

LAW 555
LABOUR LAW
Taylor

Labour Law – Feth/Taylor

PART I: INDIVIDUAL EMPLOYMENT LAW

Chapter 1 – Introduction

- 1) **Employment law** = legal, bilateral relationship between employer (Er) and employee (Ee)
- 2) **Collective labour relations**: legal relationship between union, Ers, and Ees (members)
- 3) **Recurring themes**
 - (a) Conflict between legal principles and social policy (fairness)
 - (b) Importance of work in society

Chapter 2 - What is the Employment Relationship?

- 1) Ee & Er used in a variety of contexts / may have different meanings
 - 2) Employment relationships are created by contract (must satisfy legal tests that apply to all Ks)
 - 3) Parties are free to make whatever deal they please, subject to legislative and common law exceptions:
 - a) Some minimum standards of employment are defined by statute (i.e. minimum wage, overtime, etc.)
 - b) Must be interpreted consistently with human rights principles (i.e. courts will read in maternity leave)
 - c) A person can be deemed by law to be an Ee even if K states otherwise (i.e. “independent contractor”)
 - d) In absence of express terms, courts will read in implied terms so that they become part of the EK (i.e. termination on reasonable notice, anti-discrimination obligations, obligations of good faith, etc.)
 - e) Intention of parties is relevant, but not determinative
 - 4) **Main tests for distinguishing employment relationship from other ones** (i.e. independent contractor)
 - Tests mentioned in **Cormier** and **Sagaz**: no one test is determinative
 - Employment relationship may still exist even if some elements are not present
 - An alleged “Ee” who employs other people suggests he is not an Ee (not conclusive)
 - An alleged “Ee” who works for several Ers suggests he is an Ee (not conclusive)
- a) **Control test** (4 indicia)
1. Master’s power of selection of his servant
 2. Payment of wages or other remuneration
 3. Master’s right to control the method of doing the work *** (most important element)
 4. Master’s right of suspension or dismissal
 - Test is hard to apply to highly skilled / professional Ees like doctors
- b) **Montreal test** (“four point test”): appropriate for modern industry/professionals
- a) Control of how Ee does work
 - b) Ownership of tools
 - c) Chance of profit
 - d) Risk of loss
 - Professionals may have independence, but can be characterized as Ees
 - Control is not conclusive – other factors are weighed more evenly
- c) **Business integration test**
- a) Ee: work is done as an integral part of the business (contract of service)
 - b) IC: work is done for the business, but not integrated into it, only an accessory to it (contract for services)
 - Factors: who provides equipment, is Ee a part of an internal communication system, where does work take place, does Ee participate in organizational meetings?
 - This test expects an amount of integration from the Ee
- d) **Uniform approach** (**Sagaz**, see below)
- Emphasizes control and whether person is performing services in business on own account

5) Broad definition of employment

- Courts have an interest in giving “Ee” the broadest definition possible as matter of public policy; legislative intent becomes relevant (**Cormier**)
- Human rights legislation is quasi-constitutional in nature; should be given its broadest application
- Modern recognition that many workers have a great deal of independence (**Sagaz**)

Cormier v. A.H.R.C. (1984 ABQB) Tests to determine employment relationship

- Black man alleged discrimination; AHRC claimed there was no employment relationship

Held: Yes there was

Main points:

- a) Statutes will be liberally interpreted if they are ambiguous – if courts err, it will be on the side of inclusion
- b) Application of tests will be influenced by the type of work relationship involved (professional person will look more to *Montreal* or BIT, as control test is not useful for them)
- c) Purpose of defining the individual as an Ee or IC is irrelevant – what is important is the context in which the definition is occurring (Ee or IC can mean different things in different contexts)

Ratio:

1. There are multiple tests for determining whether there is an employment relationship
2. There is no definitive test; appropriate test may depend on the nature of the work performed
3. Legislative or CL purpose behind defining the relationship is relevant to characterizing the relationship

Sagaz Industries v. 671122 Ontario Ltd. (2000 SCC) Enterprise test and other factors

- Analysis of whether vicarious liability applied if employment relationship (versus IC) could be found

Ratio: List of criteria is not exhaustive, continues to expand

1. Test applies in tort law to assess vicarious liability – not usually used to decide between employment vs. IC
2. Test provides that Er may be vicariously liable because
 - a) He controls the activities of the worker;
 - b) He is in a position to reduce the risk of loss;
 - c) He benefits from the activities of the worker;
 - d) The true cost of a product or service ought to be borne by the enterprise offering it
 - Control is always the critical element b/c the ability to control the enterprise enables the Er to take risks
3. “The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account”
4. Control will always be a factor, but can no longer be the determining factor
5. Other criteria have been identified to assess whether a person is performing services on own account:
 - a) Parties’ own description of relationship
 - b) Own description for income tax purposes
 - c) Whether worker employs other people to assist him in his job (if so, likely IC)
 - d) Whether worker works for other offices (likely IC)

Chapter 3 - Formation of the Contract

- 1) **Normal K rules** apply to EKs unless modified by statute
- 2) **No general requirement of writing** for employment contracts (EK), subject to exceptions:
 - a) **Collective agreements** (CK) must be in writing (**s. 1(f)/LRC**)
 - b) **Ks of a fixed term for more than a year** (*Statute of Frauds* apply to these types of EKs, not Ks for an indefinite duration employment)
- 3) Other statutory modifications:
 1. *Human Rights Citizenship and Multiculturalism Act*
 2. *Labour Relations Code*

Chapter 4 - Terms of the Contract of Employment

A. Generally

- 1) Ks of employment impose primary obligations on Ee and Er
- 2) Types of terms:
 - a) **Express** = explicitly agreed to by Er or Ee
 - b) **Statutory** = imposed by statute, regardless of whether parties agreed to them
 - c) **Implied** = implied by operation of law, in absence of some other express agreement by parties
- 3) **Certainty of terms:** terms can be ascertained through (1) specific terms laid out at the outset, (2) reasonable expectations of the parties, or (3) industry practice
 - 1) **Agreement to an agreement:** parties have negotiated and terms have been accepted by Ee (i.e. offer of employment letter)
 - 2) **Collateral docs** are sometimes imported into the EK
 - 3) **Industry custom:** implied term of the K (implied term cannot override an express term of K, unless express term is unenforceable or unlawful)
- 4) **Application of fundamental K rules to EKs** (for a fixed term longer than one year):
 1. Must comply with Statute of Frauds
 2. Subject to repugnancy rule (unenforceability of terms contrary to public policy or morality)
 3. Subject to unconscionability, i.e. unconscionable penalty on Ee → unenforceable
 4. Requirement of consideration, i.e. continued employment in exchange for non-competition is only consideration if Er agrees to forebear on terminating the relationship at least equal to notice
 - **Globex:** if the Er simply agrees to forebear termination of Ee for period of notice = constitutes consideration in AB; in other provinces, Er must forebear for a longer period
 - These types of agreements (to forbear) are generally not seen as an amendment to the agreement
 - Public policy considerations for protecting Ee against Er's power and Ee's lack of sophistication
- 5) **Application of special legal rules specific to EKs**
 - a) Requirements of legislative minimum standards must be adhered to
 - b) EK is not enforceable where it does not reflect the true relationship between the parties
 - **Sharpe v. Computer Innovations Distribution** (1993 NBQB), **Collins v. Kappele** (1983 Ont. Co. Ct.): relationship should be defined by conduct between the parties in recent years
 - c) Other statutory modifications of the relationship or specialized legislation must be interpreted with human rights (HR) principles, i.e. general leave rights may cover maternity leave
 - *Human Rights Citizenship and Multiculturalism Act*
- 5) **Notice of termination in absence of just cause** (most important type of term)
 - a) In absence of JC clause, courts presume that employment ends after a time of reasonable notice
 - May be overridden by language to the contrary in the K, oral or express
 - b) Where there is reasonable notice, the termination point is at the end of the reasonable period
 - Er can give pay in lieu of notice = terminate now and compensate pay for \$ Ee would have earned
 - c) If Er has just cause to terminate, no need for notice
 - Courts are reluctant to find just cause as loss of employment is a drastic event for Ee
 - d) If there is a term in K regarding dismissal w/o cause, notice at CL does not apply (as it is an implied term): can be rebutted by express term or implied intention of parties; as long as agreement does not offend *ESC*, term can override reasonable notice CL presumption
 - e) Factors affecting reasonable notice period from **Bardal** (1960 Ont. H.C.):
 - **Age** (if older Ee, harder to find employment so greater reasonable notice period)
 - **Education** (if Ee is highly skilled/educated, job prospects are fewer, so greater reasonable period)
 - **Length of service** (the longer the service, the longer the notice period)
 - **Availability of similar work** (how long would it take a reasonable Ee to find something conformable)

B. The Effect of the *Employment Standards Code*

- 1) Statutory terms:
 - Minimum standards in **ss. 6-67/*Employment Standards Code***
 - Lieutenant Governor in Council has general power to exempt an employment relationship from the minimum standard in *Code* (**ss. 6 and 138/ESC**)
 - **Canada Labour Code** applies to federally regulated Ees, i.e. workers for Indian bands, federally regulated industries such as Canada Post, airlines, telecommunications, inter-provincial transportation, etc.

2) Structure of ESC:

- **s. 1 (Interpretation):** definitions
- **s. 2(1) (Application of Act):** applies to all Ers and Ees; **(2)** except terms relating to maternity/parental leave and other provisions of ESC necessary to give effect to those provisions, ESC is not universal and does not apply to all Ees in AB equally, i.e. profs are regulated by *Post-secondary Learning Act*
- **s. 3 (Civil remedies and greater benefits):** civil remedies at CL
 - a) Reasonable notice at CL is determined by (1) Bardal criteria, (2) CL, and (3) statutory minimum standards which are lower than CL
 - b) Wrongful dismissals: when CL and statutory minimum overlap, Ee can go to courts for full period of time and not an order from Employment Standards branch, which gives less notice
 - c) May contract for benefits/entitlements for Ee and onerous to Er (except Ee's obligation to give notice to Er)
- **s. 4 (Minimum standards cannot be avoided):** parties cannot contract out of ESC (contractual terms that offend s. 4 are illegal and unenforceable)
- **s. 6 (Exemptions, modifications and substitutions):** exemptions from application of ESC (i.e. articling students)
- **s. 55 (Options for Er to terminate employment):** option to give termination notice, termination pay, or combination
- **s. 56 (Employer's termination notice):** amount of termination notice, pay, or combination required (Er must give written termination notice of at least 1 week up to 8 weeks notice; must be written termination notice, at CL, verbal notice is sufficient)
- **s. 58 (Termination of employment by an Ee):** termination by Ee req written notice of at least 1 up to 2 weeks

3) Jurisdiction:

- a) Possible forums for Ee in provincially regulated industry to seek remedies:
 1. Provincial court / QB
 2. Employment Standards Branch
 3. AB Human Rights Commission
- b) **Employment Standards Branch:** typically a breach of termination is brought as a complaint to ES branch, which has discretion to extend the period; complaint can only go back 6 months in ES branch, although in the courts, complaints potentially could go back 2 years in accordance with the *Limitations Act*
- c) **Beaulne v. Kavert Steel** (2002 ABQB) stated that AB courts have jurisdiction to deal with overtime and vacation pay claims (in AB, **Beaulne** is viewed as correct; 6 month limitation probably applies to ES)
 - However, in BC and Ont, one cannot go to courts for overtime and vacation day claims
- d) **Concurrent jurisdiction:** issue estoppel applies where there are multiple claims for things such as wrongful dismissal, violation of employment standards, and discrimination
 - **Issue estoppel:** when a finding of fact is made in one forum between the same parties, that finding is binding on parties in every other legal forum in which issue is adjudicated
 - Sometimes courts will defer to other jurisdictions for issues like whether or not there is just cause
 - **Wong v. Shelf Canada** (ABCA): findings by ES branch, where they conducted hearing that both Ee and Er attended, qualified for issue estoppel

Matchtinger v. HOJ Industries (1992 SCC) **Presumption of reasonable notice at CL**

- Ees had EKs with termination clauses with fixed notice periods that were below required statutory levels
 - **Trial:** πs were entitled to reasonable notice at CL (reasonable periods: 7 and 7.5 months)
 - **CA** focused on intentions of the parties through the K that had been created and disagreed with trial level

Issue: Were Ees entitled to reasonable notice at CL or the minimal levels as prescribed by the ESC?

Held: If EK fails to comply with minimum ST requirements, reasonable notice at CL is the presumption

Main points:

- a) Bardal factors are to be considered when determining reasonable notice
 - What constitutes reasonable notice will vary based on circumstances, character, etc.
 - Look to other considerations, i.e. if Ee has been lured away by a secure job elsewhere

- b) One can contract into notice period that is lawful based on statute standards
- c) Reasonable notice at CL is the presumption but is rebuttable by:
 - i. Express intentions of the parties, or
 - ii. Implied intentions from course of conduct or events between the parties
 - Without evidence of other intentions, reasonable notice at common law presumption stands
- d) If term is null and void, then it is null and void for all purposes; cannot be used as evidence of parties' intentions
- e) **Public policy / social conflict:** Ee must be protected from UI, lack of sophistication, imbalance of bargaining power, etc. as Ees are vulnerable upon loss of employment and work is important to self-identity and self-worth
 - **Punitive remedies** may be applied to ensure Er compliance

C. The Employer's Obligations Under the Contract of Employment

1) Payment of wages

- a) **Implied obligation:** even when obligation is not express, CL will imply obligation to pay wages
- b) **Definition of wages:** s. 1(1)(x)/ESC (tips not included); included in definition of earnings, s. 1(1)(j)/ESC
- c) **Interest** recoverable on unpaid wages
- d) **Duty to pay wages** (ss. 8, 11 – 13/ESC)
- e) **Minimum wages** (s. 138(2)(f)/ESC): \$8.40/hour subject to exceptions (*ESR 14/97*, ss. 7-13)
- f) **Frequency of payment:** pay period cannot be longer than 1 month (s. 7/ESC); payment should not be later than 10 days of pay period (s. 8/ESC)
- g) **Payment of earnings upon termination:** if terminated w/o cause then all payments must be paid within 3 days, with cause = 10 days (s. 9/ESC); method of payment (s. 11/ESC)

2) Hours of work and overtime: ss. 16-24/ESC

- a) **Compensation:** must provide compensation for hours of work and overtime
- b) **Rest periods:** must be at least a 30 min break during every shift greater than 5 hours
- c) **Exemptions** (s. 2/ESR): most professionals, sales persons, etc. (i.e. articling students)
- d) **Overtime hours:** (s. 21/ESC): total number of hours in excess of 8 hours/day; cannot work for more than 12 hours in one day (s. 16/ESC); rest (s. 19/ESC); allowing to work more hours (s. 20/ESC)
- e) Provisions provide ability to modify overtime provisions: overtime agreements under collective agreement (CK) or non-collective K (s. 23/ESC)

3) General holidays and holiday pay: ss. 25-33/ESC, ss. 44-50/ESR 14/97

- a) **General holidays** in AB (s. 25/ESC)
- b) **General holiday pay** (ss. 28-30/ESC): x 1.5 Ee's wage rate
- c) **Exemptions:** construction Er must pay to a construction Ee in respect of general holidays, general holiday pay in an amount that is at least 3.6% of the Ee's wages (s. 46/ESR)
- d) **Potential Charter issue: *Edwards Books*** found that the Ont provincial Sunday closing law violated freedom of religion, but was saved under s. 1/*Charter*, while the dissent found it couldn't be justified
 - How does this affect Christian holidays? No real economic penalty if there is no duty to stop working during holidays – Ers just have to pay more if they require Ees to work during holidays

4) Vacation pay: ss. 34-44/ESC, ss. 4, 44-50/ESR 14/97

- a) **Vacation:** after one year of employment → 2 weeks of vacation, after 4 years → 3 weeks/year
- b) Must be paid no later than pay day started
- c) Vacation must be taken within a certain period (s. 37/ESC)
- d) Ers can require Ee to take vacation (s. 38/ESC)

5) Other protective elements of ESC

- a) **Retention of employment records** (ss. 14-15/ESC): must be kept on record for 3 years
- b) **Termination of employment** (ss. 9-10, 54-64/ESC, s. 5/ESR 14/97):
 1. Obligation of notice of termination or pay in lieu;
 2. Exemptions for situations of just cause (s. 55(2)/ESC)
 3. Calculation depends on employment (s. 56/ESC)
 4. Relationship between termination under *Code* and pay in lieu: look to age, experience, length of service, and availability of employment (**Bardal** factors)

- c) **Maternity and adoption benefits (ss. 45-53/ESC):**
 - **Entitlement of benefits:** eligible if employed for 52 consecutive weeks (ss. 45, 50/ESC)
 - **Length and timing:** 6 weeks off after delivery unless Ee gives notice of health reasons or Er requests that Ee start maternity leave early (ss. 48 & 49/ESC)
 - **Parental leave (s. 50/ESC)**
 - **Potential remedies:** (1) if woman has worked for more than 52 weeks, becomes pregnant, and is dismissed → human rights discrimination or wrongful dismissal; (2) if woman becomes pregnant after working for less than 52 weeks → human rights complaint, difficult wrongful dismissal case
- d) **Employment of young persons (ss. 65-66/ESC, ss. 51-54/ESR 14/97):** cannot work during school hours, cannot employ someone under 18 w/o parents' consent, restrictions on adolescents (ss. 51, 54/ESR)
- e) **Employment of disabled people (s. 67/ESC):** disabled persons may be employed for less than minimum wage; requires approval of the Director of Employment Standards
- 6) **Duty to provide a safe place to work:** implied that Er will provide safe environment
 - An Ee would have a claim for wrongful dismissal if fired for refusing to work in an unsafe environment
 - **Constructive dismissal:** when there is a unilateral change in Er that alters employment relationship, Ee is entitled to claim wrongful dismissal
 - **Lloyd v. Imperial Parking** (1996 ABQB): Er is to treat Ee with civility, decency, and dignity, although standard depends on work environment
- 7) **Duty to pay Ees who are temporarily ill**
 - May be an implied term in some Ks, unless K or custom indicates otherwise
- 8) **Non-duties of Ers** (absent an express term) (**Slaight**): Ers usually do not have an obligation to:
 - a) Provide references
 - b) Provide work
 - c) Take seniority into account
- 9) **Duty to provide notice of termination or payment in lieu**
 - If no cause or reasonable notice, Ee typically gets damages at CL
 - **Exception:** if foundation of employment relationship is destroyed = just cause for termination

D. The Employee's Obligations Under the Contract of Employment

1) Generally

- a) **CL ways to fire Ees:**
 1. May fire with given cause for dismissal
 2. Whether cause exists or not, Er can fire (i) on reasonable notice (based on *Bardal* factors), (ii) by providing payment in lieu of reasonable notice, or (iii) a combination
- b) **CL remedies:** usual remedy is damages for failure to give reasonable notice or pay in lieu
 1. Ee entitled to recover amount during reasonable notice period (other benefits, club memberships, life insurance, etc.)
 - **Prince v. T Eaton** (1992 BCCA): Due to wrongful dismissal, Ee received value of benefits he would have received during notice period
 2. Ee entitled to damages for independently actionable wrongs
 - **Vorvis v. ICBC** (1989 SCC): Ee can get damages if terminated w/o cause and independent tort accompanies termination, i.e. nervous shock caused by assault by Er or Ee, defamation, etc.
 3. Miscellaneous damages, i.e. mitigation expenses or costs to get new job, legal costs, interest, etc.
 - Limitation: must show reasonable steps to mitigate or else damages can be reduced
 - No "partial cause" or "near cause": either Er can claim just cause or there is no just cause at all
 - If just cause exists, Ee has no remedies
 4. **No right to reinstatement unless:**
 - a. Ees governed by CK (not really an exception because this is about non-unionized Ees)
 - b. Ee whose unjust dismissal are under Canada Labour Code, which has the power to reinstate unjustly dismissed Ees (i.e. federally regulated Ees, Indian bands, etc.)
 - c. Public office holders in limited cases (i.e. reinstatement of a police chief to public office due to performance of some statutory duties)
 - d. Upon HRC's order of reinstatement

2) **Duty to work:** be available for work if Er requests (isolated absenteeism does not count)

3) **Obligation to obey lawful orders**

- a) Ee must be able to follow instructions, subject to qualifications:
 1. Orders must be lawful
 2. Within Ee's scope of employment
 3. Not patently unreasonable
 4. Cannot be dangerous to health and safety
- b) Insubordination = failure to follow lawful order; affects relationship such that it is fundamentally broken by insubordination (consider isolated incidents, incident in heat of moment, trivial consequences, wilful or through neglect, undermining of Er's trust or confidence in Ee, adverse affects on relationship with other Ees, affects on Er's business reputation, etc.)
- c) Failure to follow policy: policy must be well-known to the Ee; policies determined by express communication, culture/custom of workplace, etc.

4) **Duty to avoid misconduct:** requires substantial nexus between Ee's activity and Er's business, where Ee's off-duty activity is overtly connected to Er's business and could cause loss of consumer confidence or reputation

- **Example of off-duty misconduct that affects Er's operations:** sexual harassment that could lead to vicarious liability – argument that such an act speaks to character of the Ee, but courts want to balance competing interests (privacy of Ee vs. welfare of business)
- Today, drug addiction is recognized as a disability (demonstrates court's interest in Ee's privacy)

5) **Obligation to be competent:** certain obligations on Er to coach Ees, give warnings before dismissal

- **Expectations for employer:**
 1. Er must set clear expectations;
 2. Set reasonable expectations;
 3. Let Ee know of expectations;
 4. Give warnings;
 5. Provide assistance to improve; and
 6. Warn Ee that they may be terminated if no improvement

6) **Duty of fidelity:** Ee must serve Er honestly and faithfully

- a) Duty not to engage in fraud
- b) Not to misuse trade secrets
- c) Not to engage in duties that constitute competition
- d) Not to betray trade secrets created on Er's time

RBC Dominion v. Merrill Lynch (2008 SCC) Ee's duty of fidelity and good faith

- Former Er sued manager (who coordinated an en masse resignation) for breach of confidence, good faith (normally, obligation on Er to protect Ee – used to detriment of Ee in this case), and fiduciary duties
 - **Trial:** Ee liable for failure to give notice, awarded \$45 K against investment advisors, \$225K in damages based on losses from non-compete duty, \$1.5 m for loss of profits due to breach of duty of good faith

Held: Duty of good faith breached and liabilities upheld, but damages were qualified

- 1) While Ee's duty extends to give notice, no obligation from non-competing and no fiduciary duty owed
- 2) Non-fiduciary managerial Ee has a duty of good faith and fidelity to Er
- 3) Ees can compete during reasonable notice, even where Ee triggers resignation → freedom to compete imposed

Ratio: An Ee is not a fiduciary and has no obligation from non-competing, but an Ee's duties extend to giving notice and observing good faith and fidelity to Er

Dissent: Decision creates uncertainty in employment law, i.e. category of quasi-fiduciary Ees and lower level Ees who owe no GF duty

7) **Obligation to give notice of resignation**

- **s. 58/ESC** (*Termination of employment by an employee*) and CL set out periods

E. Termination and Wrongful Dismissal

1) Termination may occur through:

- a) **Dismissal or firing:** termination for just cause (immediate)
- b) **Expiry of fixed term:** upon reaching a certain date, immediate termination (K serves as notice)
 - Probationary period must treat Ee fairly; need justification that is consistent with probation; obligation to show Ee is incompetent is lower
- c) **Termination by mutual agreement:** courts are usually suspicious and will inquire into matter
- d) **Retirement:** voluntary (Ee's notice of resignation) and mandatory (Er's notice of dismissal)
 - Potential *Charter* case re: age discrimination
 - ***Dickason v. U of A*** (1992 SCC): SCC accepted age discrimination but also accepted justifications for imposing mandatory retirement (i.e. if profs stayed too long in faculty, would create stagnancy); probably not a broad endorsement of mandatory retirement, as (1) public policy has changed, (2) people can successfully work beyond 65 years of age, and (3) various judicial signals that mandatory retirement is not specifically endorsed (dissent in ***McKinney*** (1990 SCC), ***Greater Vancouver Regional District Employees' Union v. Greater Vancouver Regional District*** (2001 BCCA))

2) Ees may receive damages for method of dismissal, but will not be compensated with extension of notice period, as was done in ***Wallace (Honda v. Keays)***

- Problems with ***Wallace***:
 - a) Poor reasoning, confusing language, lack of certainty – how to compensate for emotional distress?
 - b) It does not treat like Ees fairly; like cases should be quantified similarly
 - Manner of dismissal does not relate to *Bardal* factors
 - Problem if notice period is extended based on salary, when the mental distress could be the same among different Ees
 - An increase in notice periods could result in arbitrary judgments for different Ees; case introduces inconsistency for like cases and precedents
 - c) Case does not address whether mitigation should affect portion of damages (later cases indicate mitigation does not apply)

Honda v. Keays (2008 SCC) Method of dismissal does not extend notice period, but may provide damages

- 1) Case abandoned notion of *Wallace* where Ee received extended period of notice for method of dismissal
- 2) In determining what constitutes reasonable notice of termination, courts should consider *Bardal* factors
- 3) **Damages** may be awarded as a result of the Er's failure to give proper notice but no damages are available to the Ee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being fired
 - Damages resulting from the manner of dismissal may be owed if dismissal was "unfair or is in bad faith by being untruthful, misleading or unduly insensitive"
 - Must distinguish manner of dismissal from actual injury suffered (the way one was dismissed, not just the fact of dismissal) and compensate for that
 - "[I]f the Ee can prove that the manner of dismissal caused mental distress that was in contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attaching the Ee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the Ee of a pension benefit or right"
- 4) **Aggravated damages** may be given for egregious displays of bad faith in conduct of dismissal
- 5) **Punitive damages** are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own

Ratio: Ees may be compensated based on way of dismissal, but will not be compensated by extending the notice period

- Calculation of damages is based on suffering

2) **Obligation on Ee** to give notice of termination greater than that required in *ESC (s. 58/ESC)*

- Ee must give minimum of one week's notice if employed for greater than 3 months but less than 2 years
- Must give two week's notice if employed for more than 2 years

- May be a reasonable notice obligation owed that is greater than *ESC* at CL (*Tree Savers*), but this is not normally litigated

Tree Savers Int'l v. Savoy (1992 ABCA) Ee's reasonable notice

• Er sued for damages against Ees (who gave 2 week's notice and started rival business) for cost of hiring new Ees, loss of business, and for misappropriation of confidential information

Held: Reasonable period set to 18 months, judgment \$1.3 m against Ees

Note: Unusual case, but where there is a breach of trust and Ees are skilled, notice period can be extended

3) **Reasonable notice period factors:**

- a) Based on **Bardal** factors
- b) **Circumstances in hiring/dismissal**, i.e. consider whether Ee was hired away, promised job security, received assurances of fair treatment, and the manner of dismissal
- c) **Bad faith** in manner of dismissal by Er may result in separate damages for mental distress
- d) Consider **precedence**
 - For management-level Ee, 1 month/year of service
 - For blue-collar Ee, 2 weeks/year of service
 - These are just guidelines

4) **Just cause:** behavior that is incompatible with employment relationship

- Minor breach of an obligation is insufficient
- If there is just cause for dismissal, no obligation to give notice (not even under *ESC*)
- **Notion of progressive discipline:** not every breach requires harshest form of discipline (verbal or written reprimand/warning, suspension, demotion, etc.) = discipline should be proportionate to conduct and only in worst of cases can Er resort to termination
- A single act can result in just cause, even w/o prior acts (*McKinley*)

McKinley v. B.C. Tel (2001 SCC) Contextual approach in weighing dishonest acts

• Ee misrepresented to Er the types of medical treatments available for his disability, which Er didn't find out until M sued for wrongful dismissal; Er argued M was dishonest

Issue: Was M a person of dishonest character? If so, was the employment relationship (at its foundation) broken?

- **Trial:** if just cause existed at time of dismissal, Er had right to terminate w/o notice; burden of proving just cause on Er; what constitutes just cause varies (i.e. something that undermines trust to a degree incompatible with relationship; if Ee is in position of trust, higher standard)
- **CA:** disagreed; any measure of dishonesty is enough to justify dismissal w/o notice; Ee's act speaks fundamentally to character = if Ee has dishonest character, Er should have right to terminate

Held: Trial decision upheld; dishonesty will not always be grounds for dismissal – must look to context

- 1) **Contextual test:** “the test [as to] whether the Ee's dishonesty gave rise to a breakdown in the employment relationship... can be expressed in different ways. One could say... that just cause for dismissal exists where the dishonesty violates an essential condition of the EK, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the Ee's obligation to his or her Er”
- 2) **Examine the context** in which dishonest behaviour occurred (circumstance and nature/degree of misconduct) – thus some forms of dishonesty will not constitute just cause (i.e. showing up late to work versus this Ee's behaviour)
- 3) “Rather than viewing cause for dismissal as a legal conclusion that must be drawn in any case where disobedience (including dishonesty) is proven, these cases indicate that just cause can only be determined through an inquiry by the trier of fact into (a) whether the evidence demonstrated Ee misconduct and (b) whether, in the circumstances, such misconduct sufficed to justify the Ee's termination without notice”
- 4) **Underlying principle of proportionality** between the severity of an Ee's misconduct and the sanction imposed

Ratio: In determining whether the dishonest act of the Ee creates a breakdown of the employment relationship,

one may apply the “contextual approach” by considering the seriousness of the misgivings based on the circumstances and degree of misconduct

F. Constructive Dismissal

1) Unilateral change of a term of K by Er

- If Er changes a fundamental term (i.e. salary rates) w/o notice, Ee may argue constructive dismissal
- At CL, if Er gives reasonable notice (i.e. 6 months), Er can unilaterally change fundamental term of relationship on reasonable notice – Ee is deemed to have accepted amendment to terms
- If Ee refuses to accept Er’s offer to amend the terms of his EK and Er allows the Ee to continue working, the terms of the original EK remain in force (**Wronko**). By allowing Ee to continue working, Er acquiesces to the Ee’s refusal to amend the EK (case has implications for Ers who are considering making fundamental changes to Ee benefit and compensation arrangements)

2) Constructive dismissal may be caused by unilateral change by Er of fundamental K term w/o adequate notice

- Modest changes, changes on proper notice, changes by agreement, etc. ≠ constructive dismissal
- Ee can (1) accept change; or (2) reject change, resign, and sue for damages within reasonable time
- Assessed on an objective standard (i.e. Er does not have to intend to compel Ee’s resignation) (**Farber**)

3) Mitigation (**Evans**):

- Any Ee that has been wrongfully dismissed has a duty to mitigate (actively seek comparable work)
- Does Ee have to accept continuing employment as mitigation during reasonable period? Arguments that it (1) is unconscionable for Ee to continue working there when Er has breached K; (2) interferes with Ee’s ability to rehabilitate career by searching for conformable employment

Wronko v. Western Inventory Service (2008 Ont. CA) Unilateral change in K

- Ee had an EK stipulating termination on 2 years notice
- Er gave notice intention to change termination provision to 30 weeks pay at the end of 2 year time period; during 2 year period, W disagreed and W continued to work for Er after the 2 year mark passed
- Er then terminated w/o cause and gave 30 weeks; W sued and said he was entitled to 2 years notice

Held:

- 1) Er could not unilaterally change fundamental term of K
- 2) Ee’s decision to keep working did not constitute acquiescence in the face of express, repeated rejection to change
- 3) Three options available to Ee:
 - a) Ee may accept the change expressly or implicitly
 - b) Ee may reject the change and sue for damages in constructive dismissal
 - c) Ee may advise Er that he rejects the new terms, Er may respond by terminating Ee with reasonable notice and offering re-employment at the end of the notice period (consideration offered to Ee is Er’s agreement to forbear termination); if Er does not expressly indicate that first K is terminated and new K arises, Er is regarded as acquiescing to Ee’s rejection of the change; if Ee rejects, Er can give reasonable notice, allow K to end within reasonable time, forbear termination with cause during the period, and offer a new EK at end of notice period

Note: In AB, reasonable notice of unilateral change to fundamental term by Er will be enforceable — however, cases suggest that this is true only if Er agrees not to terminate the employment during reasonable period

Farber v. Royal Trust Company (1997 SCC) Constructive dismissal

- Ee supervised branch managers; corporate restructuring eliminated his position and he was offered branch manager position; Ee took that to be form of demotion, resigned, and argued that he had been constructively dismissed

Issue: Was F constructively dismissed?

Held: Yes, RTC’s offer amounted to constructive dismissal, since the offer substantially altered the essential terms of the EK

- 1) In assessing whether there has been constructive dismissal, apply an objective test to determine whether the unilateral changes imposed by Er substantially altered essential terms of K of Er (i.e. would a *reasonable person* in the same situation as Ee have felt that essential terms were substantially

changed)

- 2) Ee had significant loss of prestige and responsibility and was affected by change in compensation structure (from having certainty and the protection of fixed salary to having an income based on 100% commission)
- 3) At the time of the dismissal (fundamental change to employment), expectation was that amount of remuneration would go down in the immediate future
- 4) At trial, RTC introduced evidence that 100% commission structure over reasonable notice period would have allowed F to earn more money than fixed structure, but SCC determined that the situation must be viewed through the eyes of reasonable person at time the unilateral change was made (neither side gets benefit of hindsight)

Ratio: If Er makes a unilateral change that substantially alters essential EK terms, may form a basis for constructive dismissal

Evans v. Teamsters (2008 SCC) Ee's obligation to mitigate

• E was constructively dismissed by Un; Un offered re-employment which E declined; Un argued E failed to mitigate damages

Held: Ees can have duty to mitigate by returning to Er who constructively dismissed them

- 1) **Onus:** Er bears onus of demonstrating that Ee failed to make reasonable efforts to find work; question of whether a reasonable person would have accepted the work where (1) the same salary is offered; (2) work entails similar working conditions; and (3) there are no acrimonious personal relationships
- 2) **Additional factors:** (1) history of relationship between Er and Ee, (2) whether Ee commenced litigation, (3) whether offer of re-employment was made while Ee was still working for Er or had left
- 3) **Critical element:** Ee not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation

Note: Application of *Evans* is still subject to interpretation – does this mean Ees are expected to accept re-employment with former Ers? Most believe this case will have little impact on the traditional approach

Chapter 5 - Human Rights Legislation and the Charter

A. Human Rights Legislation

1) ***Human Rights, Citizenship and Multiculturalism Act*** contains 4 parts

- Act contains preamble (general statement of principles that all persons in AB are equal), code of conduct (outlines forbidden areas of discrimination), HRC structure, and enforcement

2) Certain areas have been recognized as having protection:

- **Sexual orientation:** read in as a ground of discrimination via ***Vriend v. Alberta*** (1998 SCC)
- **Religious beliefs:** generally understood to extend to atheists
- **Gender:** under Ontario *Act*, gender includes transsexuals and cross-dressers; not addressed in AB *Act*
- **Maternity:** physical characteristics unique to one gender engages protection (according to some cases)
- **Addiction:** viewed as a type of disability protected by legislation
- **Place of origin:** argued that the right to speak native language falls under protection of place of origin
- **Source of income:** involve welfare recipients
- **Family status:** involve single parents, workers who take care of elderly, etc.

3) ***Canada Human Rights Act*** (Federal) regulates Ers under federal juris

- Act contains general principles, code of conduct, Canadian Human Rights Commission, and enforcement
- Excludes source of income and place of origin and ancestry

4) **HR Commission structure:**

- Government appoints administration consisting of (starting from the top of the hierarchy): director, regional managers, and human rights officers
- Commission releases interpretation bulletins, investigative findings, and reports

5) **Complaint process:**

Complaint (must be written)

↓

Response

↓

Conciliation service (HR officers attempt to resolve complaint)

↓

Investigation (standard is lower than BOP)

↓

Director's decision:

- **If case has merit** → panel (hears *viva voce* evidence, usually one commissioner) → decision → appeal to QB → CA
- **No merit** → dismissal → request for review → judicial review or panel → QB → CA
- Director can dismiss claim for lack of merit or dismiss a claim if complainant refuses to accept a reasonable settlement offer

6) **Duty to accommodate:** Er has duty to accommodate Ee with disability or an immutable characteristic

- Where Er has established work place rules or qualifications that directly or indirectly discriminate against an individual on a prohibited ground of discrimination, Er is obligated to accommodate the Ee until the point of undue hardship
- HR principles require Er to bear some expense
- Undue hardship = Er may suffer hardship; when it is undue, it exceeds Er's obligation
- Obligation is not one-sided: (1) Ee must bring disability/characteristic to attention to Er where the immutable characteristic is not evident and seek accommodation before dismissal; (2) Ee is required to provide relevant medical info; (3) Ee may be required to seek out equipment or devices to assist in the process (***Renaud v. Central Okanagan School District No. 3***, 1992 SCC)
- As work place rule may be neutral on its face but have discriminatory effects, Ee must link adverse impact of workplace rule to a prohibited ground of discrimination
- Where rule is *prima facie* discriminatory, onus on Er to show that rule is a bone fide occupational requirement (BFOR) and it is not possible to accommodate Ee without suffering undue hardship

British Columbia v. BCGEU aka Meiorin case (1999 SCC) Test for bona fide occupational requirements

- Un complained on behalf of Ee that physical ability requirements were discriminatory
- Arbitrator found that reqs were discriminatory, had an adverse impact on women, and ordered reinstatement
 - **BCCA:** disagreed without even characterizing whether this was in/direct discrimination; as long as the standard was necessary for safe work and the Ees were individually tested, standard was non-discriminatory

Issues: (1) Was the aerobic standard discriminatory? (Yes) (2) Did it constitute a *bona fide* occupational requirement? (No)

Held: Ruled in favor of Ee, who was reinstated to her former position and compensated for her lost wages and benefits

- 1) SCC did not endorse threshold question of indirect vs. direct discrimination
- 2) Once complainant establishes that a standard prima facie constitutes discrimination (according to HR statute), Δ must justify standard by establishing a rule to be a BFOR by showing:
 - a) Er adopted the standard for a purpose rationally connected to the performance of the job (if this is not met, BFOR defence fails; if met, move on to next step);
 - b) Er adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose (if Er intended to discriminate, BFOR defence fails; if no intent, move on to next step);
 - c) Standard is reasonably necessary to the accomplishment of the legitimate work-related purpose; it must be demonstrated that it is impossible to accommodate individual Ees sharing the characteristics of the claimant without imposing undue hardship upon Er – test fails here in favour of Ee
- 3) Factors for determining undue hardship: (1) undue financial costs, (2) disruption of a CK, (3) where the accommodation creates problems in morale among other Ees, (4) where accommodation results in unsafe equipment / workplace, (5) inter-changeability of workplace / facilities, (6) ease of workplace

modification, etc.

4) Questions to ask in course of undue hardship analysis:

- Has Er investigated alternative approaches that do not have a discriminatory effect?
- If alternative standards were investigated and found to be capable of fulfilling the Er's purpose, why were they not implemented?
- Is it necessary to have all Ers meet the single standard for the Er to accomplish its legitimate purpose?
- Is there a way to do the job that is less discriminatory while still accomplishing Er's legitimate purpose?
- Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? May also place burdens on Ee (and Un in labour context)

B. Alcohol and Drug Testing Policies

1) Drug/alcohol addiction is viewed as a disability

2) Mandatory screening by Er may be viewed as *prima facie* discrimination

3) Ee has *prima facie* duty to show they have disability or that Er perceives that Ee has a disability (**Chiasson**)

- **Onus:** if Ee asserts discrimination based on disability, Ee bears burden of proving that they suffer from disability or Er perceives Ee suffers from disability
- Onus then shifts to Er to show reasonable accommodation
- Courts look very closely at privacy interests of Ee

Entrop v. Imperial Oil Ltd. (2000 Ont. CA) Duty to accommodate

• Ee (who had been sober for 7 years) challenged Er's random alcohol/drug testing policies for Ees in safety sensitive positions; Er justified policy as BFOR b/c those in safety sensitive positions should not be impaired

Held: In favour of Ee; Er should impose lesser sanctions where appropriate for alcohol addiction

- 1) Random drug testing was not a BFOR as it measured the past drug use, would catch casual users, and does not reasonably accomplish Er's goal of safe workplace
- 2) Certain devices could detect current impairment, i.e. random breathalyser testers that detect current impairment levels could be justified
- 3) While the policy was *prima facie* discriminatory, since a positive alcohol testing indicated present impairment, it was a BFOR, provided that the sanction for an Ee testing positive was tailored to the Ee's circumstances
- 4) Er's policy of automatic dismissal for all Ees' failure of alcohol testing contravened duty to accommodate
 - Er must treat substance abuse as a disability and help Ee manage addiction
 - Accommodation is fact-specific / determined by case-by-case basis

Chiasson v. Kellog Brown (2007 ABCA) Safety-sensitive position allows drug testing

• Co. had drug testing policy (a post-offer/pre-employment test); C applied for job, went through negotiations, but tested positive for cannabis (offer immediately withdrawn)

• C claimed he had used it in own time – not at work, therefore not impaired

Issue: Did the drug testing constitute disability discrimination?

- **HR panel:** in favour of Er, since in a safety-sensitive position, drug testing was reasonable limit on duty to accommodate

Held: HR's decision restored

PART II: COLLECTIVE LABOUR RELATIONS

Chapter 1 - Introduction

A. Definition

1) The law of collective labour relations governs the employment relationship where Ees are represented by Uns or are in the process of Un organization; also deals with the relationship between the Un and Er

2) Collective labour relationships introduce third party (union = UN):

- Changes nature of relationship between Er and Ee; creates distinct relationship between Er and Un and between Ee and Un

B. Inadequacies of CL of Employment

- 1) Contract model: application of K model to relationships that engage in people's social status
- 2) Unfairness of bargaining process
- 3) Other harmful aspects of CL employment:
 - a) The right for Er to dismiss at will; no tenure or right to get job back
 - b) Low damage awards; no compensation for loss of dignity
 - c) No consideration of seniority at CL with exception to damages
 - d) Limited remedies for breach of K by Er; only remedy is to consider themselves constructively dismissed and sue for damages

C. Responses to inadequacies of CL

- 1) **Employment standards legislation:** limited freedom to contract as between Er and Ee; created safety and minimum age laws and terms of employment
- 2) **Labour standards legislation:** reversed employment standards code around time of Black Plague, equalizing bargaining power by collectivizing those in the labour, with the Un as their rep
- 3) **Development of trade unions**

D. History of Trade Unions in England and N. America

1) History:

Repression (middle ages): criminalization of union activity

- Primarily a post-Industrial Revolution experience (late 18th and 19th Cs)
- Informal labour collectives developed → strikes and violence
- Criminal (conspiracy) and civil law (restraint of trade) applied to preserve status quo

Tolerance (1800s): decriminalization of Un activity, no legislative framework

- Until early 20th C, Canada tried different "tolerant" models with minimal success
- Crime of conspiracy repealed, torts scaled back
- However, no positive legal obligations for Ers to deal with Uns and no grievance forum for Ees

Recognition (20th C): influence of U.S. legislation (*Wagner Act*) promoted industrial peace, collective bargaining, liberty of choice, imposition of obligations on parties, etc.

2) 7 model principles developed in various Canadian jurisdictions:

1. Ee freedom of association and Un recognition
2. Compulsory bargaining rights for certified TUs
3. Postponement of the right to strike until after gov't intervention through conciliation (stability)
4. Prohibition of unfair labour practices by both Ers and TUs to protect individual rights and the collective bargaining process (enforcement mechanism)
5. Establishment of legal status and enforceability of CK
6. Provision for resolving disputes re: collective bargaining agreement w/o resorting to strike (stability)
7. Establishment of regulatory bodies with investigation and control powers in the form of relations boards

E. Present Trade Union Organization in Canada and AB

- 1) **1945:** all provinces (except PEI) had some sort of labour relations code and foundational labour relations principles became recognized in legislation and practice across Canada
- 2) **Charter:** since 1982, the labour movement has tried to invoke the *Charter* for their cause with limited success
 - **BC Health Services** (2007 SCC) case outlined *Charter* values that should influence labour relations: (1) human dignity, liberty, autonomy, etc., (2) equality, and (3) democracy

- **Toronto Electric Commissioners v. Snider** (1925 PC): labour relations do not fall under general trade and commerce (Federal juris); jurisdiction of labour relations presumptively fall under provincial regulation, unless it falls within field regulated under Federal jurisdiction (i.e. aviation, telecommunication, etc.)

3) International treaties: ICESCR and ICCPR

Chapter 2 - History of Alberta Labour Relations

A. History of *Labour Relations Code*

- AB's experience in brief:
 - 1886: first Un (CPR Engineers)
 - 1905: AB is incorporated as province
 - 1912: Alberta Federation of Labour established
 - 1919: Alberta Teachers' Association organized
 - 1947: AB *Labour Act* enacted
 - 1988: last major revision to AB *Labour Relations Code*

B. Purpose of Code: Communication and Education

- See Preamble, ss. 5-7/LRC

Chapter 3 - The Alberta Labour Relations Board

1) Parts of *Labour Relations Code* (LRC):

- Preamble (commitment to collective bargaining process)
- Part 1: Communication and Education (ss. 5-7)
- Part 2: Labour Relations (ss. 8-162); (2.1) Special Provisions Regarding Regional Health Authorities (ss. 162.1-162.2)
- Part 3: Construction Industry Labour Relations (ss. 163-206)
- Part 4: Transitional (ss. 207-208)

Note: Other statutes that also have application in AB include: *Public Service Employee Relations Act*, *Police Act* and *Police Officer's Collective Bargaining Act*, and the *Canada Labour Code* (Federal)

2) AB Labour Relations Board (ss. 8-20)

- **Rationale** for delegating power to Board: courts do not have specialized expertise, perception that courts have been historically biased against Un and organized labour, purpose of expediency
- Board is an **admin body that derives power from statute**; limited in subject matter, powers to investigate, remedies, what issues it may adjudicate, how it can apply *Charter*, etc.
- **Subject matter jurisdiction:** Board is given power with limitations (s. 12: *Powers of the Board*)
- Board does not deal with labour grievances, employment complaints, or wrongful dismissals (unless in relation to union)

3) Supervisory jurisdiction:

- Conduct of votes (s. 15)
- Power of Board to conduct investigations/inquiries into matters related to complaints (s. 12(2)(d))
- Failure to comply with LRC (s. 16: *Applications to the Board*); must be within a reasonable time
- Inspection of records (s. 13(1)(a)), statements (s. 13(1)(d)), premises not a private residence (s. 13(2)(a))

4) Adjudicative powers:

- Adjudicative powers: ss. 12 and 16
- Exclusive jurisdiction: s. 12(4)
- Remedies: s. 17

5) *Charter* jurisdiction (s. 12(4))

- Depends on what is being sought
- An admin body cannot make a declaration that a law is invalid under *Charter* but can refuse to apply a law if it is contrary to the *Charter* (**Cuddy Chicks**)
- Board orders are subject to the *Charter* (**Slaight**)

Cuddy Chicks v. Ontario Labour Board (1991 SCC) **Board can rule on Charter issues**

- As agricultural workers could not collectively bargain pursuant to *Code*, Un took position that in the event that

the Board found Ees of hatchery to be agricultural workers, this was a violation of the *Charter*; Board decided it had juris to consider; Er appealed to SCC

Held: Board's initial decision was correct, subject to some constraints

- Broad wording of statutory interpretation granting juris over fact and law includes juris to rule on *Charter* issues, but Board cannot grant declarations of invalidity

Slaight Communications v. Davidson (1989 SCC) **Board orders are subject to Charter**

• An adjudicator ordered Er to provide letter of reference; Er argued it was infringement of expression

Held: The infringement justified under s. 1/*Charter*

Ratio: Board orders and directions are subject to *Charter*

6) Board composition

- Appointed positions (**s. 8/LRC**): Chair (1), Vice-Chair (3 full time, 2 part time; typically experienced labour lawyers in city/region), Members (about 35 part-time)
- Panel composition (**s. 9**): ordinarily Chair or Vice-Chair plus two Members; Chair or Vice-Chair may hear certain matters alone
- Board staff (**s. 10**): 24 staff including 6 Labour Relations Officers (see also s. 8(8)); Board staff have investigative powers to search and seize, etc. and are not necessarily lawyers

7) **Sources:** rules in *LRC*, written rules of procedure, procedures established on *ad hoc* basis by Board

- Board may create any rules, etc. (**s. 12(2)(g)**)
- Role of director, forms of complaints, representation, interveners

8) Application process (s. 16):

1. **Complaint:** an Er org, Ee, or Un can make complaint in writing to Board, re: failure of compliance
2. **Reply:** adverse party may file reply
3. **Action by Director of Settlement:** (1) appoint officer to investigate and issue a report, (2) refer to settlement negotiations (**s. 11**), (3) refer matter to Chair of Board – call for hearing of panel or direct further hearings (**s. 11**), (4) director may reject complaint on basis of (lack of) jurisdiction, (5) director can allow complaint to be served on parties, (6) refuse to accept complaint if more than 90 days parties knew or ought to have known about complaint
4. **Conduct of hearings:** pre-hearing conferences conducted; compel witnesses and production of docs; lawyers or lay-advocates may represent; procedures do not strictly follow traditional procedures
5. **Rules of evidence:** Board may consider any evidence it wishes (**s. 14(5)**), but this does not mean Board will accept anything; in admitting evidence, need to consider: (1) **relevance**, (2) **reliability**, (3) **cost**, (4) **fairness to parties**, and (5) **public policy**
6. **Rules of natural justice and fairness** must be followed: each side must have opportunity to represent, reasonable time to respond, and ability to cross-examine witnesses
7. **Order enforcement:** order/directive may be filed at QB (**s. 18(6)**); Board cannot do so on own initiative
8. **Reconsideration:** Board has power to reconsider decision (**s. 12(4)**); or decision can go to judicial review
 - If no new evidence, Board will not reconsider
 - If decision conflicts with statute, initial decision was made an error in fact or law, or reasonable apprehension of bias, Board will reconsider
 - **JR application:** typically takes 6 months; JR application must be brought within 30 days of decision is made or the day written decision is made (**s. 19(2)**); requires originating notice supported by affidavit
9. **Standards of review** (levels of deference) (*Dunsmuir*, 2008 SCC): (1) correctness and (decision must be correct) (2) reasonableness (decision needs to be reasonable); reasonableness factors:
 - a) **Expertise of tribunal** (consider level of expertise on the issues raised in comparison to the courts; questions of fact = more deference, questions of law = less deference)
 - b) **Wording of the enabling legislation:** privative clauses, statutory rights of appeal, or subjective language giving more deference;
 - c) **Nature of the question at issue** (for issues that are questions of fact, discretion, or policy, deference will apply automatically in fact finding); and

- d) **Administrative regime / purpose of the tribunal** as determined by interpretation of legislation (Is there a policy being put to effect by this tribunal? If not, less deference)

Chapter 4 - Trade Unions and Employers' Organizations

- Board has juris to decide if something is a TU, **s. 12(3)/LRC**
 - Ee has right to be part of TU (**s. 21**)
 - TU must file constitutional docs and list of officers (**s. 24**)

A. Trade Unions

- 1) Historically, CL treated TUs as unincorporated associations; not natural persons or corps
- 2) Legal status has been changed by legislation: **ss. 1(x), 12(3)(d), 24 and 25**
 - **s. 1(x)**: “‘trade union’ means an organization of employees that has a written constitution, rules or bylaws and has as one of its objects the regulation of relations between employers and employees”
 - **s. 25**: TU is capable of prosecuting, being prosecuted, suing and be sued for the purposes of *LRC*
- 3) **Legal status of TUs**: a Un is not a corporation, but it is a creature created by the *LRC*
 - As TUs have legal status, they can be held liable in tort and for breaches of statute and can be found liable in criminal contempt (***United Nurses of AB***)

Maritime Employers' Assn v. Int'l Longshoremen's Assn (1979 SCC) TUs are legal entities

• Appellants were three TUs certified under the *Canada Labour Code*. An interlocutory injunction was issued ordering that the TUs be restrained from continuing or participating in an illegal strike. The injunction was challenged on grounds that there were no Ees of the respondent's who refused to work at the time of the injunction application, refusal by members of TUs to cross a lawful picket line was not a strike, and an injunction could not be properly issued against unincorporated TUs

- **Lower court**: It was an illegal strike, injunction against MEA; not incorporated

Held: Appeal dismissed (in favour of Er)

- Notwithstanding the fact that Uns are not incorporated, they are legal entities for purposes of legal relations
 - However, it is unclear if Uns are legal entities for other purposes
- 1) Historic reasons why Uns were not incorporated; to avoid “paralyzing effects” of previous CL
 - 2) By giving Uns rights under legislation, legislature had given them some sort of legal status – certification rights, representation rights, mergers/amalgamations, distinct penalties, etc.
 - 3) Rights can only be exercised by groups acting as entities

B. Employers' Organizations

- Organizations to bargain on behalf of Er
 - See **ss. 1(n), 12(3)(c), 30, 31** (*Suing*) 164 (*Registration*), 165 (*Collecting dues*)
 - **s. 1(n)**: “‘employers' organization’ means an organization of employers that acts on behalf of an employer or employers and has as one of its objects the regulation of relations between employers and employees, whether or not the organization is a registered employers' organization”
 - **s. 30**: “For the purposes of this Act, an employers' organization is capable of (a) prosecuting and being prosecuted, and (b) suing and being sued”
 - Ers associations have same sorts of legal status Uns have (***Maritime***), except Ers orgs do not have express statutory duty of representation for its members, although may be implied duty of fair representation (***Industrial Power Installations***)

United Nurses of Alberta v Alberta (Attorney General) (1992 SCC) Nature of Un as organization

• Nurses threatened strike; Board issued order not to strike but nurses went ahead; gov't found them to be in contempt

Held: Un could be held for contempt

Ratio: Uns are legal entities for purposes of the *Code*

- 1) The Un was an unincorporated association, sometimes described as a “society”
- 2) The Un was not incorporated under the *Societies Act of Alberta*

- 3) The Un may qualify as a “society” under the then-existing definition of “every one” in the *Criminal Code*;
∴ Uns can be held liable in tort and for breaches of statute and can be found liable in criminal contempt

Note: Having been given legal status for collective bargaining, Uns are now subject to responsibilities that go with that right

- However, consider s. 25: Uns do not have status outside of Code (courts have not taken this restrictive view)

Berry v. Pulley (2002 SCC) Relationship between members and Un

• Individual Un members attempted to sue other *Air Canada* pilots personally because Δs did not adhere to conditions of the arbitration and breach of K expressed in bylaws

Issue: Can individual Un members be personally liable to other members for breach of K based on terms of Un constitution?

Held: No, summary judgment at trial level granted to AC

- 1) The only relationship that exists is between individual Un member and Un
- 2) A member wishing to sue Un for breach is not impeded by lack of legal status; Un can sue member, member can sue Un, but members cannot sue another member
- 3) Policy reasons: what person would take any act against Un if he can be sued personally?

Main points:

- a) Uns can enter into contractual relations with members
- b) Contractual relations are shaped by constitution and labour relations statutes
- c) Members do not have contractual obligations to other Un members; not within reasonable expectations of Un member to be held personally liable to other members for breaching Un constitution
- d) Members can still be held liable for tort

Ratio:

1. Uns exist at law
2. An indiv Un member has a relationship with Un, but no particular relationship with other members by virtue of being in Un

Fallowka v. Royal Oak Ventures (2008 NWTCA) Local Uns are separate entities from national Uns

• Striking worker / member of Un (W) planted bomb in mine which killed replacement workers
• Tort law suit was initiated by families of dead miners against national Un, claiming that the Un was directly and vicariously liable for the acts of the local union and its members

Issues: Whether the Uns were separate legal entities, could be held liable for torts, could be held liable for murders, or could be breach of duty to bargain in good faith

Held: None of the Δs were liable for the illegal actions of W

- 1) Local Uns were separate entities from national Un, had status to sue and be sued
 - Recognition for local Uns as separate entities: (1) Uns as separate sueable entities is based on a statutory foundation, and the statutes generally grant bargaining certificates to the locals, not the national Uns, (2) locals have their own organization, officers, decision-making process, (3) can enter into Ks and CKs (collective agreements), (4) would not be able to carry on operations effectively if they did not have separate rights to hold property, (5) idea of separate entity has been accepted by community; not the same entity as the national Un, but there are cases where Uns are created by statute to make it one legal entity
- 2) Uns not liable in tort for inciting the mass murder
- 3) Uns not vicariously liable for action of its members who commit torts, unless act was assigned by Un; although Un had some knowledge of some violent acts, not enough to attract vicarious liability
- 4) No duty in tort to bargain in good faith

Chapter 5 - Scope of the Legislation

A. The Code Sections

1) **s. 4(1):** Subject to subsection (2), this Act applies to every Er and Ee and is binding on the Crown in right of Alberta.

(2) This Act does not apply to...

2) s. 1(l): “employee” means a person employed to do work who is in receipt of or entitled to wages...

B. Who is an Employee?

Spruce Grove v. Int’l Assn of Firefighters (1988 AB LRB) Receipt of gratuities does not create Er/Ee relationship

- City ordered reinstatement of instructor, association complied but no one wanted to attend his sessions
- Board asked to reconsider reinstatement order; volunteers could not be compelled to attend, as they were not Ees

Held: Volunteers did not receive wages in pursuant to *LRC*; definition of wages in Code did not include gratuities

Ratio: Even if there is payment in form of gratuity, those persons may not be considered Ees

United Association of Plumbers v. Midwest Pipeline (1989 AB LRB) Ees vs. ICs

- Er was subject to certification application; dispute arose as to how many Ees existed which affected how many could vote

- Some rig welders were unincorporated and some were for tax purposes; they owned their own equipment

Issue: Whether certain rig welders were Ees or ICs

- 1) 2 categories of rig welders: Ees and ICs – both were paid at same rate, could be hired/fired by co, directed by the company foreman, assistant helpers were hired to support these rig welders, etc.
- 2) Board found that both groups were ‘Ees’ for labour relations purposes by considering factors:
 - Who exercised direction and control over the work?
 - Who bears the burden of remuneration?
 - Who doles out discipline?
 - Who hires and fires?
 - Who is perceived or held out to be Es?
 - Was there intention of creating employment relationship?
- 3) Control, Montreal, BIT and *Sagaz* tests are applicable
- 4) Unincorp welders = clearly Ees; incorporated entities could be Ees (not the corp, i.e. Bob’s Company, but Bob)
- 5) Corps can never be Ees
- 6) Wages in Ee definition do not need to flow directly from purported Er

Notes:

- a) Distinguished from *Yellowcab* case (where Ees were confined to persons “in receipt of or entitled to wages): (1) change in definition of wages, (2) change in definition in Er (remove explicit preferences of control), (3) changing structure of *Code*
- b) ***Teamsters v. Airport Taxi Service*** (2008): ATS had exclusive rights and discipline program / instructions were imposed on drivers; payment to drivers involved flat rate, but drivers maintained vehicles and received fares

Held: Drivers were Ees; (1) Definition of wages includes payments to person alleged to be Ee by 3rd party, (2) person can be found to be Ee if paid by 3rd party, (3) *Yellowcab* case is not good law in AB

- c) Taxi drivers may not be Ees for purposes of *LRC*, but may be held to be Ees for purposes of HR legis (***Re Pannu***, 1986 ABCA)
- d) For a person to be an Ee, person must do some work for money; must not be a volunteer or in receipt of gratuity
- e) Under AB *Code*, Ees are included but not ICs

C. Who is the Employer?

1) s. 1(m)/*LRC*: “‘employer’ means a person who customarily or actually employs an employee”

2) Becomes an issue when there are multiple potential Ers

- ***U of A v. Non-Academic Staff Association*** (1996 ALRB)

- Association applied for declaration that the trust individuals were Ees of U of A

Held: Individuals were Ees of U of A, applied control test, Montreal test and 7 factors *United Association* factors

D. Exclusions from the Code

- 1) Managerial Ees (s. 1(l)(i)/*LRC*):

- **Listed factors:** hire or fire, direct the work force, grant time off, grant wage increases and promotions, participate in the grievance procedure, discipline Ees, independent discretion, control over performance appraisals, administer the CK, formulation and administration of procedures and policies, and participate in the preparation of budgets
 - Factors from ***United Nurses of Alberta, Local 176 v. Central Park Lodges*** (1996 AB LRB): power over discharge, power to direct over others and day-to-day supervision, independence in performing duties, input into labour relations, supervision responsibilities re other supervisors, power to evaluate person's performance, empowered to order overtime, power to alter policy, etc.
 - **Purpose of exclusion:** avoid conflicts of interest and facilitate collective bargaining
- 2) **Professional Ees (s. 1(l)(ii)/LRC):** professional registration must be perfected; onus on party seeking to exclude Ees as professionals
 - 3) **Crown Ees (s. 4(2)/Public Service Employee Relations Act)**
 - However, if within such an institution, there exists an independent, self-governing body, then the body falls under **LRC (CUPE v. Student Union, U of A)**
 - 4) **Police Officers (s. 4(2)(d)/LRC, Police Act, Police Officers Collective Bargaining Act)**
 - 5) **Certain farm workers (s. 4(2)(e)/LRC)**
 - 6) **Domestic Ees (s. 4(2)(f)/LRC)**
 - 7) **Ees under juris of Federal gov't (Canada Labour Code)**

Dunmore v. Ontario (Attorney General) (2001 SCC) Freedom to associate

- Agricultural workers/Uns brought application challenging the constitutional validity of the exclusion of agricultural workers from Ont. LRC, arguing freedom of association under ss. 2(d) and 15/Charter
- Held:** As workers demonstrated that activities fell within freedom of association and legis interfered with activities = exclusion amounted to gov't interference (infringement of s. 2/Charter that could not be justified under s. 1)
- 1) **To establish violation:** (1) party seeking to establish violation must show activities are protected by s. 2(d); (2) impugned legislation interferes with protected activities; range of activities clearly include right to belong to an association and maintain an association
 - 2) **Substantial impact test:** in establishing positive rights under Charter, look at whether purpose of labour regimes is to protect freedom to associate
 - Court found it was in this case; court also noted that right for Ees to join or form an org exists without legis
 - 3) These particular workers were substantially affected by regime ∴ workers needed some labour relations protection
 - 4) By excluding workers from labour relations regime, gov't was reinforcing unfairness
 - 5) Infringement was not justified under Oakes: exclusion was not rational and was not minimally impairing
- Main points:**
- a) No absolute right for any particular group of workers to be included
 - b) Exclusion can infringe s. 2(b) where exclusion substantially impacts worker's ability to maintain an Ee org
 - c) Consider whether exclusion creates difficulties on workers
 - d) Consider whether workers are politically impotent, have lack of sophistication, etc.
 - e) Factors relevant to substantial impact analysis are whether: (1) exclusion effects private equities, (2) legis has chilling effect on organizing activity, (3) inclusion in legis is the only route that group can take
- Note:** Case probably affects exclusion of agricultural and domestic workers
- Since *Dunmore*, Ont has passed legis that provide minimal protections for agricultural worker Ee organizations

Chapter 6 - Acquisition of Bargaining Rights by Certification

A. Generally

- 1) Uns seeking to organize Ees will usually try to get as many Ees as possible
- 2) Once Ees are signed up, Un will attempt to acquire right to bargain for those Ees with Ers by:

- 1) Becoming certified by the LRB as the bargaining agent for some or all of the Ees of the Ers (**Division 5**);
or
- 2) Having the Er voluntarily recognize the Un as the bargaining agent of the Ees (**Division 6**)
 - Voluntary recognition is more common, but has disadvantages to certification
- 3) Perspectives of each side:
 - **Ers:** Ees to do their jobs, Ees to be reasonably happy, stability, to contain costs, etc.
 - **Ees:** security, decent wages, benefits, worth and dignity (does not necessarily add up with Ers' needs)
 - **Uns:** stability (that the Un will still exist tomorrow), participation in labour relations process, to be self-sustaining, to reasonably satisfy Ees

B. An Overview of the Certification Process

1) Process:

- a) Organization of efforts are done in private/secret
- b) Application for certification
- c) Investigation steps taken by Board: (1) notify Er that certification app has been made, (2) schedule a hearing re: issues from application, (3) conduct an investigation through an officer, (4) Board officer will produce a report on whether application meets criteria to parties, (5) if there are objections, a hearing will proceed before panel of 3 (vice chair and 2 members), (6) if valid, secret ballot vote of Ees will be held to determine certification of Un

2) Certification timeline

- TU files constitution with LRB (**s. 24/LRC**)
- Filing certification application (must show evidence of 40% of Ee support in bargaining unit)
- Statutory freeze period takes effect on Er
- Officer investigates and within 10 days files a report which is filed and sent to Er and union; 48 hours to file objections (i.e. object to some Ees being included in bargaining unit, ask for Ees to be added, etc.)
- Objection and hearing regarding application
- Votes take place: 50% + 1 ballots cast is required for union to be certified as the bargaining unit
- LRB determines whether TU is an appropriate bargaining unit

3) LRB analysis of an application (**s. 34**), consider:

1. Whether applicant is a TU (**s. 34(1)(a)**): must meet **s. 1(x)** definition; one of its objects is to represent Ees
2. Whether the application is timely (**ss. 34(1)(e), 24(1), 37(1)**) – consider:
 - a) Whether Un constitution and names/addresses were filed with the Board at least 60 days before certification application (**s. 37: Timeliness of application for certification**)
 - b) If Un had made same/similar application for certification within 90 days before application (resulting in withdrawal or denial), Un cannot do so (**see s. 57**, although Board has ability to waive this requirement if it satisfies labour relations purpose)
 - c) Open periods (**see s. 37(2)**) re: period where it is admissible to make application for certification:
 - Newly certified Un has 10 months to reach CK with Ees...
 - d) Strikes and lockouts (**s. 37**); certification application can be brought under certain circumstances
 - **Manalta Coal:** application made to Board to bring revocation

Held: Consent would not be granted unless unusually compelling reasons to grant consent

- e) **s. 43(2)** allows Er to terminate its voluntary recognition of Un
- f) **s. 54(2)**: if Un was revoked through certification vote, cannot apply for certification for the same Un until 6 months later
3. Appropriateness of the bargaining unit (**s. 34(1)(c)**) (see below)
4. Whether there is evidence of 40% support from all Ees of proposed bargaining unit (**s. 34(2)**) (see below)
5. Appropriateness of the date and time of vote (**s. 58**)
6. Whether the application is prohibited (**s. 38**) (see below)

C. Determination of Appropriate Bargaining Unit

1) Key question: Is the unit that the union is applying for an (not the) appropriate bargaining unit?

2) **Test** (from *Information Bulletin 9*): an appropriate bargaining unit is a grouping of Ees that makes “labour relations sense” – indicia include:

1. **Community of interest** (important factor): bargaining units are made up of people; look at functions and whether functions are similar (*Re City of Edmonton Bargaining Units*, 1993 AB LRB)
 - Do the Ees in the proposed unit have common interests? Do they have common skills and working conditions? Do they do similar work? Do they work together, or in a close functional relationship to one another? Will they have conflicting goals in collective bargaining?
2. **Bargaining history**
 - Is there a history of collective bargaining with the Er? Does the Er already bargain with several bargaining agents? Would the application "carve out" a group of Ees from an existing, viable bargaining relationship?
3. **Nature of Er’s organization**
 - Where an Er operates in several locations, the Board will consider the degree to which the operations are integrated or interdependent (*Re City of Edmonton Bargaining Units*)
 - If Ees are highly mobile between departments or locations of the Er, the Board is less likely to find a departmental or localized unit appropriate
4. **Viable bargaining structures**
 - Easier for Er to negotiate with one Un versus twenty; larger bargaining units tend to promote more effective bargaining and representation by the TU than small units
 - The larger the bargaining unit proposed, the more likely it is that the Board will find it appropriate, so long as the Ees share a community of interest
5. **Avoidance of fragmentation**
 - Multiple bargaining units within one Er’s operations are more difficult and costly for an Er to administer and tend to restrict the job mobility of Ees
 - The Board may not find a bargaining unit to be appropriate if it would unduly fragment the Er’s bargaining structure
6. **Agreement between the parties**
 - If the TU and Er agree that a proposed unit is appropriate, Board may give agreement some weight
 - The Board will, however, reject an agreed unit if it is not otherwise an appropriate unit

3) Consider **build-up situations** are where number of Ees in proposed bargaining unit is expected to increase

Noranda Mine (1969 SCC) **Build-up situation: satisfactory representative workforce at the time of application**

• United field workers applied for bargaining unit for all Ees at mine site in Sask; Board determined it was not an appropriate unit, as number of Ees employed at time of application did not constitute a substantial number of the workforce

- **CA:** reversed order, Er appealed to SCC

Held: In favour of Er; however, SCC mentioned that in determining whether a proposed unit is appropriate, variety factors to consider, including build-up situations

- 1) Board can consider any factors it considers appropriate re: an appropriate bargaining unit
- 2) Board may consider build-up issues
- 3) Build-up principle means an application for certification may be premature b/c a substantial and representative population has not been employed

Note: *Operating Engineers* resulted in finding that it was an appropriate unit notwithstanding build-up

- **Main consideration:** whether there is a satisfactory representative workforce at the time of application

MacKenzie Catering (1997 AB LRB) **Appropriate bargaining unit**

• Un applied to represent one construction camp with 27 Ees (16% of workforce), whereas other camps were generally 3-person ops; there were few transfers between camps and if there were transfers, it was voluntary and not a condition of employment; however, terms/conditions between camps were pretty much identical

• Camp of 27 Ees applied for certification; Er argued that this was not an appropriate bargaining unit and that all

camps should be included (if this argument succeeded, the application would be denied)

Held: One camp could be certified; no evidence by Er that camp's organization of bargaining unit was not appropriate

- 1) Un must merely establish an appropriate bargaining unit
- 2) Factors to consider in analysis: 6 factors in *IB 9*, plus (1) Un organization difficulties and (2) desires of the Ees and Er
- 3) No evidence that operations between camps were integrated – factors went against larger bargaining unit
- 4) Emphasis on policy against fragmenting units

Main points:

- a) There may be more than 1 bargaining unit; certification application only needs one unit
- b) Factors considered are the 6 factors plus two factors above
- c) Although the Board prefers larger rather than smaller bargaining units, it may consider a smaller unit appropriate where Ees may otherwise be denied access to collective bargaining

D. Majority Support

1) Under *LRC*, majority support can be proven by:

1. Membership evidence: production of signed membership cards or proof of payment of membership dues by more than 40% of the Ees in proposed unit; and
2. Petition evidence: must show 40% of Ees sign petitions no more than 90 days application is made

2) Under *LRC*, majority support shown in two steps (**ss. 33(a), 33(b)**):

1. Application for certification must be accompanied by evidence that at least 40% of Ees in unit applied for have indicated support for TU or indicated support in writing for selection of TU as bargaining unit
2. Before certification is granted, LRB must be satisfied that Ees in unit have voted to select the TU as the bargaining unit; a rep vote is decided on the basis of a majority of ballot cast by Ees in bargaining unit
 - o Vote not required unless ordered by LRB (**s. 15/LRC**)

E. Bars to Certification

• Generally: Un cannot be certified if dominated by Er or if Ee has picketed at Er's premises (**s. 38**)

- Existing certification (**s. 37(2)(a-c)**)
- Previously lost or withdrawn application (**s. 57**)
- Existing CK (**ss. 1(f), 37(2)(a)(d-e), 37(3)**)
- Bargaining rights previously revoked (**s. 54(2)(c)**)
- Strike or lockout (**s. 37(1)(b)**)
- Filing of Un constitution (**ss. 24, 37(1)(a)**)
- Employer domination (**s. 38**)
- Un picketing (**s. 38(2)**)

F. Effect on Acquisition of Collective Bargaining Rights by Certification

• Main effects of certification:

- 1) Un becomes exclusive bargaining agent for that unit (**s. 40**)
- 2) Er is prevented from bargaining directly with Ees:
 - All individual EKs replaced by the same K
- 3) Duty to bargain in good faith (**ss. 59-60**)
- 4) Limited protections for certified Un from raiding
 - No Un can raid (apply for certification) during open periods (**s. 37(2)(b), (c)**)

Chapter 7 - Acquisition of Bargaining Rights by Voluntary Recognition

1) Before certification process was created by legislation, only way Un could obtain bargaining rights for Ees was voluntary recognition through Er

- Today, many Uns are voluntarily recognized instead of going through certification
- **Division 6**: general rights of Er

2) Voluntary recognition has similarities and differences from certification:

- a) Recognition is voluntary
 - b) Limited obligation to bargain in good faith once a CK is entered into, but **s. 43(1)** allows Er to terminate recognition with notice
 - c) Scope of bargaining unit is negotiated, LRB is not involved (one of the biggest issues at hearing)
 - d) Bargaining rights with a different Uns or different Ees are not necessarily exclusive
 - e) Limited protection from raiding by other Uns – only with CK in place (**s. 38**)
 - Limited right to apply for certification outside window periods (**s. 43(2)**)
 - May not be a statutory open period under **s. 37**
- 3) Potential problems with voluntary recognition:
- Risk that Un and Er might enter into CK that benefits both sides to detriment of Ees

Raydon Rentals (2005 ABCA) Voluntary recognition requires majority support

- Finning (Er) owned Raydon and entered into agreement for Raydon Ees, notwithstanding that Raydon Ees were not involved in CK; Raydon Ees never voted on agreement, but evidence that the agreement was effective in the following years
 - Ees later claimed agreement was not valid
- Held:** Argument was successful
- 1) Board noted that voluntary recognition provisions in LRC should not be interpreted to presume support of the Ees
 - 2) When an agreement is entered into and challenged, Un must demonstrate majority support of Ees
 - No evidence of support in this case
- Ratio:** For a voluntary recognized Un, must have majority support at time of recognition

Chapter 8 - Modification of Bargaining Rights

A. Board Reconsideration of Decisions

- 1) Board has ability to reconsider (**s. 12(4)/LRC**)
- 2) Restrictions (**s. 45**):
 - (a) Former certificate no longer appropriately describes circumstances of collective bargaining btwn parties
 - (b) Modification is not such that it may call into question Un’s majority support within the bargaining unit
 - (c) It is otherwise appropriate to make the modification
- 3) Un’s majority support = 50% + 1

B. Successor Rights

- 1) **Privity issues:**
 - Doctrine of privity: K cannot confer rights or impose obligations to any person except the parties to it
 - Relevance to labour relations: doctrine can frustrate collective bargaining rights by changes in the legal identity of the Er (or Un)
- 2) **Successorship issues**: where Un has agreement with co. that has no practical effect
- 3) **Mitigation**: if a Un can make out req of **s. 46**, Un’s certification stays in effect despite disposition of co. to another entity (**ss. 46(1)(a) and (b), 48**)
- 4) **Requirements for finding successorship:**
 - a) Sale, lease, or transfer or other disposition from one entity to another
 - Something must be relinquished by A to B and something must be obtained by B
 - “Transfer” has been interpreted broadly to include numerous transactions such as gifts, trust relationships, M&A, etc. (**Lester, 1990 SCC**)
 - b) Disposition of a business or part of a business
 - Look at significant component of business and continuity of business
 - Indicia as to whether business has been sold: tangible and intangible items, assignments of Ks, transfer of managerial systems, transfer of personnel, etc.
 - Part of a business must be a separate and identifiable part of the business
 - c) Control of business passes to the purchaser

- Whether B gets control of the business
- 5) **Effect of successorship finding:** Un is in effect (**s. 46(1)(a)**) and new co. is bound to K (**s. 46(1)(b)**)
- Mandatory finding: Board has no discretion as to s. 46(1)(a) and (b)

C. Spin-Offs (Common Er)

- 1) Spin-offs (Common Er): business is conducted by separate entities working together
 - Unlike successorship: business is transferred
- 2) Board may declare multiple entities to be one Er for the purposes of Act (**s. 47(1)**)
 - a) Must be an application of an Er or a TU affected
 - b) Must show proof of associated or related activities or businesses, undertakings or other activities
 - Assessment of degree to which multiple entities engage in same enterprise
 - Test: whether there is “a unity of economic identity” between the multiple entities
 - Factors considered: re “functional integration”: type of product, who the target market is, mode of obtaining new business, purpose for establishing the business, nature of the work actually done, nature of the corporate expertise, capital assets (same money supporting both enterprises), personnel team (overlap), labour force (transfer back and forth), commonality of ownership or management, etc.
 - c) Must be “common control or direction”
 - Control = high-level strategic control (i.e. Board of Directors)
 - Direction = day-to-day operations (who mops floors, who works what shifts, etc.)
 - Test: whether there has been divesting of control of operations in one individual centralized management structure
 - Factors (substance over form): common ownership or financial control, common management, interrelationship of operations, representation to public as a single integrated enterprise, centralized control of labour relations, etc.
 - d) Whether there is more than one enterprise involved (done “by or through more than one entity”)
- 3) **Board discretion:** if criteria is met, Board may declare that the entities are one Er for purposes of *LRC* (**s. 47**)
 - Test: is there a valid labour relations purpose in making a common Er declaration?
 - Generally Board will not exercise discretion where effect of declaration would frustrate wishes of Ees, where Un has delayed application for a common Er application, or whether more than one Un would be effected by declaration
 - If the motivation for the related activities is to avoid a collective bargaining relationship, Board must make declaration (**s. 47(2)**)

Finning (#1) (2005 AB LRB) Successorship and Common Er

- Finning International announced the closure of a component rebuild centre operated by Finning Canada and proposed contracting the work out to OEM
 - OEM established itself in the remanufacturing industry using Finning’s money
 - Finning financed 100% of the cost of building OEM’s new plant
 - Finning was the 100% beneficial owner of OEM
 - The building and operation of the new plant was the object of a joint venture between Finning and the owner of OEM
 - Finning possessed legal power over operation of OEM through its legal rights as a joint venturer, financier or both
 - Day-to-day operations of OEM were vested with OEM’s owner and his management team
- When Finning proposed new corp structure so as to avoid union, union applied for successorship declaration (that OEM was successor) and/or common Er (OEM and Finning)

Issue: Was there a successorship or common Er?

Held: Yes, OEM was a successor to Finning Canada and that the two companies were a common Er

Successorship issue: must be a (1) transfer/disposition, (2) disposition must be a business, (3) transfer of control management

- 1) **Transfer of a part of a business** amounted to successorship, which was established by massive capital and assets (goodwill, management systems, etc.) and infusion in work that was injected into OEM by

Finning

- 2) **Business analysis:** broad concept of business, look to various factors, must be economical vehicle, should reflect a balance of protecting bargaining rights of Ee and allowing Ers to continue business
- 3) **Control management:** infusion of capital by Finning allowed O.E.M. to exist as a fully functioning economic unit and was sufficient to support along with a relinquishment by Finning of other portions of the business, including the work

Successorship main points:

- a) **Transfer:** where there is a relinquishment by predecessor, there is a transfer (**s. 46, Effect of sale of business**)
- b) **Business:** consider whether essence or cohesive part of business has been transferred; various factors considered
- c) **Transaction:** an entity can be a successor even if the transaction is not an arms length transaction – more likely a successor when it is not an arms length transaction
- d) **Test to determine whether there has been a transfer of business:** whether the contracting of work has gone to an entity that has its own economic organization in place (no successorship) or whether first co has transferred enough assets to the successor (successorship established)
- e) **Capital infusion** from one to another can amount to a successorship if there is also a transfer of work

Common Er Declaration issue: must show (1) application made by TU or Er, (2) common Er engaged in associated activities, (3) alleged common Ers subject to common control or direction, and (4) more than one entity involved; (5) Board has discretion after criteria is met

- 1) Factors relevant to the associated criteria can be similar to the direction criteria
- 2) Court considered only a few of the numerous indicia: both cos were in same business, same market, had similar equipment, same labour pool, etc.
- 3) **Related activities (functional integration test):** Finning and OEM had to coordinate closely in various areas
 - “[T]he Board looks for a connection between the work done... The major factor is the extent to which the two entities engage in the same work or enterprise”
 - “The factors used in determining this interrelationship can and do overlap with those used in establishing common control and ownership” and can include the degree of interrelationship of the operations of the various enterprises, similar services and product, vertically integrated process whereby one business carried out one function and another business in the organization processes it, extent ownership or management of the enterprises are common
 - “[B]usinesses or activities are “related or associated” because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals”
- 4) **Common control (core activities test):** look to indicia such as common ownership or financial control, common management, interrelationship of operations, representation to public as a single integrated enterprise, and common control of labour relations
 - **Core activities test:** more likely that common control and direction will be found if the core activities of one entity has been contracted out; for common control to be met, each common Er must only be engaged in direction (day to day management) or control (overall strategic/financial control of business)
 - Totality of indicia that will produce the decision based on factors such as interrelated shareholdings and directorships, financial arrangements that give rise to an element of influence or control, managerial control, degree of integration including any physical integration of plant, equipment or office facilities and any functional dependence in terms of the way the product of the business is arrived at...
- 5) On the facts, (1) there was common ownership and financial control (Finning owned 100% of OEM and controlled business), (2) Finning did not exercise significant direction, but did exercise control on a strategic level, (3) no representations to public, and (4) no centralized control over labour relations

Main points:

- a) **Related activities:** whether the criteria is met is assessed on broad consideration of a long list of indicia (see above)
- b) **Functional integration** between the multiple entities is a key consideration to associated activity criteria

- c) **Common control criteria:** requires broad assessment of long list of indicia; core activities test is a relevant consideration for common control and direction
- d) Concepts of direction and control are distinct and reqs in s. 47 can be met if one directs and the other controls

Finning (#2) (reconsideration) (2005 AB LRB)

- Finning sought reconsideration on both issues

Reconsideration panel: There was no successorship

- **Successorship:** original panel did not put enough emphasis on fact that OEM's owner brought in own resources; relevant Er is actually Finning Canada – and nothing came from Finning Canada; the only relevant transferor is the transferor to whom bargaining rights are attached
- **Common Er:** different view of common direction or control; focused primarily but not exclusively on day to day management

QB decision: gave reconsideration panel deference and upheld ruling of second panel

CA decision: overturned QB ruling, agreed with original panel ruling that there was successorship

- 2nd panel ignored the commercial realities that money was relevant; also failed to broadly interpret provisions
- However, second panel's comments on common Er not necessarily wrong
- CA gave original panel deference as they had live evidence, etc.
- **Analytical device for determining successorship:** if alleged successor can complete the work that is contracted out w/o transferring something, then there probably isn't a successorship; however, if alleged successor cannot carry out the contracted out work w/o something transferred, then there probably is a successorship

Main points:

- a) Reconsideration panel must give a significant degree of deference to findings of fact by original panel
- b) Analytical approach to the provisions requires a broad view in accordance with broader trends in labour law towards greater recognition of bargaining rights
- c) Focus in determining successorship issues should be on the "true effect" of the overall transaction
- d) Creation of complicated structures will not mitigate against a successorship if the commercial realities indicate successorship
- e) CA will not deal with an issue if they don't have to – Common Er declaration issue was not discussed

Ajax (Town) v. CAW-Canada (1998 Ont. C.A., affd. 2000 SCC) Successorship / disposition

- Town of Ajax had K with Charter Ways which provided Ees for transit system (certified with CAW)
- Town decided they wanted to run operation themselves, cancelled K, then hired the original Charter Ways Ees
- CAW applied for a successorship application; application granted, then quashed, then went to CA

Held: Application granted, there was a successorship

- 1) Transfer/disposition of business: broad interpretation of provisions, applies where something is relinquished and acquired
- 2) Part of business had been transferred: established as primary business of Charter Ways was to provide Ees to city; city also received value (of same Ees)

Main points:

- a) Successorship provisions should be given a broad interpretation consistent with preserving bargaining rights
- b) In order to establish disposition, must be relinquishment of something by predecessor and acquisition by successor
- c) Transfer of Ees can only satisfy part of the business criteria if transfer of Ees has some value (continuity and civility of work force)

D. Successor Trade Union

- **s. 49/LRC:** requirement of merger, amalgamation, or transfer of juris (*Weyerhaeuser*)

IWA v. Weyerhaeuser (1990 AB LRB) Merger requires legal steps

- Ers in bargaining unit had passed resolution to seek merger with IWA; merger not was executed or drafted, IWA sought declaration there had been a merger

Held: No merger as there were no documents executed

- **s. 49** (*Successor trade Un*) requires a merger, amalgamation, or transfer of juris

Ratio: In order for there to be a merger, must have more than resolution – need legal steps taken

Chapter 9 - Termination of Collective Bargaining Rights Obtained by Certification

1) Rights obtained as a result of certification

- Exclusive bargaining power (**s. 40(1)**)
- Duty to commence collective bargaining and require Er to bargain reasonably in good faith (**ss. 59-60**)
- Limited protection from raiding by other Uns (**s. 37(2)(b, c, d, e)**)

2) Methods of termination of bargaining rights under LRC – termination by application and other methods

- Application for revocation (**ss. 50-54**), **s. 51**: allows revocation to be made by 4 groups
- Termination by certification (**ss. 32-40**)
- Termination b/c no Ees in unit (**s. 53(1)(c)(ii)**)
- Termination where no CK btw Un and Er exists for a period of time (**s. 52(5)**)
- Abandonment of bargaining rights (**s. 53(1)(c)(i)**)
- Termination by modification (**s. 45**)
- Termination as a result of successor rights or spin-off orders (**ss. 46(2), 47(2)**)

a) Criteria for termination by Ees

- **Support:** Ees require evidence of 40% support in writing (**ss. 51(2), 53(2)**) – generally by petition
- **Timeliness:** cannot make revocation while there is a lawful strike or lockout w/o consent of Board (**s. 52(1)**); if no CK in force, Ees cannot make revocation app until at least 10 months have expired from the date of certification or end of unsuccessful court challenge to certification (**s. 52(3)(a) and (b)**); if CK for 2 or less years exists, then application in last 2 months (**s. 52(3)(c)**); if CK for more than 2 years, then generally 11th or 12th month of 2nd or later years, or last 2 months of term
- **Representation vote:** must have a representation vote conducted by the Board (**ss. 53(1), 53(2), 58**)

b) Termination by Er

- **Timeliness of Er or former Er:** if there has been no bargaining for 3 years following certification (if no CK) or after the end of the last CK (**s. 52(5)**)
- **Majority vote:** if application by Er, majority vote (**ss. 53(1), 53(2), 58**)
- **Stability:** not during strike or lockout (**s. 52(1)**)
- Distinguish between Ers and former Ers

c) Termination by former Er

- **Timeliness of former Er:** if bargaining unit has abandoned its bargaining rights or there have been no Ees in the unit for 3 years (**s. 53(1)(c)**)

d) Termination by Un

- Can do this at any time with two exceptions: (1) not during strike or lockout (**s. 52(1)**); and (2) application may be made at any time there is no CK in effect (**s. 52(2)**)

e) Labour Relations Board

- Board retains discretion (**s. 54(1)**) not to grant revocation – must be satisfied that statutory requirements are met and that Un's bargaining right should be revoked
- Board can terminate on own motion (**s. 55**)

f) Other methods of revocation

- 1) Un's bargaining rights terminated (**s. 40(2)**)
- 2) Where successorship or common Er declaration is made; (**ss. 46(2) and 47(2)**)

3) Effect of revocation (s. 54)

- Er is no longer obliged to bargain with the Un
- Any CK in place becomes void
- Un cannot reapply for recertification for the same unit for at least 6 months

Chapter 10 - Collective Bargaining

A. Generally

1) **Bargaining**: negotiating process between Un and Er in order to reach a CK

- **s. 1(f)**: “‘collective agreement’ means an agreement in writing between an employer or an employers’ organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents containing one or more agreements”

2) **Initiation of collective bargaining (Division 10)**:

- **Notice to commence bargaining**:
 - who gives notice (s. 59)
 - timing of notice (s. 59)
 - content of notice (s. 61(1))
- **Effect of notice (s. 60)**
 - meet and exchange proposals
 - prohibition against refusing to participate (s. 60(3))

3) **Duty of good faith (ss. 60(1))**: When a notice to commence collective bargaining has been served... the bargaining agent and the Er or Ers’ org, not more than 30 days after notice is served, shall

- (a) meet and commence to bargain collectively in good faith, and
- (b) make every reasonable effort to enter into a CK

4) **Service of notice of collective bargaining**

- If there is no CK in place, then either party can serve notice (s. 59(1))
- If there is a CK in place, there are limitations; served at least 60 days before end of CK but no more than 120 days preceding the expiry of the term of the CK or within any longer period provided by CK (s. 59(2))
- Once notice is served, statutory obligations begin: neither Un or Er can refuse to comply with the obligations and duty to bargain in good faith is imposed (s. 60)

5) **Statutory freeze**

- Purpose to freeze on the terms and conditions of employment in order to maintain status quo of conditions of employment while collective bargaining is taking place
- If no CK in place, Er cannot alter rates of pay or conditions of employment until 60 days have passed since notice (s. 147(2))
- If there is a CK, same freeze provisions apply, only provisions don’t terminate after 60 days but continue until Un rights are terminated or revoked (s. 147(3))
- Er can make changes during this time if done with Un consent or according to established Er practice

B. The Duty to Bargain in Good Faith

1) Most important duty: **duty to bargain in good faith (s. 60)**

- Bring parties to the table, make proposals, and search for common ground in reaching an agreement
- Parties expected to make own agreement and duty is only imposed as a procedural duty (not substantial)

2) General characteristics of the Canadian approach

- **s. 60(1)(a) and (b)**: components are the same between AB and *Canada Labour Code*
- **s. 60(1)(a)**: subjective duty is breached where Board finds a party has come to bargaining table w/o intention to reach an agreement (*Royal Oak Mines, 1996 SCC*)
- **s. 60(b)**: objective duty is breached where one party does not take steps to reaching an agreement
- Duty is breached where there is proof of a party not living up to either one of these duties

3) Control over process of bargaining; purposes of duty (*DeVilbiss, 1976 Ont.*):

- a) Foster recognition of bargaining agent
 - Apply duty that reinforces Er’s recognition of Un’s exclusive right to represent Ee

- Prevent Ers from using bargaining process to avoid its obligations to recognize Un or where the Er tries to undermine Un's authority
 - **Examples of breaches:** Er fails to meet, Er insists on certain procedural preconditions of collective bargaining, Er deliberately makes inflammatory proposals, Er changes its position, etc.
- b) Foster rational discussion and reasonable efforts to reach CK
- Distinction between hard bargaining and breach of duty (Ers are allowed to use its economic power to attempt to negotiate an agreement that reflects its interests as long as it is not in bad faith)
 - Bargaining history and facts will determine the situation in any particular case
- 4) **Scope of duty to bargain in good faith**
- Applies to anything that might be included in a CK – parties can present any demands that relate to conditions of employment as long as demands are not illegal; difference in degree to which duty is applied depending on substance of proposals
- 5) **Bargaining to impasse (*Southam*):** where a party stays insistent w/o reasonable possibility of changing position
- Board has generally said that demands that are fundamentally inconsistent with CK regime cannot be bargained to impasse and there are certain situations where a party cannot take the position that they will not budge (demands that involve statutory breach or outside scope of relationship)
- 6) **Control over substance of bargaining**
- Frank exchange of detailed info between parties will minimize the chances of an industrial strike
 - Duty requires each of the parties to disclose a reasonable amount of info relevant to negotiations
- 7) **Remedies**
- **s. 17(1)(c):** on finding a breach, Board may make order from list of remedies
 - ***Southam*:** Board imposed a bargaining schedule, Er had to table proposals for issues in dispute and provide justification for its position

U.F.C.W. Local 280-P v. Gainers (1986 AB LRB) **Breach of DTBIGF**

- Un and Er engaged in collective bargaining, bargaining broke down, Un struck and Er locked out Ees
- Er applied to windup Ee's pension plan; Un did not learn about this until later
- Er did not provide a proposal until months after strike; Er had not notified Un about windup – Un argued Er breached duty of GF

Held: Duty to bargain in good faith (DTBIGF) was breached

- 1) Purpose of duty to protect public interest
- 2) DTBIGF imposes obligation on Er to disclose relevant info requested by Un and in some situations, includes duty to disclose info on an unsolicited basis where the decisions made by Er could impact on Ees
- 3) Breach: Er had not made any proposal after strike, onus on parties to table a proposal before a strike or lockout – proposal must be somewhat concrete
- 4) Even if Un had not requested info, Er still had duty to disclose info about winding up as pension rights are important
- 5) When Er did disclose proposal, it included provision that CK would continue with pension plan in place

Main points:

- a) Duty to bargain in good faith requires Er to disclose info requested by Un; pertinent to collective negotiations
- b) Duty to bargain in good faith includes duty of Er to disclose info not requested by Un if the info concerns decisions that could significantly impact Ees in bargaining unit
- c) Duty to bargain includes duty not to make misrepresentations during negotiations

G.C.L.U. v. Southam Inc. (2000 AB LRB) **Surface bargaining**

- Un brought complaint that Er violated duty to bargain in good faith – engaged in surface bargaining, had not engaged in rational discussion and reasonable efforts, breached duty of GF by bargaining to impasse on issues of wages, etc. not being in the agreement
- Er responded by saying it should be entitled to delaying tactics used by Uns (used hard bargaining)

Held: Er had breached duty to bargain in GF

- 1) Parties can engage in hard bargaining as long as there is a desire to enter into CK
- 2) Ers negotiating to impasse (about wages, etc.) did not amount to breach of GF – but cannot demand that some things must be included; however, can be used as evidence of Er not making reasonable efforts
- 3) *Royal Oak Mines*: duty includes subjective and objective elements – not enough evidence to show subjective intention not to reach a CK, but Er had breached duty to make reasonable efforts / engaging in reasonable discussion as Er had intentionally slowed down negotiations and did not provide any explanation as to why it was insisting on a modified formula vs. full one; Er's position on keeping wages, benefits, etc. fell short of industry / relations practice w/o providing explanation

Main points:

- a) The mere fact that a party has taken a position that certain terms/conditions should not be included in CK and bargained the issue to impasse will not amount to a breach of a duty to bargain in GF
- b) A breach of DTBIGF can be found where a party intentionally slows down negotiations
- c) Where a party opposes the inclusion of industry standard/terms in a CK, that party will have breached the DTBIGF unless that party has provided a full explanation why

8) Ways in which recognition of bargaining agent can be breached:

- Failure to meet
- Surface bargaining
- Breach of freeze period
- Deliberately presenting inflammatory or illegal proposals
- Circumventing the Un

9) Ways in which rational discussion and reasonable efforts can be breached:

- Non-disclosure
- Misrepresentation
- Lack of sufficient information and justification to support position
- Conducting away from bargaining table

Chapter 11 - If Bargaining Fails

A. Generally

- **Divisions 11 – 18/LRC:** resolving disputes short of strike or lockout or during and miscellaneous matters

B. Alternative Methods of Resolving Bargaining Disputes

- Methods in the LRC:

- a) Mediation;
- b) Interest arbitration;
- c) Disputes Inquiry Board;
- d) Appointment of Public Emergency Tribunal; and
- e) Recommendation proposals

1) Mediation

- Informal mediation (s. 64): either side may request director of mediation services to appoint a mediator
- Formal mediation (ss. 65-66, 70): either party after notice of collective bargaining has been served during dispute may ask director to appoint a mediator; director has discretion to appoint, but if Minister directs mediation, director must appoint mediator
- If no resolution made after 14 days after mediation, mediator *may* recommend settlement; if recommendations are accepted, then recommendations become binding and form part of CK

2) Interest arbitration

- Voluntary arbitration (Division 15, ss. 93-95): parties can agree to submit dispute to arbitration Board; if arbitration Board can mediate a settlement in 20 days, then Board may set an award that is binding
- Compulsory arbitration (ss. 96-103): applies to certain types of Ees (i.e. firefighters), allows either side of dispute to request for arbitration Board

3) Disputes Inquiry Board (Division 20, s. 105)

- If this Board cannot resolve dispute within 20 days after it is established, it must make recommendations to resolve dispute; if they are accepted, they become binding

4) **Public Emergency Tribunal (Division 18)**

- If Lieutenant Governor in Council determines that the dispute can cause specific damage (i.e. to sewage systems or health services) or unreasonable hardship on 3rd parties, (**s. 112**), may create PET
- If not resolved by day fixed by LGC, tribunal must make recommendation that will be binding

5) **Proposal and recommendation votes: resolving dispute by votes (s. 69)**

- a) Vote on most recent proposal made by one of the parties at request of the proposal making party; either party to dispute can apply to the Board for a vote on proposal...
- b) Vote on mediator's recommendations (**ss. 66(3), 68, 70**); if one party accepts recommendations but the other rejects them, accepting party can request the a vote... (**s. 70**)
- c) Vote on recommendations by Disputes Inquiry Board (**s. 107(2), (4)**)

6) *Informational Bulletin 15* discusses procedure

Regulation of the Right to Strike Under the Code

1) **Divisions 13, 14** refer to lockouts and strikes (see definitions)

- General prohibition on strikes and lockouts in *LRC*, unless permitted by the *LRC* (**ss. 71, 72**)

2) **Statutory criteria for lawful strike (s. 73)**

- (a) no CK is in force, other than as a result of section 130;
- (b) a strike vote was held... (**s. 77(2)**);
- (c) strike notice is given (**s. 75**); at least 72 hours before strike commences, date/time and location of strike
- (d) the strike commences on the day and at the time and location specified in the strike notice or, if an amendment to the strike notice is agreed to and is permitted, on the day and at the time and location specified in the amended strike notice (**s. 79(1)**); and
- (e) where a disputes inquiry Board is established before the commencement of the strike, the time limits referred to in section 105(3) have expired

3) **Statutory criteria for a lawful lockout (s. 74)**

- (a) no CK in force, other than as a result of section 130
- (b) lockout vote was held (i) that remains current, (ii) for which the results have been filed with the Board, and (iii) that resulted in a majority in favour of a lockout (restrictions under **s. 77**)
- (c) lockout notice is given pursuant to *LRC* (need timing and location, **ss. 78-80**),
- (d) the lockout commences on the day and at the time and location specified in the lockout notice or, if an amendment to the lockout notice is agreed to and is permitted, on the day and at the time and location specified in the amended lockout notice; and
- (e) where a disputes inquiry Board is established before the commencement of the lockout, the time limits referred to in section 105(3) have expired

4) **Support of strike by non-striking Ees**

- Non-striking workers cannot refuse to work generally or with replacement workers b/c other Ees are on strike or locked out (**s. 85**)

5) **Picketing (s. 84)**: allowed during lawful strike and lockout

6) **Declaration of unlawful strike or lockout (ss. 86-87)**: Board can declare certain activities to be an unlawful strike or lockout and issue a declaration if finds activity to be unlawful and issue orders (i.e. cease and desist orders) that are filed with the court and enforced as a court order (ABQB)

- ABQB: limited juris to grant relief re: lockouts, strikes and picketing (**s. 91**)
- Subject to limitations: court can only intervene where (1) it is likely that persons or prop could be harmed and (2) where resort to the Board is impractical

HSA v. VS Services (1990 AB LRB) Notice required for initial action

- Er claimed that strike notice from Un was insufficient and asked for a declaration that Un ought to give separate notice of each strike action and each time they changed method of striking
 - Er argued that the purpose of provision was to protect Ers by allowing them to get affairs in order before strike; argued first strike was 24-hour walkout, second strike was overtime ban

Held: For the Un, Un's notice was sufficient, second notice not required

- 1) **Definition** of term strike has been interpreted broadly to include reduction of output and other activities that amount to a total withdraw of services; strike can include any situation where Ees deliberately do not work
- 2) **Multiple purposes for notice** (not just to protect Er): to protect 3rd parties from unnecessary harm, to create environment to foster negotiations (72 hours), opportunity for mediator and gov't to intervene – must be bargaining in good faith, strike vote, strike notice, waiting period then strike
- 3) Strike does not have to be continuous; may continue at locations other than the initial location
- 4) "Will commence" = Un only needs to give notice of when strike will start, not where it will continue
- 5) Absurd to require separate strike notice for each activity

Main points:

- a) Definition of a strike is broad, extending to any situation where Ees do not work in a way they agreed
- b) Definition of strike does not include only a withdraw of services but partial withdraw services or output reduction
- c) Once notice is served, no need for a new strike notice to resume strike activities
- d) Once notice is served, no need for a new strike notice each time nature or location of activity changes

Ratio: Strike/lockout notice only has to be given for initial action

C. What is a Strike?

- **s. 1(v)/LRC:** definition is broad and requires three criteria to be met
 - a) **Refused work:** cessation of work, refusal to work or refusal to continue to work
 - b) **Concerted action:** must be by two or more Ees acting in concert or common understanding
 - c) **Purposive/subjective element:** purpose of compelling Ers to comply with certain terms of employment

McGavin Foods (1988 AB LRB) Elements of strike

- Strike by bakery unit / Un that had a CK with McGavin indicating that co. shall not require any Ee to cross the picket line
- McGavin continued to schedule work for trucking Ees, who refused to cross picket line set up by other Un (as they wanted to support other Un); as trucking Ees were not in position to legally strike, Er complained to LRB and asked for cease/desist order

- **First panel:** there was an illegal strike as those Ees refused to cross picket line

Reconsideration panel decision: Agreed and found trucking Ees had illegally struck

- 1) Definition of strike in LRC can be broken down to 3 elements: (a) refused work, (b) concerted action, (c) purposive element:
 - a) **Refused work:** in order to find a refusal to work, refusal to do any activities that count as work will meet this element (don't have to refuse to work at all), i.e. refusal to do overtime
 - Definition of "Work" in relation to 1st element = those activities/duties the Ee would ordinarily expect and be expected to perform as a consequence of his or her being an Ee
 1. *may* include work defined in written K;
 2. work will never include illegal activities;
 3. work will generally not include unsafe activities; and
 4. volunteer activities will not constitute work
 - b) **Concerted action:** Board asked to draw inference
 - Legal burden is on the applicant (Er) to demonstrate a concerted action
 - However, Un will almost always have tactical burden here too
 - c) **Purposive:** must find, in mind of Ees, intention to compel Er to accept terms of employment
 - Subjective level of intent requirement is pretty low – just a belief that one's actions will in/directly pressure Er, i.e. by refusing to cross picket line, strong intention, etc.
- 2) General legal effect of K clauses related to strikes
 - Re LRC, parties cannot contract out of obligations; not just there to protect parties, but others too
 - Any clause in CK that tries to circumvent the no strike provisions is void; however, those clauses can also be interpreted as not to contract out of LRC, but simply to influence liabilities of relationship
 - Normal rule of grievance arbitration = Ees must work now, grieve later

- If Er schedules work in contravention to clause, Board has discretion to issue cease and desist order
- 3) Relationship between K clauses and definition of strike
- This clause was not a direct attempt to contract out of strike provisions = not void

Main points:

- 1) Three elements to definition of strike (discussed earlier)
- 2) Refused work element is not redefined for purpose of CK
- 3) Definition of work means work that a reasonable observer would expect to be performed absent the work stoppage
- 4) Refused work element does not include volunteer activities
- 5) Concerted action element can be inferred from failure of Ees to report to work in face of picket line
- 6) Concerted action inference can be rebutted if Ees provide credible evidence that there is no concerted action
- 7) K provision in CK cannot be used to rebut the concerted action element
- 8) Purposive element can be inferred from circumstantial evidence, i.e. failure to report to work in face of picket line
- 9) Purposive element can be rebutted by convincing evidence
- 10) Concerted evidence cannot be used to rebut purposive element
- 11) Ee or Un claiming K right to strike must assert that right through arbitration process and not by refusal to work
- 12) If K provision is a direct attempt to circumvent no strike provisions, it is void
- 13) If K provision is not a direct attempt to circumvent no strike provisions, but intended to influence rights between parties, provision will not be void and can be relied on in arbitration
- 14) If an Er has scheduled work in contravention to CK which prohibits scheduling of work during strike, that is a factor that may affect Board's discretion

D. What is a Lockout?

- **s. 1(p)/LRC:** definition of lockout
 - (a) **Objective element:** closing of place of employment or suspension of work or refusal by Er to continue employing Ees
 - (b) **Subjective element:** refusal must be done with purpose of compelling Ees to accept certain terms of employment

Calgary Cooperative Association Limited (1993 AB L.R.B) Elements of lockout

- Un and Er were halfway through two year CK when Er approached Un to discuss reducing labour costs and cutting wages
 - Although Un was resistant to Er's proposition, Er sent it directly to Ees indicated that if the amendments to CK are not agreed to, co-op would take unilateral action to cut costs (i.e. reduce hours, replace senior Ees, etc.)
 - Un complained about threat of lockout and Er's unfair practice in attempting to bargain directly with Ees
- Held:** Activities amounted to an unlawful lockout (statutory requirements of a lawful lockout were not met)
- 1) Er cannot lockout during term of CK
 - 2) If a lockout has occurred, look to s. 1(p) elements to find whether it is lawful or not
 - **Objective:** there is an actual or threatened suspension of work;
 - **Subjective:** Er's intention to compel favourable terms of employment; distinguish from Er's business decisions
 - 3) In this case:
 - Er did not initially breach LRC by wanting to amend CK or threatening to suspend work (could have been legitimate)
 - Breach occurred when Er did both: threatened to suspend work to compel amendments
 - Only need to find intention overlying objective element – thus illegal lockout

Main points: definition of lockout has two elements

- 1) **Objective element** of definition includes where Er refuses to offer work on same terms as it did

previously

- Reduction of hours or wages meets the objective element of definition
- 2) **Subjective element** is not met where Er is simply implementing a legitimate business decision in response to financial crisis
- Even where Er is responding to financial crisis, subjective criteria will be met where Er's specific purpose is to implement changes to the CK

E. Employment Status of Strikers and Replacement Workers

- 1) **s. 89**: no one loses employment b/c they cease to work as a result of a lawful strike or lockout
- 2) **s. 90**: conflict of rights between striking workers and replacement workers during strike
 - In AB, permissible to hire replacement workers
 - At the end of strike, Ees are entitled to resume employment in preference to any replacement workers (qualifications apply – non-examinable topic)

F. Picketing

- 1) **s. 84**: refers to picketing, but *LRC* has no definition of picketing
 - Picketing is prohibited unless authorized under other subdivisions
- 2) **Picketing criteria**
 - a) Must be a lawful strike or lockout
 - b) Must occur at striking or locked out Ee's place of employment only *(qualified by *Charter* case law)
 - c) Picketing must not be accompanied by acts that are unlawful (i.e. assaults)
 - d) Picketing must be peaceful
 - e) Must be done for purpose of persuading people not to enter place of business
 - f) Must occur within any limits imposed by Board orders
- 3) **s. 84(2)**: any person affected by strike or lockout can apply to Board for restrictions on picketing
 - Board can regulate picketing and location
 - **s. 84(3)**: considerations of Board in making orders (directness of interest of persons/Uns who are picketing, likelihood of violence of picketing, desirability of limiting escalation of dispute, concerns of freedom of expression)
 - **s. 91**: court has juris to deal with picketing

UFCW v. Kmart (1999 SCC) Leaflet distribution = right of expression under Charter

- Ees of one Kmart location were on strike, went to another Kmart location to hand out leaflets (re: Kmart's bad practices)
 - *BC Code*: definition of picketing included leaflet activity
- Kmart applied for cease/desist order at secondary location on basis of illegal picketing
 - **First panel**: granted application, but Un sought reconsideration until case reached SCC

Held: Infringement was not justified, appeal allowed

- 1) Definition of picketing was overbroad, infringed s. 2(b)/*Charter* and not justified by s. 1
- 2) Distinction between leaflet activity (aimed at encouraging rational discussion) and picketing activity (aimed at "signaling" = an irrational mode of persuasion)
- 3) By including rational modes of discussion and then prohibiting activity, the provision infringed *Charter*

Main points:

- 1) Restrictions on activities by Ees, where those activities can create rational discussion, generally contravenes s. 2(b)/*Charter* and not justified under s. 1
- 2) Leaflet activity where not accompanied by conventional picketing activity generally will not fall within definition of picketing (to find picketing, look to factors like location, number of people, etc.)

RWU Local v. Brewers' Dist. and MTE (2000 AB LRB, aff'd 2001 ABQB) Elements of picketing and ally doctrine

- When dispute arose, Un started picketing at Er's premises, but as operations had transferred to MTE, union started picketing there
- MTE (as interested person) applied to Board and argued that picketing was unlawful based on its secondary nature

Issue: Could Un picket at the premises of MTE?

- **Initial panel:** cease and desist order against Un
- **Reconsideration panel:** considered Un arguments that MTE was the place of employment of locked out workers and requirement that lawful picketing take place at the place of employment of locked out workers infringed *Charter*

Held: Restriction of lawful picketing at place of employment violated *Charter* and could not be justified under s. 1

- 1) **Elements of picketing activity:** (a) physical presence of persons at or near targeted prop, (b) those persons communicate with persons passing area, (c) communication contains info about dispute, (d) an express or implied appeal for support
- 2) **“Ally doctrine”** (U.S. jurisprudence): picketing of secondary Er is allowed if that Er intentionally and materially assists struck Er in resisting strike (main point is intentional and material assistance) – MTE was clearly an ally
- 3) **Place of employment** = (1) place where Ees worked before dispute or (2) place where Er moved operations to or (3) where Ee would expect to return to work after dispute is over → MTE was not the place of employment
- 4) **Charter issue:** prohibition was an infringement of s. 2(b), desire to protect neutral parties to dispute, but minimal impairment test was not met as prohibition on secondary picketing prohibits picketing of neutral third parties and non-neutral third parties

Main points:

- 1) Definition of “picketing” includes 4 elements (see above)
- 2) **s. 84(1)** contravenes *Charter* in this case for ally Ers – not read as prohibiting picketing of ally Ers
- 3) Test for ally Er is whether alleged Er has, voluntarily and with knowledge of dispute, assumed a role in Er’s business that has the effect of strengthening primary Er in dispute
- 4) Indicia:
 - Relationship was a contractual commercial relationship = MTE derives a benefit from the relationship
 - Relationship originated in an inquiry from BDL about the availability of warehouse space at MTE = the arrangement began in contemplation of the labour dispute and for the purpose of enabling BDL to continue operations during the dispute
 - MTE had no relationship with BDL prior to the bargaining dispute between BDL and the Un
 - MTE is not in competition with BDL
 - MTE had actual or constructive knowledge of the dispute between BDL and Local 285 before it began distributing beer
 - As a result of their arrangement, MTE was performing precisely the same work as previously done by the locked-out Ees of BDL; the work had been transferred to MTE to perform on its premises
 - The work transferred was extraordinary in volume and comprised a very substantial part of BDL's pre-lockout business
- 5) For purposes of **s. 84(1)**, definition of place of employment includes description above

R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (2002 SCC) **Secondary picketing generally lawful**

• Lawful strikes occurred at two Pepsi-Cola facilities, but there was secondary picketing at other locations
Issue: Is secondary picketing *prima facie* unlawful? (Sask did not have express ST provisions pertaining to picketing)

Held: Picketing is *prima facie* lawful in Sask (compared to AB where it is *prima facie* unlawful: **s. 84**)

- 1) Picketing has two purposes:
 - Convey info to public, to Er
 - Put economic and social pressure on Er
- 2) Picketing always includes expression of some kind (affects s. 2(b)/*Charter*)
- 3) Freedom of expression is also a core value in labour relations context
- 4) Conclusion: picketing is *prima facie* legal unless it involves tort or crime
 - Approach best conforms to *Charter* values – focused on principles rather than location
 - It is the more flexible and rational rule
 - Location is only one marker that might indicate harm

- It avoids artificial distinction between labour and non-labour activities
- 5) Er argued that this would create more widespread harm to neutral third-parties
- Court disagreed – although neutral third-parties should be protected, banning all secondary picketing is overly broad

Ratio: *Charter* value analysis = secondary picketing is permitted as long as it is not involve tortious or criminal action

G. Government Action

- 1) **Mediation** – parties are required to participate
- 2) **Preconditions** to strike/lockout – must be complied with
- 3) **Picketing** – limits and restrictions
- 4) **Reinstatement** – people who are terminated during strike can be reinstated unless there was just cause
- 5) **Injunctions** – against disruptive picketing, leafleting
- 6) **Disputes Inquiry Board:**
 - Involves Minister of Labour: gov't-appointed mediator meets with parties over a period of time and ultimately writes recommendations (**s. 106**)
 - If appointed before strike/lockout, then delays it until DIB finishes
 - If appointed during strike/lockout, it will continue as usual
 - Does not bind parties, only makes recommendations
- 7) **Public Emergency Tribunal (ss. 112-113):**
 - Makes binding decisions
 - Can be imposed at any time during the strike
 - More important in situations where damages to health or property is likely, reduction in health services, unreasonable hardship caused or is likely to be caused to third parties who aren't involved in dispute
- 8) **Interest arbitration:**
 - Both parties agree that they will allow a third party to decide the terms of their CK
 - Mandatory for police, firemen, and health care nurses – in this case, gov't chooses arbitrator

Alberta Teachers' Association v. Alberta (2002 ABQB) PET cannot be applied to multiple disputes

- Union challenged decision to impose PET against 19 separate locals; argued that gov't shouldn't have treated 19 different disputes as a single one and should have given separate orders to each dispute

Held: PET cannot be applied to multiple disputes at the same time

- Court: this is a draconian power; if the gov't 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

Ratio: Where there are a number of bargaining units in overall dispute, gov't must establish that triggering criteria is met with each bargaining unit before invoking emergency powers

Chapter 12 - The Collective Agreement

A. Generally

- 1) K between bargaining agent and Er which states terms of employments of all Ees within bargaining unit
- 2) Collective agreement (CK) is an "agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents containing one or more agreements" (**s. 1(f)**)
 - CK can incorporate other agreements, i.e. letter of intent or memo of understanding
- 3) Relevant sections
 - **s. 128 (Effect of collective agreement):** binding on Er and Ees
 - **s. 129 (Term of collective agreements):** term is for 1 year unless otherwise specified
 - **s. 130 (Bridging of collective agreements):** "when notice to commence collective bargaining has been served under this Act, a collective agreement that applies to the parties at the time of service of the notice is deemed to continue to apply to the parties, notwithstanding any termination date in the agreement, until (a) a new collective agreement is concluded, (b) the right of the bargaining agent to represent the employees is terminated, or (c) a strike or lockout commences
 - **s. 131 (Signing of collective agreement):** individual Ees do not have to sign the CK, as it is signed by agent

- **s. 133 (Collective agreement declared void):** CK is rendered void if (1) union is dominated by Er or (2) union is influenced by an employer so that the trade union's fitness to represent employees is impaired (aka. sweetheart union = union that is controlled by Er in order to keep another union out)
- CKs come in different sizes and forms
- Parties are largely free to negotiate the terms, but cannot contract in a way to violate HR legis or LRC or minimum standards

4) Common terms

- Express contractual definitions
- Term and duration of agreement: start date and end date
- Membership and dues: requirement to be a member or to pay a membership fee, requirement on the part of Er to deduct union dues and to remit those dues to the union
- Acknowledgement of union representation, i.e. permission to participate in union activities during work hours, whether union can communicate with emails or hold meetings at worksite
- Management rights clause: provision that says management reserves unto itself the ability to regulate any issue that is not specifically addressed – management right must be exercised reasonably
- Safety: maintaining a physically safe workplace or a workplace free of harassment
- Notice to bargain: time frame in which either party may initiate collective bargaining
- Other matters: hours of work, probation, salary scale, performance evaluation, seniority and its effects on promotion, lay-offs, salary, leaves of absence, disability, discipline, demotion and dismissal

5) Dispute resolution process: in the event of a disagreement, there are methods of resolution

- **Informal complaint process:** minor disagreements where informal resolution process is in place
- **Formal "grievance" process:** where allegations of breaches of a specific section of CK are made unless there is no foundation for the grievance
 - Must be tied to a specific section of CK
 - Today, in the case of discrimination, anti-discrimination provision will be implied / read into the agreements (unique exception to the general rule where implied terms are rarely construed in CK)

6) Grievance procedure:

- Individual** grievance: specific Ee complains that there had been a breach of CK
 - Group** grievance: group of Ees allege a breach of CK that affects them all essentially in the same way
 - Policy** grievance: difference arising out of the interpretation, application, operation or administration of the CK affecting more than one Ee (and more than one department) where the Ee might not have yet been specifically adversely affected
- Usually submitted as a written complaint to an Er by a union on behalf of one or more members of the bargaining unit – normally includes date, nature and type of grievance, name of the grievor, the remedy and the article of the CK that is breached
 - Multi-step process to dealing with grievance: start with low level management and escalate the corp hierarchy, i.e. (1) submission of grievance to supervisor or dept head, (2) submission to upper management, (3) formal dispute resolution procedure (usually arbitration but can involve other forms of ADR)
 - Subject to time limits (30 – 60 days) and requires submissions in writing

B. Effect of a Collective Agreement

1) Historically, at CL, CK had no legal status as a K to be sued on (therefore was not recognized by the courts)

- Agents were interfering with all of the individual employment contracts – unlawful restriction on trade
- If breach of CK: Ee remedy was to strike, Er remedy to lockout
- Unclear what CK had on all the individual contracts of employment
- Due to uncertainty of the CK, labour relations developed the arbitration process for alleged breaches of the agreement – legislation changed everything

2) LRC provisions creating status:

- **s. 25(1)(b) (Capacity of trade union):** trade union is capable of suing and being sued
- **s. 25(2):** TU not unlawful by reason only that one or more of its objects are in restraint of trade
- **s. 128 (Effect of collective agreement):** binding effect on the bargaining agent, Er and the bargaining unit

3) Law evolved into basic propositions:

- CK can be sued on by the union and Er – however, in most circumstances the court will not take jurisdiction because the appropriate forum for resolving disputes is an arbitration panel and not a court
 - Terms of CK are binding on the union, Er, and Ees in bargaining unit whether they are members or not
- 4) **Issue:** after the creation of CK, do individual Ks of employment disappear or are they modified? (**McGavin**)

McGavin Toastmaster v. Ainscough (1975 SCC) No individual employment arrangements

- Union engaged in an unlawful strike intending to “stay out until the situation is rectified”
 - After a couple days of striking the company closed the plant
 - CK provided for severance pay if plant closed; Ees wanted severance pay but Er refused to pay as Ees had quit jobs
 - **Trial and CA:** Ees were entitled to severance pay as Er did not give notice that were accepting that as a breach
- Held:** Affirmed previous decisions for different reasons
- 1) The nature of the employment relationship is impacted by CK:
 - “[I]ndividual relationships... between employer and employee have meaning only at the hiring stage... If the relation between employee and union [was that the union acted as a mere agent]... the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between Er and Ee negotiated by the union. This seems... to be a misapprehension of the nature of the juridical relation involved in the collective agreement” – a bargaining agent is more than an agent for a bunch of Ees – it has legal rights under CK under its own rights
 - 2) As individual arrangements do not exist if Ee is part of a collectively bargained workplace, CK dictates the terms and conditions – CK is one master agreement between union and Er
 - Once there is a CK in place – common law concepts like repudiation and fundamental breach are not applicable where CK has not expired and where the duty to bargain collectively subsists
 - “When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship. Conversely, when there is a collective agreement in effect, it is difficult to see how there can be anything left outside except possibly the act of hiring”
 - 3) CK between Er and the union contemplated breach
 - In the case of breach, referred to a dispute resolution process and an arbitrator decides; if Ees’ acts breach against CK, Er’s remedy is to go to arbitration and to get Ees to go back to work
 - Er cannot say that because of number of Ees engaged in breaches of K, the entire CK is terminated
 - This was not the union’s breach – and even if so, must use dispute resolution
 - 4) Look at these issues of contract law within the labour relations framework
 - Apply contractual interpretation as to what makes public policy
 - Principles have been changed, modified and contorted by courts and tribunals – modify those principles to meet demands by the non-unionized sector
 - 5) As the illegal strike did not terminate Er/Ee relationship, Er was bound to honour the severance provisions of CK

C. Arbitration

- **ss. 132 – 146/LRC:** deals with arbitration
 - LRC prohibits strikes and lockouts until end of CK
 - Disputes are settled through grievance process
 - Arbitrators may consist of a 3 person panel or single arbitrator: nominees must be open minded, but they might deliberate to a certain outcome
 - **s. 135:** every CK must contain a method for the settlement of differences
 - **s. 136:** model clauses
 - **s. 140:** speeding up decision

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- Must avoid delay in arbitration; want to resolve grievances in a timely fashion
- Director of settlement may take steps to speed up the arbitration process

- **s. 142(1):** arbitrator or arbitration board cannot alter or change the terms of a CK (arbitrator may interpret and enforce the provisions but cannot disregard them)
 - **Exception in s. 142(2):** arbitrator's remedial powers can substitute a lesser penalty in lieu of termination even if the CK doesn't permit lesser penalties (i.e. reinstatement)
- **s. 143:** powers of arbitrator
- **s. 144:** award is binding on parties
- **s. 145:** arbitrator's award is immune from JR except on juris issues; privative clauses limit the power of judicial review of an arbitrator's award

Voice Construction (2004 SCC) Reasonableness standard of review

Held: If a labour arbitrator makes an unreasonable decision, that is outside juris of labour arbitrator and court can intervene

- 1) Legis could not have intended that it was immunizing arbitrators from unreasonable decisions, therefore courts must be able to review decisions
- 2) Courts should give some deference to certain arbitration bodies
- 3) Standard of review usually used for labour arbitration = reasonableness (capable of standing up to a somewhat probing examination and supported by a tenable explanation)
- 4) Privative clauses indicate that deference should be given based on different levels (correctness and reasonableness)

D. Union's Duty of Fair Representation

1) Duty is owed to the members of union

- Where union fails to represent Ee's interests, Ee may have a claim against union for failure
- There are statutory duties and CL duties of fair representation
- If Er is covered by LRC, statutory duty is owed; if not, CL applies
- If Er covered by *Public Service and Relations Act (PSRA)*, no statutory duty, so duty of FR enforced via CL

2) In determining duty, first look to ST, then turn to CL

- **s. 153/LRC:** no TU shall deny an Ee or former Ee who was in bargaining unit the right to be fairly represented under CK
- If Ee had opted out of union membership, Ee is still represented by TU
- Fair representation under CK does not include collective bargaining duty, but is described in *IB-18*

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1. Exclusive power conferred on union entails a corresponding duty to fairly represent Ees in unit
2. When there is a right to take case to arbitration, union has discretion whether there is a grievance
3. Discretion must be exercised in GF, objectively and honestly, taking into account significance of grievance...
4. Union's decision must not be arbitrary, capricious, discriminatory or wrongful
5. Representation by union must be fair, genuine, and not merely apparent...
6. Union's duty
 - Discretion of handling grievances
 - Avoiding ill will
 - Avoidance of discrimination
 - Must not be arbitrary: union can still make honest mistakes without breaching the duty; union doesn't have to seek a legal opinion to determine whether they should go ahead with the grievance
 - Union may take other considerations/interests in determining whether to pursue grievance
 - Need not hire counsel
 - Must notify the grievor of the hearing
 - Responsibilities outside of CK that require the union to represent the Ee may fall in
 - a) Union constitution and rules
 - b) Statutory obligations (i.e. human rights legislation)
 - c) TU's Code of Conduct

3) Process for filing a complaint:

- If complaint caught by *LRC*, Ee files complaint with LRB
- Complaint assigned to officer who investigates and reports
- Admin panel of labour board conducts review
- If there is merit, LRB convenes
- Filed within 90 days
- If union has breached duty, Board may impose remedies
- If union is not subject to *LRC*, available remedies are those at CL which requires Ee to sue union in courts and seek remedies that way; however, court has no power to relieve from time limit in CK, so only remedy is to sue union for damages

4) Statutory duty: rights that exist under s. 153 – available against union that is regulated by *LRC*

- In addition to those obligations, union may have independent duties
- If not regulated by *LRC*, then Ee's rights only exist at CL, so sue in court to get damages

5) When dealing with CK bargaining: s. 153 does not apply to bargaining process and duty does not exist at CL

- No CL duty of FR by any union to any Ee in relation to collective bargaining (as union is bargaining for group, not individual)

Gendron v. Supply and Services Union (1990 SCC) Courts have juris to hear duty of FR

- Er had a posting for job position; criteria set out in CK
- A was awarded position, 3 others grieved claiming requirements were not properly posted
- After grievance process, B was appointed instead of A, so A claimed breach of FR

Issues: Could A sue in CL courts for duty of FR? What is the test of duty of FR?

Held: Ordinary courts have jurisdiction to entertain a claim based on a breach of a union's duty of fair representation; test of duty of FR outlined below

- 1) Jurisdiction question: does Ee have a choice of forum?
- 2) Parliament enacted an exclusive code to deal with the duty of fair representation – statutory scheme much superior to the common law for remedies
- 3) Implication that Parliament intended exclusive remedies against unions
 - CK established is the broad parameters... CL duty ousted when Parl creates legis, but CL may not be ousted if statute is silent; notion of deference to specialized tribunals
 - Labour arbitrators know what they are doing and the courts shouldn't mess around with that
- 4) 5 principles concerning union's duty of representation (reiteration of *IB-18*):
 - a) Must fairly represent all Ees comprised in the unit
 - b) When the right to take a grievance to arbitration is reserved to the union, Ee does not have an absolute right to arbitration and the union enjoys considerable discretion
 - c) Discretion must be exercised in good faith (objectively and honestly) after a thorough study of the grievance, taking into account the significance of the grievance and of its consequences for Ee and the legitimate interests of the union
 - d) Union's decision must not be arbitrary, capricious, discriminatory, or wrongful
 - e) Representation must be fair, genuine, undertaken with integrity and competence, without serious/major negligence, and without hostility towards the employee
 - f) Union can pursue one interest over others if process is fair, etc.

Vickers v. Health Sciences Association of Alberta (1997 AB L.R.B.) Duty of FR in bargaining process

- UA employees working in the Provincial Laboratory were transferred to the University of Alberta Hospitals (UAH). On accepting employment with UAH, the transferred Ees became members of the HSAA union
- A letter of understanding existed between UAH, NASA (union: Non-Academic Staff Association) and HSAA indicating that Ees who transferred would have seniority calculated under the UAH CK and would be transferred
- Problem arose as to how to incorporate new Ees into existing structure, so HSAA convinced UAH to revise the seniority list using a new calculation method

- Old UA (not hospital) Ees brought DFR complaint

Issue: Were the former university employees prejudiced?

Held: Yes, HSAA ordered to cease and desist from breaching Ees' right to be fairly represented by that union

- HSAA and UAH required to take all steps necessary to restore the Ees' full seniority entitlement to letter of understanding and the collective agreement as ratified
- 1) **HSAA argument 1:** This is a collective bargaining matter, so duty of fair representation does not apply
 - Union represents varied interest in collective bargaining and those interests sometimes conflict
 - This was a natural exchange – should not be subject to review for the duty of fair representation
 - Collective bargaining process has a ratification process
 - Can speak to issues in the agreement and vote – opportunity to express displeasure or endorse provisions
 - Opportunity for minority provisions to be expressed

Board: Collective bargaining is a concept that will be interpreted narrowly, looked at restrictively

- Board found that the change of the seniority did not pass through ratification in the normal way (ratification process serves as a check on process)
- This type of bargaining is not excluded from the duty of fair representation – affected members were denied opportunity to participate in democratic process
- No ratification process took place = breach of the duty of FR

- 2) **HSAA argument 2:** Union was between a rock and a hard place – had to choose, was going to displease someone

Board: Argument rejected – must follow ratification process and investigate the relative merits

- There was no consultation or due diligence exercised and there was a failure to consider alternatives / other options

Ratio: Without a normal ratification process (alluding to collective bargaining), duty of FR may be breached

L'Heureux v. IBEW (1993 AB L.R.B.) **Bad faith may require union to compensate Ee**

- In previous proceeding, Board found union was grossly negligent and breached the duty of fair representation
 - Original remedy: (1) ordered arbitration and extended the time limit (providing relief against Er's reliance on the time limit – resulting in some prejudice to Er), (2) ordered union to pay costs of arbitration, (3) Board reserved jurisdiction to decide on wages and benefits
- After arbitration, Ee was reinstated without back pay (1 year) from Er, but union was ordered to pay compensation
- Union sought JR; union failed to inform L that second part of decision could be quashed which is what happened in JR, where it was ruled that the arbitrator exceeded juris and that only LRB had power

Issue: Did union owe compensation to Ee (on basis of breach of duty of FR)?

Held: Yes, breaches of the duty of fair representation established

- 1) Union argument: nothing in CK says union has to pay salary for Ee – arbitrator then has no jurisdiction to do that
- 2) However, union did not tell Ee of the risk that only the second of the 2 grounds would be successful
- 3) Ee went back to the Board for two types of relief:
 - Relying on the Board's reserved jurisdiction (to ask the union to compensate)
 - New complaint based on the JR application
- 4) **Application 1:**
 - Board had reserved jurisdiction dealing with reinstatement costs – in defending against that application, relied on the good faith defence of s. 153 (especially s. 153(2))
 - Union argued they acted in good faith but Board found that the union's gross negligence constituted bad faith
 - **Outcome:** Board ordered compensation for the last year of back pay, plus interest
- 5) **Application 2:**
 - Union acted in bad faith by not telling Ee that one of the risks of JR application was the scenario that unfolded
 - Union argued duty of fair representation did not extend to JR applications
 - **Outcome:** Union failed to inform Ee in a conflict of interest – just because arbitrator has given a decision doesn't mean the duty ends; must assess whether the arbitration award is proper – if defective or unreasonable, can seek judicial review; may have obligation to appeal to an appellate court

Joseph v. AUPE (2004 ABQB) Letter of intent does not form part of CK

- AUPE allegedly failed to advance rights governed by *PSERA* (which contains no codified duty of fair representation)
 - Based on a letter of understanding, J should have been offered a position – however, this did not form part of the agreement
 - J sued for breach of the duty of fair representation
- Held:** Board had no jurisdiction – access to courts
- 1) AUPE owed no common law duty of fair representation under these circumstances
 - 2) Letter of intent did not form part of the collective agreement – was outside the 4 corners of CK
 - 3) Dispute resolution process only applies to the interpretation and enforcement of rights under the CK
 - 4) In the absence of statutory representation, duty arises at common law
 - 5) In this case, while there was a general duty of fair representation, it wasn't triggered by the fact pattern
 - Letter of intent is a document signed by Er and union – but it isn't a part of the CK
 - 6) And the dispute resolution process only deals with rights under CK
- Ratio:** A letter of intent between Er and union may not trigger the duty of fair representation, and thus there is no right at common law as to the duty of fair representation
- Many agreements between Ee and union do not form part of the CK

E. Can a Dispute Arising out of a Collective Agreement be Taken Directly to Court, by passing the Arbitration Process?

[Non-examinable]

Chapter 13 - Unfair Labour Practices

- 1) **Unfair labour practices** can be committed by Er or union
 - “Unfair” = conduct prohibited b/c it interferes with other rights of Ees, unions, or Ers
- 2) **Offences:**
 - **s. 158:** general offence provision
 - **s. 161:** penalty provision
 - **s. 162:** prosecutions require Minister's consent
 - **s. 17:** general remedies

Unfair Employer Practices

- 1) **s. 147:** statutory freezes on terms and conditions of employment (discussed previously)
 - Ways to get around: (1) Where changes are done in accordance with established practice by Er, (2) Where union agrees to the change, (3) Where CK allows for change notwithstanding the freeze period
 - Tests to establish if there has been unfair labour practice:
 - a) **Business as usual test:** notwithstanding the freeze, Er is still entitled to implement alterations that were announced before the freeze
 - b) **Reasonable expectations test:** A change will not be a breach of the statutory freeze, even without past practice, if it was within the reasonable expectations of Ees in the unit
- 2) **s. 148:** prohibits Er from
 - 1) Participating in or interfering with formation or admin of TU
 - 2) Participating in representation of Ees by TU
 - 3) Providing financial support to union
 - **General rule:** as long as Er is sharing only information and not making express/implied threats or consequential statements (i.e. “if union is certified, we will have to go out of business”)
 - **“Participation”:** basically TU should not be dominated by Ers and should have separate existence
 - **“Interference”:** Er organizing decertification drive, intimidation tactics, etc. (*Stuve Electric*)
 - **Defences (s. 148(2)):**
 - a) **Some activities allowed:** Er may allow Ee or rep of union to confer with Er or attend to union business during working hours, provide transportation to union reps or collective bargaining reps,

may allow Ees to use premises for union business, Er can make donations to union for purposes of welfare of union members and families, etc.

b) **Er free speech defence (s. 148(2))**: Er can express their views to Ees as long as they do not use coercion, intimidation, threats, or undue influence

3) **s. 150**: proper and sufficient cause defence

- Er retains right to suspend, transfer, layoff, or discharge Ees for sufficient cause (defence to any unfair labour practice complaint)

4) **s. 149**: lists specific things Er cannot do; 3 elements required to show breach:

- 1) Breach must be by Er or Er's org
 - 2) Er must engage in certain actions enumerated in subsections, i.e. making threats, penalizing, etc.
 - 3) Purpose behind threats/penalty is to compel Ee to cease being member of union
- Once elements are made out, only defence is **s. 150**

I.B.E. W. Local 424 v. Stuve Electric Ltd. (#1 and #2) (1989 AB L.R.B.) Unfair labour practices by Er

- Union applied for certification after having 50+% initial membership support; however lost the vote (18-11)
- Union complained that Er intimidated Ees (telling them they would be laid off, called Ees at home to ask about their support, etc.)

Held: Board found unfair labour practices

- 1) Contravention of **ss. 148-49**: Er interfered with representation by TU and attempted to influence vote
- 2) Er's free speech defence failed because of substantial use of threats and coercion – 3 elements were proven
- 3) Er cannot make overt or subtle threats to Ees

Main points:

- 1) Threats or other coercive activity by Er done for purposes for defeating certification vote will be a breach of **s. 148**
- 2) If there is a breach of s. 149, three elements must be present (mentioned above)
- 3) Er free speech defence will not apply where free speech can be characterized as coercion, threats or intimidation

Stuve Electric #2: dealt with remedies

Held: Board granted vote that included former Ees

- 1) Union had argued that process took so long that employment list/roster had changed, the new people are still scared, and asked for a vote that included former Ees as well (those who are no longer scared/intimidated by employer)
- 2) In this case, Er's actions were so extreme that they interfered not only with union's process of certification, but also process of Board in general
- 3) Board did not want Ees to think that Board is toothless

Unfair Union Practices

1) **s. 151**: list of unfair practices by union – 3 elements required to show breach:

- a) Conduct must be done by union or someone acting on its behalf
- b) Union must have engaged in specific acts, i.e. bargaining with Er where union knows another union is certified, participating or interfering of Er org, attempting to persuade Ees to be a union member during working hours, etc.
- c) Actions must have been done for a particular purpose, i.e. see s. 151(f)

2) **s. 152**: internal unfair labour practices by union

- Union cannot expel or suspend or take disciplining action against members by applying own standards in discriminatory fashion

3) **s. 154**: dispute related misconduct – see section

Remedies for unfair labour practices

- 1) Subject to prosecution and fines
- 2) Cease and desist orders

- 3) Reinstatement of Ee
- 4) Refusal of granting revocation or certification vote

Chapter 14 - Continuation of Collective Agreement

• ss. 129-130, 147

- ST breach provisions and ST freeze provisions
- Bridge provisions applicable
- After notice is served, CK continues until new collective agreement is concluded, until right of bargaining agent for Ees is terminated, until lawful strike or lockout commences

Chapter 15 - Termination of Collective Agreements

- **s. 129:** if there is no express term in CK, **s. 129** implies there is a 1 year term

PART III FREEDOM OF ASSOCIATION

- **Dunmore** was about the freedom to organize vs. **BC Health Services** was about rights to collective bargaining (different constitutional questions, both argued via s. 2(d))
 - *Charter* concerns state action: gov't as Er or gov't legislating on subject matter

Health Services and Support v. British Columbia (2007 SCC) s. 2(d) covers right to collective bargaining

- BC health care faced huge funding problems
- 2001: BC gov't adopted new legis to reduce costs and give health sector more flexibility via *Health and Social Services Delivery Act*
 - Legis: certain terms/conditions of employment can no longer be bargained upon and in areas where there has been bargaining, gov't may change those (would make any CK outside of that void), i.e. terms of transfers, whether one could contract out, job security, layoffs, seniority, etc.
- However, gov't did not consult labour – merely told them 20 minutes before it was passed

Issue: Does s. 2(d) extend the right of Ees to join together in a union to negotiate with Ers on workplace issues or terms of employment (collective bargaining)? In other words, does s. 2(d) include right to collective bargaining?

Held: In favour of unions, as legis contravened s. 2(d)/*Charter*

- 1) **Argument 1:** The right to strike is a modern ST right created by legislation and thus not deserving of constitutional protection
 - Collective bargaining rights were an established part of common law, predating 1800s
 - Legislation only legitimated and specified these rights – but they existed beforehand
 - Court looked at trilogy (*AB Reference, PSAC, RWDSU*) and decided that none of the reasons in those cases made sense
 - Although collective bargaining rights are creatures of statute, trilogy cases were wrong in suggesting those rights were not fundamental – **bargaining rights are fundamental**
- 2) **Argument 2:** The right to collectively bargain under s. 2(d) would go against the principle of judicial restraint (deference)
 - Government actions must conform to *Charter* and to the extent that they don't conform, courts should intercede
- 3) **Argument 3:** Freedom of association protects only those activities that are performable by individuals
 - *Dunmore*: some core activities of associations might be subject to *Charter* protection
 - Collective associations can do other things, so must protect them
 - Some activities should be protected, i.e. union can lobby for political change
- 4) **Argument 4:** s. 2(d) is not intended to protect the objectives or goals of association – collective bargaining is merely a goal
 - **Collective bargaining is at the heart of collective labour organization**
- 5) **Argument 5:** Criticism that earlier 1987 decisions took a de-contextualized approach that didn't consider history, significance, and uniqueness of labour law
 - s. 2(d) provides some protection to right to collective bargaining specifically, because (1) value of 2(d) has always been at the core of collective bargaining in Canadian history, (2) collective bargaining is afforded internationally (see treaties), and (3) *Charter* values support this right → right

to human dignity, equality, liberty, respect for autonomy of individual, and enhancement of democracy

Summary

- 1) s. 2(d) protects not only individual activities done collectively, but also associational activities (keeping *Dunmore* in mind)
- 2) s. 2(d) protects the *process* of collective bargaining, not any particular outcome
- 3) Ees have the right to unite, to present demands collectively, and to engage in discussions with respect to workplace goals
- 4) Gov't as Er has corresponding duty to meet with Ees
- 5) Gov't as legislator is constrained in that its legislation must permit these things
- 6) **Bottom line:** s. 2(d) does *not* protect all aspects of collective bargaining – only against substantial interference with associational activity (in this case, collective bargaining) which can be determined by asking:
 - a) Does the measure in effect interfere with collective bargaining? Is the interference substantial? Both tests were met: provisions giving management rights interfered with collective bargaining b/c provisions meant collective bargaining could not occur; also, SCC found similar conclusion for layoff and contracting out provisions
 - b) **Was there substantial interference?**

(1) More likely to find it where legis impacts measures that affect freedom of association

(2) Legis is less likely to amount to substantial interference where changes came about as a result of good faith consultations or where changes generally reflect GF negotiations – court found that matters affected by legis were freedom of association as provisions were substantive provisions that were historically important in CKs

- c) SCC noted that the legislative measure did not respect the duty to consult and negotiate in good faith; must consider all circumstances (e.g. emergency) b/c they could affect content of duty to bargain in good faith (paras 98-100)
- 7) Under the two stage test, court found breach of s. 2(d), which was not justifiable under s. 1

Main points:

- 1) Two stages to determining if legis affects collective bargaining: (1) affect collective bargaining (2) substantial interference
- 2) Under first stage, interference with collective bargaining will be found where certain subject matters are affectively removed from collective bargaining, where those subject matters would historically form the subject matter
- 3) Under second stage, substantial interference is more likely to be found where legis impacts freedom of association
- 4) Under second stage, legis is less likely to breach *Charter* where legis came about as a result of good faith consultations