Wrongful Dismissal**
 - Occurs when Ee is terminated without just cause and without reasonable notice or pay in lieu
 - Cause: Behaviour which is incompatible with the essential terms of the employment relationship
- **Payment to Disabled Ees**
 - Ee is generally entitled to be paid if they are genuinely ill on a temporary basis
- **Suspension**
 - At common law, there is no right to suspend an Ee. Can only be done if the contract so provides
- **Things that aren't obligations of the Er**
 - Er doesn't have to give a reference – but if they do, it must be fair. Otherwise can be subject to a misrepresentation claim
 - Er doesn't have to provide the Ee with work
 - Exceptions: i) where Ee's wages are dependent on the amount of work received (e.g. commission); ii) where Ee needs exposure as much as he needs the wage (e.g. actors, celebrities); iii) Ee whose highly skilled profession is part of their identity, and depriving them of work would be a demotion or constructive dismissal

4. Wrongful Dismissal

Cause of Action

- **A claim for breach of contract seeking civil remedies in the courts**
- Generally speaking, there is no right to reinstatement under a wrongful dismissal claim
 - Limited exceptions: Public office holders; Ees who fall under *Canada Labour Code*; unionized Ees covered by a collective agreement
- **Key distinction: Human rights boards/LRB CAN reinstate a wrongfully dismissed Ee – but courts CANNOT!**
- Primary remedy for wrongful dismissal: Damages for failure to give reasonable notice and pay in lieu thereof
 - **Damages = Value of lost salary + Lost benefits during notice period – Mitigation**

Mitigation

- Any Ee who has been wrongfully dismissed has a duty to mitigate – they must actively seek comparable employment
 - If new employment is found, what they earn in their new job is deducted from their damages
 - This sometimes causes Ers to try and ‘wait out’ the Ee to see if they find other employment, thus reducing the damages that are owed
- If Ee gets fired and then retrains, it may be mitigation
 - Depends if this is a ‘reasonable way’ to mitigate the loss
 - If Ee was employed for a short period of time, this is probably not reasonable
 - If Ee was employed for a longer period of time, this is probably reasonable
 - **The longer the reasonable notice period, the more likely retraining will be seen as mitigation**
 - Numerous cases have forced Ers to pay the retraining costs of the Ee
- The evidentiary burden is on the Er to show that the Ee has conducted himself unreasonably
 - If Ee has not mitigated, the Er must prove this is unreasonable
 - Court can reduce damages/shorten the notice period if it finds that the Ee didn’t mitigate
- Damages for a fixed term contract
 - Unless there is a term to the contrary in the agreement, the damages are the balance of the unexpired term of the contract
- Independently actionable wrongs
 - Ee has a cause of action outside of breach of the employment contract – e.g. defamation, intentional infliction of mental suffering
 - Even if employment contract has not been breached, this wrong could be brought before the courts
- Near cause: Er cannot make out just cause for dismissal, but is close
 - If Ee is fired in this situation, Er would argue damages are owed, but not as much as there would be if Ee had behaved properly
 - *Dowling v. City of Halifax* (SCC) – Near cause or moderated damages have been laid to rest. In a wrongful dismissal claim, Ee is entitled to all or nothing

Employee’s Obligations

- **1) Duty to work, or hold himself out to do the work he is supposed to do**
 - Absenteeism and tardiness can breach this duty
 - There must be a culmination of these factors to create just cause for dismissal
- **2) Duty to obey lawful orders**
 - Orders from Er must be lawful, within scope of employment, not be patently unreasonable, and must not be dangerous to health and safety of Ee
 - Insubordination: Ee’s refusal to follow a lawful order
 - Minor insubordination is generally not sufficient to constitute cause, but significant insubordination or a cumulation of events can be
 - Key question: Has the employment relationship been fundamentally altered by the insubordination?
 - Ers can also argue that the Ee has breached industry practices
- **3) Duty to avoid misconduct**

- Generally refers to misconduct in the workplace – abuse of internet, vulgar language, etc.
- Off-duty time of Ee is usually considered to be irrelevant, with certain exceptions (e.g. teachers who engage in misconduct)
- **4) Duty to be competent**
 - Er has obligations to perform before an Ee can be deemed so incompetent that they are to be dismissed. These include:
 - Adequate/fair standards to be measured against
 - Coaching/training
 - Warnings that performance is inadequate
 - Warning of consequences if there is no improvement
 - Allowing time for improvement
 - If Ee misrepresents their skill set, Er can dismiss them at any time without cause
- **5) Duty of fidelity**
 - Ee has duty to serve Er faithfully and honestly
 - Applies to: trade secrets, misappropriation of funds, fraud, competitive activity by Ee, inventions created by Ee on company time, etc.

Termination of Employment Contracts

Can occur in four main ways:

- **1) Termination through dismissal or firing**
- **2) Expiration of a fixed term contract**
 - Will terminate automatically on happening of specific date or ascertainable event
- **3) Retirement**
 - Interesting issue: mandatory retirement – held to be a justifiable limit on age discrimination by SCC under *Charter* challenge; but BC CA challenging this decision; McLachlin C.J. was in dissent; some jurisdictions have passed legislation limiting mandatory retirement
- **4) Termination by mutual agreement**
 - Courts are usually suspicious of these situations! Tend to think Ee has been constructively dismissed

Wallace v. UGG (SCC, 1997)

- One of the most important employment law cases in the last 25 years
- Facts: Wallace had a secure position, was enticed to take a job with a different Er; he performed well there but was released
- Issue 1: Was there a fixed term contract? No, even though Wallace was promised employment until he was 65. Courts are reluctant to find this sort of agreement. Need specific language to create a fixed term contract
- Issue 2: Was Wallace entitled to punitive damages? No. Only available where Er's conduct was "harsh, vindictive, reprehensible or malicious." Er's conduct was not so egregious as to warrant these damages
- Issue 3: Was Wallace entitled to aggravated damages? No. Ee cannot be awarded aggravated damages in a wrongful dismissal claim unless there has been a separate actionable wrong. Er is entitled to terminate the employment contract when they want – this cannot in itself give rise to a claim for aggravated damages

- Issue 4: Does the Er have to give reasons for the termination? No. As long as Er gives reasonable notice when terminating the employment relationship, reasons do not need to be given. Exception: When Er terminates on a discriminatory ground
- **Key point: The reasonable notice period may be extended based on the manner in which the Er has dismissed the Ee**
 - Traditional contract law doesn't take manner of termination of contract into account, but employment law does. Why? Employment relationship is special:
 - There is a power imbalance between the parties
 - There is an acute vulnerability on the part of Ees
 - Work is one of the most fundamental aspects of a person's life
 - **New rule of law created: In the course of dismissal, Er must be reasonable, candid, honest and forthright**
 - If this rule is not followed, the reasonable notice period will be extended!
- Factors to be added to the *Bardal* test: i) inducement to leave previous employment; ii) promise of job security; iii) assurances of fair treatment; iv) manner of dismissal
 - If Er is untruthful, misleading or unduly sensitive, it will run counter to the good faith and fair dealing requirement of the employment relationship
 - Note: This list is not exhaustive!
- In this case, there had been a breach by the Er: Wallace was dismissed days after receiving compliments on his work; Er made foul comments around the industry about Wallace; Er played hardball in post-employment negotiations
- Reasonable notice period was determined to be 24 months – as high as courts will go!
- **Recall: Reasonable notice at common law is an implied term! Where there is an express provision on reasonable notice, the common law presumption is rebutted. In accordance with *Wallace*, if there is an express clause in the agreement regarding reasonable notice, the case won't apply!**
 - BUT some cases that have dealt with express clauses on reasonable notice and *Wallace* has still been applied – so argue either way!
 - Just remember that reasonable notice at common law is an implied term that can be rebutted by the agreement! It only applies where the agreement is silent on reasonable notice
- McLachlin (minority):
 - Agrees with result of majority, but not with how the got to it
 - Thinks majority confused separate things: notice period at common law is how long it would take Ee to find comparable employment. Majority implemented factors that have nothing to do with this!
 - Wants to go back to basic principles: what is the time frame for the Ee to find comparable employment?
 - Factors identified by the majority should be addressed through separate causes of action (e.g. negligent misrepresentation, etc.)
 - Wants to import into the employment contract an implied term to treat Ees in good faith
- This case has resulted in very unpredictable notice periods being granted!

Criticism of *Wallace*

- This was an attempt to protect vulnerable Ees and punish unfair Ers, BUT extension of reasonable notice period doesn't result in fairness to Ees

- What if one Ee makes much more money than another one? Court doesn't take this into consideration
 - In a tortious claim, the court would look at distress (which is common to both of them) and award accordingly – probably the same damages to each
 - Under *Wallace*, someone making a lot of money will be compensated much more than someone making very little money, even though their distress is the same!
- More fundamental flaw: If Ee finds new work before the notice period ends, the Er is not being punished at all!
 - On the other hand, a tortious claim would award them damages that they would receive for sure
 - As a result, some courts say that mitigation doesn't apply to *Wallace* damages
 - Attempt to compensate for what SCC did in this case

McKinley v. BC Tel (SCC, 2001)

- Facts: McKinley took a leave of absence from his job due to high blood pressure; was told he would be offered a less demanding job with the company. His employment was terminated when he was on his leave. Company said they terminated him because he had been dishonest about his illness. Turns out he had withheld medical information on his condition
- Before this case, any dishonest behaviour by an Ee (regardless of how minor it was) could be cause for dismissal
- SCC rejects this line of reasoning. Instead, look to contextual nature of dishonesty in question:
 - **Seriousness** of misconduct
 - Whether there is a **habitual neglect of duty** on the part of the Ee
 - Whether there is **repeated wilful disobedience** on the part of the Ee
 - **Did the dishonesty strike at the core of the relationship in such a way that the relationship could no longer continue?**
- **Key point: There is a notion of proportionality between the misconduct and the penalty when an Ee is dishonest. The real question is not whether there has been misconduct, but whether the misconduct has been raised to the level of cause**

Constructive Dismissal

- When Er makes a unilateral change to a fundamental term of the employment contract without adequate notice of the change
 - Minor or moderate changes are allowed, as they don't fundamentally alter the employment contract
- Changes on reasonable notice do not constitute constructive dismissal
 - Reasonable notice here is the same as in termination of the employment contract – look to *Bardal* factors of age, skill-set, length of service, other opportunities, etc.
 - This makes sense, since Er is essentially terminating the existing relationship and creating a new contract
- Changes that agreed on by both parties do not constitute constructive dismissal
- In face of constructive dismissal, Ee can either: i) accept the change and keep working; ii) reject the change by resigning and then suing for damages saying that Er breach the agreement
- Not required that Er intends to force the Ee to resign

- **Test for constructive dismissal is objective: Has there been a unilateral change to a fundamental term of the agreement without reasonable notice being given?**
- What about mitigation? I.e. what happens if Ee objects to the change, but Er disagrees that it is a fundamental change?
 - Widely accepted view is that Ee doesn't have to keep working for the Er so as to mitigate her loss
 - Duty to mitigate doesn't extend so far as to cause an Ee to accept an inferior job with Er
 - Based on understanding of trust and fidelity: if Er makes unilateral changes to fundamental terms of the contract, this trust and fidelity has been broken and Ee doesn't have to continue working there

Farber v. Royal Trust (SCC, 1997)

- Facts: Farber was a regional manager and his job was to supervise branch managers; his position was eliminated through corp restructuring and he was offered a branch manager position at a shitty location. He resigned and claimed constructive dismissal
- The intention of Er is irrelevant in determining whether there has been constructive dismissal – only relevant consideration is how reasonable person would see it
- Switching methods of remuneration can be grounds for constructive dismissal – here Farber went from guaranteed salary to commission
 - Rationale: can cause greater uncertainty in the Ee's life
- **Indicia of fundamental changes to the relationship:**
 - **Loss of prestige and responsibility**
 - **Change in compensation structure**
 - **Real reduction in amount of compensation when looking forward to the future**
 - **Change in the amount of work the Ee has**

Notice of Termination by Ee

- Typically referred to as 'resignation'
- **Ee has obligation to provide reasonable notice of intention to resign**
- *ESC*, s.58 – basic rules of Ee reasonable notice
 - If employed for 3 months to 2 years, must give one week notice
 - If employed for 2+ years, must give two weeks notice
- **At common law, there is an obligation on the Ee to give reasonable notice. This can be greater than the provisions in the ESC!**
 - Key question: How long would it take to find and train a replacement Ee?
- *Treesavers International v. Savoy* (AB CA, 1992)
 - Facts: Two Ees gave 2 weeks notice and then took customer list from company and went into competition with them. Er had to hire replacement workers on very short notice. Er sued for expenses incurred in hiring new Ees, loss of business and misappropriation of confidential information
 - Court said reasonable notice period that Ees had to give was 18 months, and damages were recoverable for all expenses incurred and loss of profits
 - Looks like court was trying to punish Ees for breaching duty of fidelity

5. Human Rights Legislation

- An increasingly prevalent issue in employment and labour law!
- Afforded near-constitutional status, so they can override express terms of the collective agreement or employment contract
- New areas: Disabled worker protection; family status protection
- 80% of complaints to the AB Human Rights Commission are employment related

Federal and Provincial Human Rights Legislation

- *Human Rights, Citizenship and Multiculturalism Act*
 - Enumerated grounds are given a liberal and expansive definition
 - E.g. Religious beliefs→atheism; gender→sexual orientation, transsexuals, cross-dressers and transvestites, pregnancy; physical disability→chemical dependency; place of origin→language; source of income→welfare; family status→anti-nepotism rules
- Canadian legislation has an inclusion for criminals who have received a pardon. AB has no such provision
- Federal act excludes some things that are covered provincially: source of origin, place of ancestry
- Key sections relating to employment (*HRCMA*):
 - 6 – Equal pay provision
 - 7 – Discrimination in hiring
 - 8 – Discrimination in applications, advertisements and job postings
 - 9 – Trade unions can't discriminate
 - 11 – Reasonable and justifiable limitations
 - **44 – Important definitions!**

The Duty to Accommodate

- **Er has duty to accommodate an Ee who has a disability or some other immutable characteristic**
- Most significant practical issue that Ers, unions face on a day-to-day basis
- As it currently stands, an area of unsettled law!
- Ers frequently impose standards that discriminate on immutable grounds
 - Directly discriminatory: standards that discriminate on their face (e.g. rule that truck drivers must be able to see discriminates against blind people)
 - Indirectly discriminatory: standards that don't discriminate on their face, but adversely affect an enumerated group indirectly (e.g. rule that police officers must be of certain height/weight discriminates against women)
- **Where Er has established a workplace rule or job qualification that directly or indirectly discriminates against an individual on a prohibited ground, the Er must accommodate the individual to the point of undue hardship**
 - The discriminatory rule must be based on a prohibited ground
 - Accommodations include modifications to the workplace, rules and job qualifications
 - Er has obligation to explore possible accommodations and provide them to the point where undue hardship is suffered
- Undue hardship: Not easily defined; is driven by context
 - Er will experience SOME hardship, but shouldn't experience it unduly

- Money is a weak indicator of hardship – human rights principles indicate that Er must bear some expense of Ee accommodation
- **In determining if duty to accommodate is triggered:**
 - **Did Er put into place a rule or requirement that discriminates against certain Ees?**
 - **Did the Ee complain that they have been negatively affected by the rule, and this negative effect is related to a prohibited ground?**
- **Where a rule is prima facie discriminatory, the onus is on the Er to show that the rule is a BFOR and that it isn't possible to accommodate the Ee without suffering undue hardship**

Direct vs. Indirect Discrimination

- Before *Meorin*, the court considered discrimination on the basis of whether it was direct/indirect
 - Direct/threshold – based on an immutable characteristic
 - Ee could rebut this by establishing a BFOR
 - Had to prove: i) Standard was imposed honestly or in good faith and was not designed to undermine human rights legislation; ii) Standard was necessary to perform work safely and didn't place an unreasonable burden on those affected
 - Indirect/adverse effect – Er adopted rule that appears on its face to be neutral and applies to all Ees equally, but has a special effect on a certain group due to their characteristics that are protected by human rights legislation
 - No BFOR defence here!
 - Er has to prove: i) There is a rational connection between the job to be done and the workplace rule; ii) Er couldn't reasonably accommodate the needs of the Ee without incurring undue hardship

British Columbia v. BCGEU (Meorin) (SCC, 1999)

- Leading case in this area!
- Facts: Firefighter in BC had worked at job for 3 years; BC government introduced a new physical standards test that she couldn't pass (aerobic portion), and she lost her job; she sues for discrimination in being let go
- Both sides invited SCC to adopt a new model that avoided the distinction between threshold and adverse effect discrimination
 - The concept of reasonable accommodation was integrated into the BFOR defence (basically a combination of the two defences)
- Reasons for abandoning the previous approach:
 - (a) The distinction was artificial – was causing Ers to focus on what the rule was instead of what was actually happening in the workplace;
 - (b) Different remedies arose depending on what type of discrimination was found – direct: rule would be struck down if it failed the test; indirect: rule would be inapplicable to the particular Ee if it failed the test;
 - c) Ers were having to meet different standards
- **The “Unified Approach”:**
 - **1) Er must have adopted the standard for a purpose rationally connected to the performance of the job (identify general purpose of the impugned standard)**

- 2) **Er must have adopted the standard in an honest and good faith belief that it was necessary for fulfillment of a legitimate work-related purpose**
 - If there was any intent to discriminate, this part fails – intent is still relevant to the analysis!
 - But if there was no intent to discriminate, this part can still fail
- 3) **The standard is reasonably necessary to accomplish that legitimate work-related purpose**
 - Look at the individual Ee – can Er only accommodate the claimant and others affected by incurring undue hardship? If accommodation is possible without incurring undue hardship, the rule is discriminatory
 - Er bears burden of showing it is impossible to accommodate the Ee without incurring undue hardship
 - BFOR defence only applies where Er shows they cannot accommodate the Ee's condition or characteristic without incurring undue hardship
 - (a) Is there a better test available?
 - (b) If other standard are available, why aren't they being implemented?
 - Er must show why the other test is not being used
 - (c) Is it necessary for all Ees to meet the single test, or could the standards reflect group or individual differences and capabilities?
 - E.g. Different standard for men/women
 - (d) Can the job be done in a less discriminatory way that still accomplishes the Er's legitimate purpose? I.e. can job duties be adjusted?
 - (e) Is the standard designed to ensure the desired qualification is met without placing an undue burden on the Ee? I.e. can individual adjustments be made?
 - (f) Have other parties who are obliged to assist in the search for accommodation fulfilled their roles? **Unions and Ees have an active obligation to bring disabilities to the attention of the Er, seek out accommodation and actively engage the Er in discussions about appropriate accommodations – failure to do this may relieve the Er of duty to accommodate**
- If test fails on any one point, it fails overall. Answer must be 'yes' to all three questions
- Still have to determine if standard was prima facie discriminatory – to be, it must discriminate based on an immutable characteristic
- **Factors for determining if there is undue hardship:**
 - 1) Financial cost: some cost is acceptable, but unclear where to draw the line. Case law suggests if the cost of accommodation is close to or exceeds the salary of the Ee, it is probably undue
 - Courts will look to Er's size, cost of their operation and budget
 - The larger the Er, the less likely there will be undue hardship
 - 2) Disruption of the collective agreement: The greater the disruption, the more likely there will be undue hardship
 - Some disruption is acceptable
 - 3) Problems and morale among other Ees, as caused by the accommodation
 - Constant accommodation by coworkers can lead to morale problems and this can lead to undue hardship

- Courts are careful in how they gauge this element
 - 4) Risk to safety or equipment
 - 5) Interchangeability of workforce or facilities: is there a high turnover in other positions that might be appropriate for the accommodated worker?
 - In a large company, chances are better of finding another job for the Ee
 - 6) Ease of workplace modification
- **Obligations of the Ee (Renaud):**
 - 1) Must bring the disability or personal characteristic to the Er and seek accommodation
 - Must be disclosed before termination (prevailing view, but debated)
 - 2) Must provide relevant medical information to substantiate the personal characteristic or disability
 - Generally, only applies where disability is not self-evident
 - Sometimes all that is needed is a description of the limitations of the Ee
- In this case, the Er failed because there was a failure to take into account the difference between men and women when the standard was being designed. It was determined that the aerobic standard of the test was not necessary in the performance of the job!

Entrop v. Imperial Oil (ON CA, 2000)

- Facts: Alcohol and drug-testing at an oil refinery. Entrop was a recovering alcoholic but had been sober. Alcohol and drug addiction is a disability under human rights law
- Court said that random drug testing is not a BFOR – it measures past drug use instead of current impairment. Therefore, it isn't necessary to accomplish the Er's goal
- Random alcohol testing detects current impairment, so it is okay
 - BUT Imperial Oil's policy dismissed Ees for a first offence, so it was shot down – too harsh, strict and arbitrary. There must be proportionality
- Despite this case, drug and alcohol testing is still used! Basically ignoring the rule
- This case was harshly criticized:
 - Causal users are not addicted and can be legitimately busted
 - Testing is not prima facie discriminatory because it isn't trying to locate someone who has a disability
 - Can help disabled Ees get treatment

PART II – COLLECTIVE LABOUR RELATIONS

1. Introduction/Constitutional Responsibility for Labour Relations

- Why make a distinction between employment and labour law?
 - Only two parties in employment law; but there are three parties in labour law
 - Individual contract of employment doesn't work too well for low level Ees
 - Unions became representatives of these Ees, i.e. 'bargaining agents'
 - Agents in a traditional legal sense – negotiate, sign agreements, terminate agreements, speak on behalf of Ees
 - Ability to enter into contracts on Ees' behalf, protect members from excesses that may occur in the workplace
 - **Unions level power imbalance between Ees and Ers**

The Collective Agreement

- Employment agreement negotiated by the union and Er
- Doesn't treat Ees differently – every Ee covered has basic rights

The Union Movement in Canada

- Grew with philosophical shift from 'master and servant' to empowerment of individuals through their work
- Work is a defining feature of an Ee's life and has far-reaching implications (SCC)
 - If Er is going to remove an Ee, it must be done with the highest standard of procedural fairness and natural justice

Employment vs. Labour Law: Other Motivations

- **1) Inequality in bargaining power**
- **2) Couldn't get job back under common law once fired**
 - Ees could be terminated at will under common law; only requirement was reasonable notice
 - Unionized Ees keep their jobs unless there is just cause or LIFO (seniority)
 - Common law: can never get job back once you are fired (unless human rights)
 - In unionized setting, there are ways to get job back if you are fired
- **3) If Er is sued for wrongful dismissal, damages will be modest**
 - Problem for individual Ee due to rising costs of litigation – deep pockets of Er could stretch it out
- Other developments
 - Introduction of labour standards legislation – minimum standards, OH&S
 - Evolution of the trade union

Threshold Issues

- Labour law and employment law will never intersect!
- They will both intersect with human rights principles and statutes
 - This in an area of increasing importance!

Forums

- **Common law courts**
 - Wrongful dismissal claims
 - Individual contracts of employment
 - No room for going here under collective labour relations!
- **Employment Standards**
 - Claim for statutory entitlements
 - Determines whether Er is living up to statutory minimums
 - Advantages over common law courts: cheaper, more user-friendly
- **Human Rights**
 - Breach of enumerated grounds
 - Most common grounds of complaint: sex, nationality
- **Labour Relations Boards**
 - Tribunal that deals with union/management relations
 - Every province and the federal government have a labour relations statute
 - Rules for how Ers and unions deal with each other
 - Provides mechanisms and remedies for union-management relations

- Deal with disputes between unions and Ers that don't have to deal with interpretation of the CA
- Deals with things such as: strikes/lockouts; organizing drives; decertification; raids by other unions; negotiation of CA; ULPs
- When dealing with the parties, they consider that the relationship is a continual and ongoing one!
- **Grievance Arbitration Board**
 - Private court that deals with breaches of the CA
 - There must be an actual agreement in place between Er and union for this board to be involved
 - Every CA will have a grievance procedure in it. If it doesn't, default provisions will be applied
 - Grievance arbitration is a fundamental part of the CA – fast, efficient, binding, relatively inexpensive, expertise
 - How does it work?
 - Mutually agreed upon chairperson
 - Each side gets to appoint a nominee
 - Majority rules; decision will be binding
 - Parties can decide on number of members making up the board

2. The History of Labour Relations in Alberta

- British roots; demand for workers was greater than supply was. Skilled craftsmen organized themselves into trade unions, known as 'guilds.' Legislation was passed that made guilds unlawful; this legislation also imposed wage and price controls on craftsmen. This legislation lasted until the mid 1800's, when there were many skilled workers and very few jobs
- The advent of the printing press, Marxism and collective power came about. In Canada in the early 20th century, there were a series of strikes. Fear of communism led to the imposition of criminal charges on strikers
- Around 1925, legislators realized that criminal charges were too severe. *Toronto Transit Commission v. Snider* went all the way to PC, where it was ruled that labour is a provincial responsibility (with the exception of federally regulated industries). Federal legislation is much more Er-friendly than its provincial counterpart
- After WWII, labour movement gained a lot of support. Government focus turned from suppression to management. Key piece of legislation was the *Wagner Act*. Provisions in the Act are still considered to be the cornerstones of employment law:
 - **(a) Freedom of association and union recognition** – most fundamental point! Unions were recognized as legal entities
 - **(b) Compulsory bargaining rights** – certified union in the workplace has the right to bargain with Er. Once union is certified, Er must recognize it
 - **(c) Government intervention before strikes occur** – preconditions before strike/lockout can occur
 - **(d) Unfair labour practices**
 - **(e) Legal status of CA** – CA has legal effect and is binding
 - **(f) Grievance arbitration** – dispute resolution mechanism in CA; way of resolving differences

- **(g) Establishment of LRB to regulate management/labour** – specialized tribunal to act as the party responsible for managing Er-union relations

Rules of Statutory Interpretation

- **1) Ordinary meaning**
 - Words are presumed to have their normal and ordinary meaning unless they are defined otherwise or context demands that they be interpreted otherwise
 - Presume common meaning unless there is an indication to the contrary
 - This is the Golden Rule in statutory interpretation!
- **2) Legislative purpose**
 - What is the purpose of the statute? What is it trying to correct or prohibit? What perceived need it is responding to?
 - Go with the interpretation that is best going to capture legislative intent
 - E.g. Labour relations statutes: Purpose is to set ground rules for interaction between unions and management; level the playing field
- **3) Presumption v. tautology**
 - There is no such thing as a superfluous word in a statute. Every word is intended to be there
- **4) Deliberate exclusion**
 - If something isn't in the statute, it was deliberately omitted
- **5) Same words = same meaning**
 - The same word should mean the same thing throughout the agreement
 - E.g. 'day' and 'school day' mean different things. 'bargaining agent' and 'certified bargaining agent' mean different things
- **6) Avoid absurdity**
 - Presumption against interpretations that would lead to absurd consequences
- **7) Harmonious construction**
 - Never read a single section of an instrument in isolation; need to read the section in the context of the statute/contract as a whole
 - If two interpretations are possible, but one would nullify or make another section absurd and one would not, go with the latter interpretation

External Sources

- 1) Debates at federal or provincial level
- 2) How have the courts interpreted particular words or phrases?
- 3) Expert reports (if it is a societal issue)
- 4) Judicial notice – facts that are so notoriously well-known that the courts just accept them

3. The Labour Relations Code and the LRB

Major areas of the *Labour Relations Code*

- Board Powers
- Union and Er Status
- Certification – process by which a union gets organized in the workplace. Er can voluntarily recognize the union OR the union has to get certified as the bargaining agent

- Transfer of Bargaining Rights – when a union certificate will transfer from one Er to another; common and successor Ers
- Revocation – what has to happen for a union to get booted from the workplace by the Ees; timeframes for certification and revocation
- Duty to Bargain in Good Faith – arguably the most important section in the *Code*
- Pre-conditions to Strikes/Lockouts
- Regulation of Strikes and Picketing
- Government Intervention - government options for stopping strike/lockout
- Effect of CA – what happens when CA is in effect; remedies for breach
- ULPs
- Duty of Fair Representation

Definitions

- 1b – Bargaining Agent: don't necessarily have to be certified to be a bargaining agent! Can be voluntarily recognized
- 1d – Certified Bargaining Agent: union that has gone through formal certification process. The distinction matters when the process breaks down later
- 1l – Ee: defined in broad terms, but same analysis applies here as applies under employment law. If you don't meet the definition of Ee, you can't organize. Some exceptions to Ee:
 - Conflict of interest exclusions – someone who exercises managerial functions (right to hire or fire, right to discipline, right to schedule and organize work). LRB will sometimes have to look at what person does during the majority of their time at work
 - Confidential Ee – someone who has access to sensitive corp info, particularly where that info relates to collective bargaining. Examples include secretaries for CEO, VP; human resource Ees; financial Ees
- 1m – Er: defined in broad terms
- 1n – Er Organization: Ers are allowed to band together and negotiate a CA as a unit
- 1p – Lockout: checklist for what has to occur for a lockout to occur; i) closing of a place of employment, suspending or refusing to give work; AND ii) this is done for the purpose of exerting pressure on Ees; OR iii) this is done for the purpose of trying to get Ees to accept Er's terms and conditions
- 1v – Strike: i) stopping work, refusing work or refusing to continue work; AND ii) done by two or more Ees acting in combination; AND iii) being done for the purpose of trying to get Er to accept Ees' terms and conditions
- 1x – Trade Union: object is to regulate relations between Ees and Er
- 12 – Powers of the LRB: if power not listed here, LRB doesn't have it. AB LRB has relatively fewer powers than LRBs in other jurisdictions. Biggest omissions include:
 - **I) N power to impose a CA** – in other jurisdictions, LRB can do this. Huge disadvantage to unions!
 - **II) No power to issue automatic certification** – other jurisdictions' LRB can do this if Er is found guilty of ULP during certification process
 - **III) Ability to impose damages against the union** – BUT cannot impose damages on the Er
 - **IV) No ability for LRB to impose a lesser form of discipline upon Ee who may be terminated for strike-related conduct**

- 16 – Applications: any inquiry to be brought must be done so in accordance with this section. 90 day limitation period; process to expedite matters
- 17 – Remedies: related to s.12
- 21 – Ee has right to be a member of a trade union
- 24 – To become a trade union, organization must file its constitution with the LRB
- 25 – Trade union is capable of prosecuting and being prosecuted; capable of suing and being sued

4. Trade Unions and Employers' Organizations

- Unions are a unique legal entity – they are not considered to be the same as corp, associations, or any other recognized legal entity

Berry v. Pulley (SCC, 2002)

- Facts: Canadian Airlines and Air Canada merge; one Er has to take over two unions and mesh two groups of Ees. Two groups of union members are suing each other over breach of contract – can't agree on how seniority, other issues will be dealt with
- **Unions are legal entities, they can sue and be sued; can have assets and liabilities**
- Official recognition by SCC that unions are legal entities

United Nurses of Alberta v. Government of Alberta (SCC, 1992)

- Facts: Nurses stage an illegal strike and ignore order to go back to work; QB ordered them pay \$40,000 in fines and they appealed decision
- **Unions have legal status to do certain things, and because of this they are subject to the law if they choose to break it**
- A union can be found in criminal contempt!
 - *Royal Oaks Mines* (SCC, 2002) – union can be liable for actions of its members

5. Scope of the Legislation

Midwest Pipelines (AB LRB, 1989)

- Facts: Company had a number of rig welders working; some were incorporated but some were just individuals. They were all subject to essentially the same conditions of work with Midwest. Union wanted to certify the whole group, but company claimed half of them were Ees and half were independent contractors
- **Whether or not someone is an Ee will be established by using the same tests we used under employment law section (Control, Montreal, Business Integration and Sagaz Industries Tests)**
- Definition of Ee in the *Code* is very broad!
- **LRB will look to actual relationship between parties, not how they 'paper' it**
- Managerial functions that may lead to an exemption: i) exercise of discretion and control; ii) who bears burden of remuneration; iii) imposition of discipline; iv) hiring of Ees; v) authority to dismiss Ees; vi) who other Ees perceive to be Er; vii) existence of intention to create relationship of Er and Ees
- **Always use the common law Ee tests to determine if someone is an Ee, even in a labour law setting!**

6. Acquisition of Bargaining Rights by Certification

What is certification (s.40)?

- **Process by which the union obtains the legal right to represent a group of Ees**
 - Immediate and exclusive right of representation for a group of Ees
- Automatically replaces any other union that might currently be in place
- Sometimes referred to as 'union organizing'

Certification Timeline

- **1) Trade union files constitution**
 - Union HAS to file its constitution at LRB (s.24)
 - **Cannot file for certification application until at least 60 days after filing of constitution with LRB**
 - Usually takes far longer than 60 days between filing of constitution and application for formal certification anyway (s.37)
- **2) Filing of application**
 - **Need evidence that 40% of Ees in the bargaining unit that the union wants to certify support the application**
 - Union will try to get more than 40% support, just in case
 - Ees can show support by: i) signing a petition of support; ii) paying \$2 for a union membership card
 - Union doesn't want Er to know they are canvassing for support at this point!
 - Will engage in 'covert operations'
 - **There is a 90 day maximum for the union to get 40% support – after this period expires, they have to start process of getting Ee support all over again**
 - If union gets required percentage, the file the application with the LRB – say they have the required support (40% of bargaining unit) and want to be certified as the bargaining agent for the Ees
 - **As soon as document filed with LRB, statutory freeze period takes effect on Er – s.147(1)**
 - Er must conduct 'business as usual'
 - Limited ability to hire, fire, discipline Ees or close down operations
 - Terms and conditions of employment are frozen
 - Er cannot make any inducements or threats during this period
 - If someone is dismissed for multiple reasons during this period, and only one of these reasons was because of union involvement, it is ULP – fear of unionization doesn't have to be the main reason for dismissal
 - LRB will assign a board officer to investigate the application (ss.34, 35). Will investigate things such as:
 - Is the union a registered trade union in AB? Does the union have the required 40%? Did the union get the support within 90 days? Is this an appropriate bargaining unit? Is this a 'yellowdog' union?
 - **Within 10 days, the officer will present her report. It is filed, sent to both Er and union, and they have 48 hours to file any objections they may have**
 - This is where the strategy and tactics of labour law come into play!
 - Er gets to see which Ees voted in favour of the union
 - **They can object to some of these Ees being included in the bargaining unit (e.g. managerial exceptions). They can also ask for more Ees to be added to the bargaining unit**
 - More Ees in bargaining unit generally benefits Er

- If Er proposes changes to the bargaining unit, they must include reasons
- **Main argument here: who should be in the appropriate bargaining unit and who should be excluded**
- 3) Vote takes place
 - At end of the 48 hour objection period, LRB has a hearing
 - A vote is scheduled
 - All Ees who could 'potentially' be included in the bargaining unit vote
 - Disputed Ees' ballots are double sealed
 - LRB wants vote done as quickly as possible – delays usually favour Er
 - **After the vote is conducted, both sides argue their case to LRB on who should be included in the bargaining unit. LRB then decides appropriate bargaining unit**
 - **Ees who voted but are ultimately excluded from bargaining unit have their ballots destroyed**
 - **50% + 1 of ballots cast is required for union to be certified as the bargaining agent**
 - ULPs can vitiate the results of the vote. But in AB, the best remedy the LRB can grant the union is another vote (as opposed to other jurisdictions' remedial abilities)
 - Successive votes usually result in decreased union support
 - If the union fails the vote, they have to wait 90 more days before restarting the process and trying to get signatures again – s.57(a)
- **Review: Union files constitution → Get 40% Ee support within 90 days → File certification application → Statutory freeze on Er's activities → Officer investigates and files report → Objections and hearing regarding application → Vote takes place → LRB determines appropriate bargaining unit → Votes are counted**

Open Period #1 (s.37)

- Those periods of time when a union is able to file a certification application
- 37(2)(b) – 37(3) deal with 'raiding unions': when one union is in the workplace and another union comes along and wants to be certified
 - Must be a statutorily defined 'open period' before raiding union can come in
- **37(2)(a) – No union currently in place**
 - If no CA in place and no union representing Ees, there is always an open period in effect
- **37(2)(b) – Union in place, attempting to get 1st CA**
 - Incumbent union has 10 months to get 1st CA after they have received 50% + 1 in the certification vote
 - If no CA is reached in this time, 10 months + 1 day later is an open period
 - **Revocation: Ees can revoke union during this period as well. This is basically an 'undoing' of everything that union did during certification process. Also requires 50% + 1 of Ee vote**
 - Raiding union has to go through entire certification process itself
 - Both Er and incumbent union can file complaints against the raiding union
- **37(2)(c) – Court proceedings challenging certification**
 - If there are court proceedings, the union certificate remains in effect

- The timer on the union's 10 months to get a CA starts as soon as court's decision is laid down
- **37(2)(d) – CA less than 2 years in length**
 - If CA less than 2 years in length, open period is the last 2 months of the agreement
- **37(2)(e) – CA more than 2 years in length**
 - If CA more than 2 years in length, open period is 11th and 12th months of the second and subsequent years, and the last 2 months of the CA
 - E.g. If 5 year CA, open periods are last two months of 2nd, 3rd, 4th and 5th years
 - Purpose: if Ees are locked in long-term, they still have opportunity to dump their union or bring in another union
 - If a new union comes in, it is subject to the remainder of the existing CA, but it has the opportunity to reopen collective bargaining (must give 2 months notice – s.40[3])
- 37(3) – Confusing section!
 - **If CA is more than 2 years in length, the rule about the 11th and 12th months in the second and subsequent years being open periods won't apply unless the 11th or 12th months are at least 10 months before the end of the CA**
 - E.g. 4 year C.A. Starts Sept.01.05 and ends Aug.31.09. What are open periods? July and August in 2007 and 2008. Why not in 2009? Because of 37(3) – these months aren't 10 months before the end of the CA!
 - E.g. CA starts Sept.01.05 and ends Dec.31.08. When are open periods? July and August 2007, and November and December 2008 (last two months of CA). No open periods in July and August of 2008 – they aren't 10 months before the end of the CA!
 - **The last two months of the CA will still be open periods here!**
 - Why this rule?
 - Have 10 months to try and get new agreement
 - Would be unfair to expose union to two open periods in such a short time, since there is always one at the end of the CA

Determination of Appropriate Bargaining Unit (s.35)

- **Key question: Is the unit that the union is applying for an appropriate BU?**
 - Doesn't have to be the BEST unit, just has to be AN APPROPRIATE unit
- LRB has power to alter composition of BU
- Test for determination of appropriate BU:
 - **(i) Community of interest**
 - FUNDAMENTAL consideration in determining BU
 - Will the interests be largely the same or homogeneous?
 - Consider factors such as hours of work, conditions of work, wages, skill sets, etc.
 - The more diverse these factors are, the more difficult it will be for a union to negotiate for this group as a whole
 - Er will always ask: what BU will make it most difficult for union to win?
 - Can be creative in making these classifications!
 - E.g. Bakery: bakers, assistants and salespeople – lots of possibilities!

- **(ii) Er bargaining history; nature of Er organization**
 - Are there unions already at the worksite? If so, what would be the effect of organizing this new group? Can this new union fit into a situation where there are already other unions?
 - Is this a single or multiple locations Er? If multiple locations, does it make more sense to organize in one location, or should they all be organized?
- **(iii) Viable bargaining structure**
 - Look for a BU that has defined parameters – a core set of duties or interests that is unlikely to change
 - Makes it hard to unionize industries with high turnover!
- **(iv) Avoid fragments and tag-ends**
 - Fragmentation: In deciding whether or not BU is appropriate, the labour board will not accept a unit that fragments a group of Ees with the same community of interest
 - Tag-ends: Are there going to be groups of Ees that are not represented? Can amend proposal so that there are no tag-ends
- **(v) All Ee units**
 - All Ees working for company in same BU
 - Presumption in favour of this – union and Er have to rebut it if they don't want all Ee BU
 - Labour boards prefer this type of BU!
- **(vi) Reasonably similar bargaining units**
 - Considerations in specific industries
 - Clerical staff almost always carved out!

McKenzie Catering (AB LRB, 1997)

- Facts: Kitchens in rural and northern AB served forestry industry, drilling rigs, etc.; 22 isolated camps in total and 169 Ees in these camps. Union tried to certify a single camp that had 27 Ees; filed certification application, gained 40% support, proposed BU to be that single camp. Er objected – not a viable unit, high turnover and many other camps have the same working conditions
- LRB sets out list of factors to be considered in determining whether a unit is appropriate (see above list with three additions!):
 - Traditional methods of union organization or difficulty with organizing
 - Agreement of the parties
 - Desires of the Ees and Er
- Using these factors, LRB decides a site-specific BU could be appropriate

7. Acquisition of Bargaining Rights by Voluntary Recognition

- Er can voluntarily recognize a union as bargaining agent for the Ees
- Union doesn't have to go through whole certification process BUT union rights are not as strong or long-lasting against Er as a certified union's would be
- **If you are in a voluntarily recognized relationship, Er can give union 6 months notice at any time that they no longer recognize you as the bargaining agent**
 - **This can occur at any time before 6 months of end of CA**

- In these 6 months, union must try and become certified. If they don't move quickly, they will be susceptible to raiding unions
- Ees can apply for revocation of a voluntarily recognized union at any time

8. Modification of Bargaining Rights

- Exist to protect union bargaining rights when business ownership changes hands
- Successorship = transfer or disposition + transfer of business or part of business (functional economic vehicle) + control, ownership or direction transferred into hands of 3rd party
- Common Er = associated or related activities being carried on + by two or more entities + exercising common control and direction + absence of labour relations reason for this to happen

Successor Er (s.46)

- **Occurs when Er transfers business or part thereof to another owner**
 - One Er has simply replaced another
- 3 elements that union must prove to show that successor Er should become bound by the certificate that union had with prior Er:
 - **1) Sale, lease or disposition**
 - As broad as a sphere of corp transfers as possible is covered
 - Any sort of disposition will allow LRB to find that this requirement has been met
 - **2) Business or undertaking, or part of business or undertaking, was transferred**
 - This is where the battle rages!
 - 'Business' and 'part of business' have specific meaning in labour context
 - What is a business?
 - **A discrete entity that has the ability to carry on business on its own**
 - A viable business entity must be transferred
 - Refers to a 'going concern' or 'functional economic vehicle'
 - Factors that LRB looks at:
 - Fixed assets such as buildings, machinery, fixtures
 - Goodwill
 - Customer lists
 - Inventory
 - Existing contracts with suppliers
 - Existing Ees (most important consideration!)
 - **3) Control of the business was passed on**
 - If Company A does anything to transfer, loan or merge anything so that control rests with Company B, this section is satisfied
- LRB has authority to decide if all 3 elements have been met, whether CA is in effect, whether CA has to be modified, whether BU has to be redefined, whether certificate has to be modified
- There is no right answer in this area of the law: it can turn on advocacy!

Ajax Union (ON CA, 1998)

- Facts: Town was on term contract with Ajax what wasn't renewed, as city decided to contract work out to C Ltd. C Ltd. hired drivers and mechanics but didn't buy buses or any fixed assets. Union brings successorship application
- CA ruled that there was a transfer of a business that would give rise to a successorship
 - Lots of value was transferred when the workforce came over
- **Labour constitutes a significant part of a business and can give rise to successor Er, even if it is the only thing that is transferred**

Hull's Foods (AB LRB)

- Facts: Hull brought grocery store from Safeway. He took down signs, hired new Ees, got groceries from other suppliers, did renovations, changed the name
- LRB found there was a successorship. Why?
 - Location is everything in grocery industry
 - He intended to carry on the same sort of business in the same location
- **LRB will have predisposition towards finding a successorship!**

Common Er (s.47)

- **Argument that two separate business entities are the same and are being controlled by the same interests**
 - Instead of one Er replacing another, it is being argued that two separate Ers are essentially one entity and should be treated as such
- Union must prove 4 elements:
 - **1) Associated or related activities are being carried on**
 - Two businesses are basically carrying on the same business
 - **2) Activities are being carried on by two or more entities**
 - Very broad interpretation of this
 - **3) These entities are under common control or direction**
 - This is the key section under common Er!
 - Has what has been transferred really in the control of the transferee, or does the transferor still exert all the control?
 - **4) There is no valid labour relations purpose for this to occur**
 - It is an attempt to get around unionized protection
 - Double breasting: One company has a unionized arm and a non-unionized arm. This is allowable, as long as the non-unionized arm is not taking business from the unionized arm
 - Arms must be kept as separate as possible! Do not intermingle resources
- LRB is asked to look behind corp veil: Who are the shareholders? Who are the directors? Are the companies related or independent?

Danfield (AB LRB)

- Facts: AB hospital had CA with AUPE that was wall-to-wall. They eliminated all in-house security staff and contracted for services with Danfield, which is a separate, privately owned corp.
- LRB not prepared to find common control or direction here
- **Successful outsourcing: arm's length transaction between unrelated companies; will not cause LRB to find common Er**

Finning International (AB LRB, 2005)

- Facts: Finning entered into complex arrangement with McLaughlin to create OEM Reman ('Project Thor'). Legal counsel for Finning basically proposed corp structure so as to avoid union. Union applies for successorship and/or common Er
 - There were two LRB decisions here – shows that there is no 'right answer' in this area of the law
- First LRB Panel:
 - Found that there was a successorship and common Er
 - Keys to decision: Finning, who had union certificate against them, paid for the entire venture. Decided to look at substance over form
 - Test for successorship: i) there was a disposition of part of Finning's business; ii) a discrete unit of business was transferred; iii) control of business was passed on
 - Test for common Er: decision made on basis of \$98 M payment by Finning
- Second LRB Panel:
 - Found that 1st panel went outside jurisdiction and that there was no successor or common Er here
 - 1st decision focused too much on money; engaged in social engineering
 - Should be confined to '4 corners' of the law
 - Successorship: all OEM Reman got was \$\$\$; no transfer of business
 - This is no different from *Danfield* – a part of a business was shut down and it was subcontracted
 - No business was transferred, so there can be no successorship
 - Common Er: i) There were related activities; ii) There were two or more entities; BUT no common control – McLaughlin controls day to day operations

9. Termination of Bargaining Rights Obtained by Certification

Revocation (s.52)

- **There are certain periods when Ees can apply for revocation. These are the same open periods when a raiding union can come in under s.37!**
 - In statutorily defined open periods, union is subject to both raids and revocation
- General rule is that there can be no revocation application unless you are in an open period
- **Support of 40% of Ees is needed to have a revocation vote. 50% + 1 is needed in the vote itself**
- Specific open periods in s.52:
 - (1) Cannot apply for revocation during lawful strike or lockout
 - Need LRB's consent in these situations, but it is rarely given
 - (2) Union can apply for revocation at any time there is no CA in effect
 - (3) Ees can apply for revocation when:
 - (a) No CA is in effect and union is certified
 - If union is certified and has failed to get CA within 10 months
 - If union is voluntarily recognized, Ees can apply for revocation at any time!
 - (c) If CA is 2 years or less in length, application for revocation can be made during last 2 months of agreement

- (d) If CA is more than 2 years in length, application for revocation can be made in 11th or 12th month of 2nd and subsequent years, or last 2 months of CA
- (e) Same as s.37(3)
- (5) Er can apply for revocation if 3 years has passed since expiration of last CA or 3 years from when parties last bargained

10. Collective Bargaining

The Duty to Bargain in Good Faith (s.60)

- Section 60 is THE most important section in the *Code*. If it didn't exist, bargaining with the union would be voluntary
 - (1)(a): Representatives of both sides must meet and bargain collectively in **good faith**
 - **Test: Would the reasonable person see it as good faith?**
 - (1)(b): Must make **every** reasonable effort to enter into a CA
 - Also assessed from the objective perspective
- Has nothing to do with substantive outcome of the CA – is purely procedural. Can negotiate 'unfair terms' if possible
 - Exception: Can't put illegal terms into the CA (*Southam*)
- Purpose of the duty to bargain in good faith:
 - **I) Provides recognition of the union as the bargaining agent**
 - Er can't strike deals with individual Ees; has to go through union
 - **II) Promotes rational discussion and reasonable efforts to reach a contract**
 - Can't hide true intentions, withhold relevant info, etc.
- **Ways in which recognition of bargaining agent can be breached:**
 - 1) Failure to meet at all
 - 2) Surface bargaining
 - Going through the motions
 - Make it look like you are interested in negotiating, but really you are not
 - Must be established over a long period of time (months or years)
 - Includes things such as: never commit to anything during lengthy negotiations; delaying and stalling; make excuses; make proposals you know won't be accepted
 - 3) Breach of freeze period
 - During open periods, statutory freeze periods Er changes terms and conditions of employment
 - 4) Deliberately tabling inflammatory or illegal proposals
 - 5) Failure to recognize bargaining agent or circumventing the union
- **Ways in which rational discussion and reasonable efforts can be breached:**
 - 1) Non-disclosure
 - If union asks for something specific that has to do with a bargaining issue, the Er has to provide it. Includes things such as cost of benefits, income predictions, etc.
 - Have to disclose things that will have serious impact on Ees (e.g. desire to shut plant down – *Gainers*)
 - 2) Misrepresentation by Er
 - 3) Lack of sufficient information and justification to support position

- Have to provide detailed justification of your position in order to engage in rational discussion (*Southam*)
- 4) Conduct away from bargaining table
 - Includes things such as negotiating in the media, negotiating directly with Ees, circumventing the bargaining committee

Open Period #2 (s.59)

- **This term applies to negotiating a new CA – it has NOTHING to do with s.37**
- **At any time during open period, union or Er can file ‘notice to commence collective bargaining’ – s.59(1)**
- **The open period can be no shorter than 60 days and no longer than 120 days prior to the expiration of the current CA, subject to the parties agreeing to the contrary in their CA – s.59(2)**
- Most unions file notice to commence bargaining right at the start of the open period
- **Filing of notice to commence collective bargaining triggers s.60**
 - After notice has been filed, bargaining must be entered into within 30 days
 - Filing of notice to commence collective bargaining doesn’t affect s.60 obligations! Even if there is a strike/lockout, s.60 remains in force. It is very powerful
- **Remember that ‘OPEN PERIOD’ applies in 2 contexts:**
 - **i) Certification applications (i.e. raiding unions)**
 - **ii) Negotiation of CA**

Statutory Freeze (s.147)

- Once notice has been served to commence collective bargaining, the statutory freeze takes effect on the Er
- Er can only make changes during this time under three exceptions – s.147:
 - 1) Bargaining agent consents to changes
 - 2) Current CA says Er can make changes
 - 3) Making changes is in accordance with established custom or practice
- 147(1) – Statutory freeze from filing of certification application to the time certification succeeds or fails. If certification fails, statutory freeze ends
- 147(2) – Statutory freeze from time certification succeeds to time first CA is negotiated
- 147(3) – Statutory freeze when notice to commence collective bargaining is served under existing CA (between 120-60 days before CA expires, unless stated otherwise). Freeze ends when new CA is negotiated or strike/lockout starts
- 130 – Bridging period: If new CA is not negotiated by time current one ends, old CA will bridge the gap between the agreements

UFCW v. Gainers (AB LRB, 1986)

- Facts: Pocklington bought Gainers because there was an overstuffed pension plan. Union filed notice to commence collective bargaining, but Pocklington didn’t want to negotiate with the union at all
- Breaches of s.60 by Er:
 - Wouldn’t give any dates to meet
 - Wouldn’t provide opening proposals

- **Anything you want to negotiate must appear in the initial opening proposals!**
- **Receding horizon bargaining: i) Introducing issues later that don't appear in opening proposals (*Gainers*); ii) Reneging on clauses that have already been signed off on (*Southam*)**
 - Misrepresentation, as main goal was to shut down the plant
 - Didn't disclose information that union asked for
 - Didn't justify position or provide sufficient background to position
 - "Negotiating with a party that refuses to reveal even an opening position...is like trying to nail jelly to a wall."
- **Gainers breached their duty to negotiate in good faith!**

Southam (AB LRB, 2000)

- Facts: Union was trying to unionize *The Calgary Herald*. The union got certified, filed notice to begin negotiations (1998). Started negotiations in 1999, but Er didn't provide necessary info. Eventually signed off on some clauses, but Er later reneged on them. Union filed ULP complaint, claimed breach of s.60 on part of Er
- Complaints by union included: failure to meet; non-disclosure; bargaining to impasse on illegal proposals; surface bargaining; receding horizon bargaining
- **Royal Oak Mines Test: If there is a clause that is largely accepted as being standard in a particular industry, then refusal to negotiate that type of clause is likely to be considered a ULP**
- Two situations where LRB will get involved in content of CA:
 - 1) Where unlawful content is trying to be included
 - 2) Where one side won't bargain a clause that is an industry standard

11. Strikes and Lockouts

Preconditions to Strikes and Lockouts (ss.73, 74)

- Legislature wants as few cases as possible to end up in strike or lockout. There are several things that must happen before a strike or lockout occurs
- **Precondition #1 – Bridge (s.130)**
 - After CA ends, it remains in effect until a new one is reached, the rights of the bargaining agent are terminated, or a strike/lockout begins
 - There must be a bridge period before there can be a strike or lockout!
 - When in the bridge, the parties must bargain to impasse
 - Once to impasse, nothing else can be done until parties go to mediation
 - Mediator sits down with parties and tries to reach settlement
 - No strike/lockout vote can be held until a mediator has been appointed and at least a 14 day cooling off period has expired – s.75(3)
 - The Minister shall require the Director to appoint a mediator – s.65(1)(b)
 - Still have to make application to LRB for strike/lockout vote – it isn't automatic
 - Mediator will do one of three things – s.65(7):
 - A) Succeed in getting parties to reach CA
 - B) Make recommendations for CA
 - C) Write out of the dispute, saying that parties are too far apart and can't be brought to a set of recommendations

- Mediator has to write himself out AND cooling off period has to expire before sides can proceed any further
- **Bridge→ Bargain to impasse→ Mediation→ Mediation Fails→ Cooling Off Period Expires→ Apply for Vote→ Strike/Lockout Vote**
- **Precondition #2 – Current Mandate/ Strike Vote**
 - Board conducts vote; need 50% + 1 to get strike approved
 - Union wants to get as high of support as possible, otherwise Ees will probably cross the picket line; also signals weakness to Er
 - Lockout vote: Er can just decide; unless Er organization
 - Once you have strike mandate, it is only good for 120 days – s.77
- **Precondition #3 – Serving of Legal Strike/Lockout Notice**
 - Written notice that states where and when strike/lockout will begin
 - Must be served at least 72 hours before the strike/lockout is to begin
 - There are many different types of strikes: rotating, intermittent, ‘work one off two’ strikes. Only one strike notice must be given (VS)!
 - Purpose of serving strike notice is to create a ‘pressure-cooker’ situation – parties might come to agreement within the 72-hour period
- **Precondition #4 – Strike/Lockout Starts As Per Notice**
 - Notice must be followed!

Strikes

McGavin Foods (AB LRB, 1988)

- **1(v) – Strike: i) A stoppage of work, refusal to work, or refusal to continue working; ii) By two or more Ees; and iii) Two or more Ees are acting in combination or in concert, or in accordance with a common understanding for the purpose of compelling the Er, or Er organization, to agree to terms or conditions of employment**
 - Parts i) and ii) are objective, iii) is subjective
- Facts: McGavin had different unions in their workplace. Bakers were on a lawful strike, drivers had article in their CA that said they didn’t have to cross a lawful picket line. They wouldn’t cross the bakers’ picket line
- Issue: Was refusing to cross the bakers’ line a strike on the part of the drivers? Yes
- Drivers argued that it was part of their CA and they couldn’t do it
 - LRB said work was scheduled and they should have performed it – ‘work now and grieve later’
- **Work, in s.1(v)(i) is to be defined very broadly**
 - **Work: Those activities or duties that the Ees would ordinarily expect, and be expected to, perform as a consequence of being an Ee**
 - If there is work and the Ees refuse to do this work, part I of the test is met!
- Hard part of proving test is element III (subjective element) – was refusal to work done to put economic pressure on Er, for purpose of supporting other union?
 - LRB will put all circumstantial evidence together to determine intent
 - It is clear here that drivers acting for this purpose!
- **Concerted action may be inferred from the failure of a group of Ees to report for work in the face of a picket line, and if such an inference is made, Ees can rebut it by providing convincing and credible evidence in the contrary**
- Definition of ‘strike’ stretches beyond traditional meaning!

VS Services (AB LRB, 1990)

- Deals with steps and procedures a union has to go through before filing for a strike
- Notice must be provided to the other side before strike/lockout can occur – 78(1)(2)
- Why provide notice?
 - Gives other side opportunity to brace themselves
 - Creates a pressure cooker for parties to get a deal done
- Facts: Strike notice was given; Ees walked off job but later returned. Er wanted them to file strike notice for each separate action
- **Strike/lockout notice only has to be given for initial action**
 - “Strike notice is a bugle call at the start of the war, rather than a daily bulletin announcing each day’s battle plan.”

Lockouts

Calgary Co-operative (AB LRB, 1993)

- Facts: Union and Er were halfway through CA; Er was experiencing financial difficulties and wanted to renegotiate. Union said too bad; Er drafts notice to Ees saying if they don’t renegotiate then everyone will be affected
 - Er cannot communicate directly with Ees!
 - Er cannot threaten Ees!
- Issue: Whether Er’s conduct constituted a lockout? Yes
- **1(p) – Lockout: i) The suspension of work by an Er; ii) For purpose of compelling Ees, or to aid another Er in compelling Ees of that Er, to accept terms and conditions of employment**
 - Part i) is objective, part ii) is subjective
- Part i) is usually easily met BUT in this case it was tougher. It was found to be satisfied because Er **threatened to reduce work and salary**
 - Seems to be enough to satisfy this section!
- Part ii) was easily met – if Ees didn’t accept terms, they threatened company would go out of business
- **Definition of lockout is very, very broad!**
 - **Red flag: When Er skirts around union and communicates directly with Ees**
 - This is allowable, but not when Er is attempting to undermine the union
- Remedy is basically a slap on the wrist: stop doing what you were doing!

Picketing

UFCW Local 1518 v. K-Mart Canada (SCC, 1999)

- Facts: UFCW represented Ees at two stores. When they were negotiating for the 1st CA, K-Mart locked out Ees. At the 6 month point, locked out Ees went to non-unionized stores and handed out leaflets (not picketing!). There was no interference with business, delivery of supplies, and there was no intimidation. Er brought injunction to stop 2ary picketing
- Issue: Whether peaceful leafleting at 2ary location is allowable? Yes
 - This case cracked the door open for leafleting being a protected form of expression in Canada
- Restricting leafleting is an infringement on expression (2[b]) and is not saved by s.1
 - Number of conditions that must be satisfied for leafleting to be allowed:
 - Message conveyed in leaflet is accurate

- Leaflet clearly states that dispute is with primary Er – make it clear who dispute is with if at 2ary location
- Leafleting is not conducted in coercive, unlawful or intimidating manner
- Activity doesn't involve large number of people so as to create situation of intimidation or unduly impede access
- Activity doesn't prevent Ees at 2ary site from working, or interfere with contractual relations of suppliers at 2ary location
- **Key point: Peaceful leafleting is a protected form of expression**

Brewers Distributors (AB LRB, 2000)

- Facts: Brewers was owned by Molson and Labatt's. There was a work stoppage at Brewers, so they contracted with MTE to use their warehouse during this time. MTE was also supposed to carry out the work Brewers would have done, and they hired 165 new Ees to do it. Ees of Brewers started to picket MTE, and MTE made application at LRB to get them to stop
 - Problem is that s.84 of the *Code* says Ees can only picket at their place of employment!
- **LRB allowed 2ary picketing based on the 'ally doctrine' – Ers who intentionally and materially assist a struck Er in resisting a strike or prosecuting a lockout of Ees**
 - MTE was essentially an alter-ego of Brewers – they were helping them through the strike!
- Picketing is a protected form of expression, and it fails s.1 here
- **Key point: Law in AB now is that Ees can picket at locations other than their place of employment, provided that the other location qualifies as an ally of the Er**
 - If the 3rd party decides to support the Er, it is no longer a neutral party and should no longer be protected from the consequences of its action
 - **Picketing an ally Er is lawful in AB!**

Pepsi-Cola v. RWDSU (SCC, 2000)

- Facts: From SK, where there aren't prohibitions on picketing like there are in AB. Focuses on common law position that picketing was a restraint of trade. Here, union was engaged in lawful strike and it got really nasty. They started picketing retail outlets, tried to dissuade store staff from accepting deliveries, picketed hotels where replacement workers stayed, picketed homes of management
- Issue: Whether 2ary picketing is legal at common law?
- Ingredients common to picketing: Physical presence of persons called pickets, the conveying of information, and the object of persuasion
 - Picketing represents a continuum of expressive activity, but it always involves some expression
 - It is one of Ees' only economic tools
- **All picketing will be okay unless it is shown to be wrongful and unjustified**
 - Wrongful conduct includes criminal, tortious and unlawful conduct
- By going to homes and the hotel, the picketers engaged in wrongful conduct

Summary of Picketing

- **The law in AB is the ally doctrine**
 - Can only engage in 2ary picketing of ally Ers

- Section 84 has been amended in light of *Brewers* decision
- We are still under statutory picketing regime
- In other jurisdictions where there are no statutory provisions on picketing, the wrongful action approach in *Pepsi-Cola* is the law
 - Can engage in 2ary picketing as long as it is peaceful

Strike/Lockout Prevention

- There are several ways strikes/lockouts can be derailed or government intervention can prevent them from happening

1) Proposal vote – s.68

- Each side is allowed to do one proposal vote per dispute
- **Either party can ask other side's members to vote on either the mediator's recommendation or on that party's last proposal**
 - E.g. Union has to vote on Er's last proposal if Er uses proposal vote
- Can happen any time after mediator makes written recommendations, but usually happens within 48-72 hours before strike is going to commence or within first 48-72 hours of the strike itself
- Usually used to determine how strong Ee support for the union is
- Doesn't have same effect for union – Er will just shoot it down right off the bat!
- Proposal vote is all about timing!

2) Disputes Inquiry Board – s.105

- Requires Minister of Labour to get involved in the dispute
- DIB doesn't happen unless it is a high profile or large scale dispute
- **Key point: if DIB is appointed before a strike/lockout commences, then it is delayed until the DIB has finished its business – it is frozen!**
 - **If DIB is appointed during a strike/lockout that is already in progress, the strike/lockout will continue as usual**
- 99% of the time, if a DIB is going to be appointed it will be appointed before the strike/lockout starts
- **What does a DIB do? Government-appointed mediator is parachuted into the dispute at the 11th hour and meets with the parties over a period of time. Ultimately writes recommendations for settlement – s.106**
- Difference between DIB and regular mediator is urgency – the closer you get to strike vote, the closer the parties get to their bottom lines
- DIB usually has 20 days with parties but often gets longer
- Once DIB issues recommendations, parties can accept or reject them
 - If one party accepts and the other rejects, the rejecting side must vote on them
 - If this vote fails, parties are back to square one
- **DIB cannot bind parties – can only make recommendations**

3) Public Emergency Tribunal – ss.112, 113

- Can be imposed at any time before or after a strike starts, and can stop the strike or lockout regardless of what point it is at
- **Difference between PET and DIB: DIB makes recommendations, PET makes a binding decision**

- **Subject to the most stringent conditions for application!**
 - **Concerned with strike/lockout situations where damage to health or property is likely (i.e. utilities); reduction in health services; unreasonable hardship caused or likely to be caused to 3rd parties who aren't involved in dispute**
- *AB Teachers Association* (AB QB, 2002)
 - Facts: Union challenges decision to impose PET against 19 separate locals. Argued that government shouldn't have treated 19 different disputes as a single one and should have given separate orders to each dispute
 - Court said this is a draconian power, and if the government is going to use it they must live up to the letter of the law. The statute reads 'dispute' so a PET cannot be applied to multiple disputes at the same time
- Note: PET wasn't used in Lakeside Packers because they were negotiating for a 1st CA and the government didn't just want to hand them one

4) Interest Arbitration (ss.93-96)

- **Both sides agree that they will allow a 3rd party to decide the terms of their CA**
- Right to strike/lockout is forfeited
- Also known as 'binding arbitration'
- **In some sectors of the economy, interest arbitration is mandatory – police, firemen, health care nurses**
- If interest arbitration is voluntary, the parties choose the arbitrators
- If interest arbitration is mandatory, the government chooses the arbitrators

Review: Government Intervention

- Ways the government can intervene in labour relations:
 - Mediation – parties are required to participate!
 - Preconditions to strike/lockout – must be complied with
 - Picketing – limits and restrictions
 - Reinstatement – people who are terminated during strike can be reinstated unless their was just cause for their termination
 - Injunctions – can prevent things like disruptive picketing, leafleting
 - DIB/PET/Interest Arbitration

12. The Collective Agreement

The Effect of the Collective Agreement

Compagnie Paquet (SCC, 1959)

- Facts: Union was certified, but 254/607 Ees didn't vote in favour of the union and didn't want to be represented.
- Once there is a CA regime, the common law master-servant relationship is abolished. Private negotiations between Er and Ee are no longer allowed
- **If a majority of Ees vote for a union, all Ees will be bound by the CA whether or not they voted for the union**
- Ees cannot be completely exempt from paying union dues – if they object to being in the union dues will still be deducted but may go to another cause
 - Certain religious groups can be exempt – but this is applied very strictly!

McGavin Toastmaster (SCC, 1975)

- Note: Anything written by Laskin is 'gospel' in labour law!
- Facts: McGavin was having financial difficulties and were talking about a plant relocation, in which case Ees would be entitled to severance. Union tried to force Er's hand by staging an illegal strike. Er shut down plant when Ees didn't show up. Union argues that Ees still owed severance, but Er says when they didn't show up for work they broke the CA and breached the employment contract
- Once the CA came into effect, there was no longer a common law relationship between Er and Ees. CA is a different regime – common law rules of termination don't apply
- **CA supplants common law rights that Er and Ee might have against each other**
- Ers should have gotten declaration of illegal strike from LRB and sought damages from the union resulting from lost production

Collective Agreement Arbitration

- How disputes are resolved under CA
- Rights arbitration vs. Interest arbitration
 - Interest arbitration is a way to avoid going on strike – two sides agree that CA will be decided by a 3rd party. That party's decision is binding
 - **Rights arbitration refers to what happens when a grievance is filed under an existing CA**
- Three kinds of grievances can be filed:
 - **1) Individual grievance – Ee believes CA has been misapplied to them personally**
 - **2) Policy grievance – Union thinks Er is misapplying or misinterpreting a provision in the CA, and all members are affected**
 - **3) Er grievance – Er files grievance against union, e.g. Ees on illegal strike**
- Parties go before an arbitration panel, which is a private court. Panel makes a ruling as to whether there has been a breach of CA and what remedy should follow
- Arbitration panel can't vary the language of the CA – they must interpret it
 - Don't need to stick to strict 'literal' approach – can be creative, but have to stick to the words used

Exclusive vs. Concurrent vs. Overlapping Jurisdiction

- Concerned with whether arbitrator or courts have ultimate say over grievances
 - Exclusive jurisdiction: Only arbitrator can decide
 - Overlapping: For some things courts will have jurisdiction, for other things arbitrator will have jurisdiction
 - Concurrent: They both have jurisdiction

St. Anne Nackawick Pulp & Paper (SCC, 1986) and *Weber v. Ontario Hydro* (SCC, 1995)

- **Exclusive jurisdiction is the law: Any dispute that has a connection to the CA, expressly or inferentially, must go to arbitration**
 - New issue: What does 'inferentially connected' mean? Unclear
 - BUT for most issues there is a clear link to the CA
- Arbitrator's decision is subject to the utmost deference and the standard of review is patent unreasonability
- Note: In *Voice Construction* (SCC, 2004), the court changed the standard of review to reasonableness simpliciter. No clear reason why this was done!

The Union's Duty of Fair Representation (s.153)

- Deals with relationship between the union and its members – not the relationship between Er and Ees
- Asks whether union has fairly represented its members interests
 - Concerned with application of CA and handling of grievances
- **DFR applies to grievance arbitration (administration and enforcement of CA), it does NOT apply to negotiation of the CA**
 - Necessary consequence of negotiations is that some interests will have to be sacrificed in order to achieve results

Gendron (SCC, 1990)

- Facts: Er had a competition for a position, Gendron won the job. Three other Ees complained that he shouldn't have gotten it, union brought grievance and Gendron lost new position. Gendron wanted to bring a grievance for this but union wouldn't bring it. He sues union for breaching DFR
- **Five universal principles that apply whenever there is a DFR complaint:**
 - **1) Exclusive power for union means they must represent Ees fairly and equitably**
 - Since union has power to decide what grievances to bring, it has an obligation to treat members the same way
 - **2) Union has sole discretion to pursue grievance and must exercise it carefully**
 - Ee doesn't decide what grievances will be brought, the union does
 - If individual grievance doesn't have merit, union can refuse it
 - **3) Discretion must be exercised in good faith, objectively and honestly**
 - Union has to deal with matters in an objective manner and engage in reasonable due diligence
 - Union can make an error in exercising discretion, it just cannot be negligent
 - Union has a duty to investigate, consider issues and act in good faith
 - **4) Discretion cannot be exercised in an arbitrary, capricious, discriminatory or wrongful fashion**
 - **5) Union cannot be negligent and must undertake representation with integrity and competence**
 - Cannot just go through the motions
- If a union member feels a grievance should be taken to arbitration and it isn't, their remedy is to file a complaint with the LRB
 - Can argue that union didn't live up to DFR principles
- Union should get legal counsel if unsure on whether grievance should proceed – first line of defence that says they weren't negligent
- **There are situations when a union ends up subverting one member's rights in favour of another's members rights BUT there is nothing prima facie wrong with this provided that the union acts in accordance with the 5 principles of DFR**
- To challenge DFR, take case to LRB NOT to courts – Gendron took it to the wrong forum here
- DFR principles were satisfied by the union in this case

Health Sciences Association of AB (AB LRB, 1997) (i.e. Rita Vickers)

- Facts: Provincial Lab was jointly operated and staffed by U of A and Capital Health Authority. Two separate unions were in place: CHA was represented by Health Sciences Association of AB (HSAA); UA was represented by Non-Academic Staff Association (NASA). Deal was reached where UA would divest itself of its interest and turn it over to CHA. All Ees would be transferred to CHA and HSAA union. Problem is how to incorporate new Ees into existing structure. Deal was proposed that would transfer seniority on a one to one basis, all parties agreed. Some HSAA members complained and the union made the change without consulting the membership. Old UA Ees bring DFR complaint
- HSAA argued that this was a collective bargaining matter and didn't fall under DFR. LRB said no: wasn't in open period, didn't bring forward proposals, etc.
 - If union waited until collective bargaining and then made change, there would have been no issue
 - Should have let Ees decide the issue in a vote (democratic acceptance/refusal of proposed changes)
- HSAA argued that they were 'between a rock and a hard place'. LRB said no: DFR still owed to union members
 - Issue wasn't dealt with in fair and objective manner
 - There was no consultation and no due diligence exercised
 - Failure to consider alternatives and other options

Darius L'Heureux v. Civil Service Union 52 (AB LRB, 1993)

- Facts: Union sat on L'Heureux's grievance for more than a year and simply did not file it. When they decided to file it, the limitation period had expired
- Union can be found to be grossly negligent, not just negligent. If gross negligence found, union can be made subject to sanction
- If union's negligence causes Ee to lose money, union must bear full brunt of any financial shortfall or harm suffered by that Ee
- Union was negligent here: missed limitation periods; didn't conduct thorough investigation; didn't make sure they had all facts before they made a decision; etc.
 - If only one of these factors is found, union will have breached DFR!
- **DFR is another way of saying: Procedural justice must be given to each and every grievance application**

Joseph v. AB Union of Provincial Ees (AB QB, 2004)

- Facts: Joseph believed union owed him DFR because he lost his job as a casual Ee with the government. There was a CA between AUPE and the government, and there was a separate letter of intent that was entered into between them that stipulated how temporary Ees would be administered. He was dismissed in accordance with this separate letter of intent
- Union argues that there was no DFR because issue didn't arise from administration of CA, but was a negotiation issue. They succeeded
 - This is the opposite of *Rita Vickers/Health Sciences!*
- **The CA can be made up of more than one document. There may be cases where a document that the parties didn't intend to become part of the CA does in fact become part of it (e.g. Incorporation by Reference). BUT if the parties have clearly**

contemplated among themselves that letter/part is not part of the CA, it won't be held to be so

- Incorporation by Reference – e.g. reference to a benefit plan being provided by a certain company

13. Unfair Labour Practices – ss.147-150

Vulnerable Periods

- Certain times when Ees are particularly vulnerable to undue influence by the Er
 - **1) Pre-certification and 1st CA – 147(1)**
 - **2) Open periods (both for raiding unions/revocation and notice to commence collective bargaining) – 37, 52, 59(1)**
 - **3) Negotiation of CA – 60**
- During these periods, Er cannot threaten, coerce, unduly interfere with union, make promises or threats
- Er has to be hands off during these periods!

Relevant Provisions in the *Code*

- 16: Complaints to LRB about ULPs
 - When complaining about ULP, reference all sections you think were breached
- 17: Remedies the LRB can issue
 - If remedy doesn't appear here, LRB can't do it
- **60: Duty to bargain in good faith**
 - Will be breach if Er doesn't bargain in good faith and make every reasonable effort to engage in CA
 - See *Gainers, Southam, Calgary Co-op* for examples of ULPs under this section
 - Failure to disclose relevant info, both after request and when no request has been made; blatantly misstating position; receding horizon bargaining; escalating demands; communicating directly with Ees; surface bargaining; tabling inflammatory or illegal demands
 - Refusing to agree to industry standard clauses might be a ULP (see *Royal Oaks*)
- **147(1): Statutory freeze when union applies for certification**
 - Business as usual for a specified period of time – starts when the application is filed, ends when certification is granted or denied by Ee vote
 - As soon as LRB announces vote results, there is immediately either a certificate or no certificate
 - If certification is successful, the freeze will continue for 30 days until the notice to commence collective bargaining is filed
- **147(2): Statutory freeze when there is a successful certification application, but no CA (1st CA)**
 - Freeze takes effect the moment a notice to commence collective bargaining is filed – 59(1)
 - This freeze period only lasts for 60 days
 - On the 61st day, Ers don't have open season on the Ees – they are still protected by ss.148, 149 (ULPs)
 - When there is a first CA being negotiated, the business will have more leeway to act how it shall because there is no precedent CA to act as a guideline – the Er

must be able to run its business! This is why freeze period under this section only lasts 60 days

- Compare to s.147(1): In (1), if union loses there is no union presence at all. Er has free reign to do as it pleases after freeze ends. In (2), Ees are still protected from ULPs after the freeze ends, by virtue of ss.148 and 149
- **147(3): Statutory freeze during CA negotiations (ends when strike or lockout occurs)**
- **148(1):** One of most important sections in the *Code!* Er cannot:
 - **I) Interfere with formation of the union**
 - Er can't interfere with organizing activities of the union
 - **II) Interfere with the administration of the union**
 - Er can't interfere with internal workings of the union
 - **III) Interfere with the union's representation of the Ees**
 - Most important subsection here!
 - Almost every conceivable ULP is aimed at undermining the union's ability to represent its members
 - Interpreted very broadly by LRB
- 148(2)(c): Saving provision for Er (i.e. 'free speech defence')
 - **Er doesn't engage in ULP so long as it doesn't use coercion, intimidation, threats, promises or undue influence**
 - If union can prove on balance of probabilities that one of these things has occurred, a ULP will be established
- **149: 'Laundry list' of things the Er cannot do**
 - (b) Er agrees not to put conditions in contracts that have effect of restraining Ee rights under the *Code*
 - If Er tries to get something in CA that breaches the *Code*, it is automatically a ULP
 - **(c) Er agrees not to seek by intimidation, threat or dismissal to seek to compel someone from becoming a member of a trade union**
 - Very important section – seeks to catch wide range of actions by Er!
- 150: Union ULPs
 - Boils down to union exerting threats, coercion, undue influence on Ees to try and get them to do something that is allowed under the *Code* or prohibit them from doing something that they are allowed to do
 - Sometimes unions exert coercion on Ee to prevent them from filing a grievance

Prohibited Acts by Er

- **1) Captive audience meetings**
 - During workday, Er brings group of Ees into room on worksite and calls a meeting
 - Attendance is mandatory and is usually recorded
 - Usually say something stupid like they will shut plant down if union gets in
 - Clearly a breach of s.148 – interference with formation of a union
 - Also breach of s.149(c) – threats of dismissal, penalties, consequences
 - Can't use free speech defence of 148(2)(c) because there is the use of threats, intimidation and coercion
- **2) One-on-one meetings**

- Er basically does same thing as captive audience meetings, but it is done on a personal basis
- On work time, at workplace, etc.
- **3) Can't encourage Ees to wear anti-union propaganda on Er property**
- **4) Can deny the union access to Er property, but cannot deny union-supporting Ees access to the property**
 - Union has to get message through door but will have to use Ees to do this
 - Can't deny pro-union Ees access to things like photocopiers, email, etc.
 - Basic rule is that Ees cannot campaign for union during working hours, but are allowed to campaign during non-working hours
 - Campaigning includes things such as handing out leaflets, talking to other Ees, etc.
 - Non-working hours include coffee and lunch breaks (whether they are paid or not)
- **5) Termination of union organizers**
 - **If there is any scintilla of anti-union animus in the termination, it will be considered to be ULP**
 - If many reasons for termination and anti-union animus is but one of them, it will be a ULP

How to Defeat the Union (Legally)

- Meet someplace away from workplace during non-working hours (e.g. town hall, hotel)
- Participation is optional, no attendance taken
- Don't convey threatening or coercive message
- Get copy of union's constitution (public document)
- Educate Ees on what it means to be a member of the union – show them union's penalty provisions and dues payments
- Tell them that Er has to agree for them to gain anything. No 1st CA legislation in AB. May be strikes/lockouts. Show them amount of strike pay
- Tell them workplace will be much more bureaucratic if union comes in. Everything will have to be done through union reps and there will be less flexibility
- Set up suggestion box so think Er is willing to listen
- **Main reason Ees unionize is they feel they aren't being respected by Er. The best way to thwart the union is by treating Ees better**

Stuve Electric (AB LRB, 1989)

- Facts: Union was seeking certification, had 52% support of Ees. Between filing certification application and having vote, Er allegedly committed several ULPs (breach of 147-149). Union filed complaints before vote was held. Vote turned out against the union
- **Important to file ULPs before certification vote occurs!**
 - If union waits until after vote they might not have any rights
 - Have to file them almost as fast as they happen
 - Even if union loses vote, ULPs filed in advance can cause there to be another vote
- **Test for ULPs:**
 - **1) Action by Er or agent of Er**
 - **2) Action has to be positively or negatively inducive**

- Positive inducements – Rewards, promises
 - Negative inducements – Threats, dismissal
 - **3) Purpose of offering inducements is to compel Ees to not exercise their rights under the Code**
 - Same test applies for union ULPs (s.150)
- Outcome: Er was found guilty of ULPs, ULPs affected the vote; another vote was to be held
 - Same Ees that voted before would vote again this time
 - This resulted in some of them being reinstated
- Union lost the 2nd vote as well – once the bell has been rung...it cannot be unring!
 - Almost a rule of law that if union fails 1st vote, it will fail subsequent votes
 - Only exception: when membership is divided almost 50-50

European Cheesecake Factory (AB LRB, 1993)

- Facts: 25 person workplace was being unionized. Er engaged in almost every conceivable ULP. Included implementing policies that never existed before (changing terms and conditions of employment); changing peoples' shifts from night to day knowing they were single parents
- Lots of Ees were fired, LRB reinstated all of them (recall LRB and human rights tribunals can do this but courts cannot)