



## Revised LAW 529 Notes

Employment and Labour Law (Ryerson University)

## Chapter 20: Canadian Charter and Regulatory Standards

*What or Whom does the Charter Govern?*

- *The charter only applies to government action. Sets limits on government actions, and it's purpose is to regulate the relationship between government and citizens.*

### Understanding the Charter Challenge

- *Once legislation is enacted into law, it can be challenged by anyone who believes that the law violates a right or freedom protected by the charter*
- **Charter Challenge:** *a legal proceeding that alleges that government action contravenes the Canadian Charter of Rights and Freedoms.*

### 2 Step Process to Analyze Charter Challenges

#### A. Has government infringed a charter right or freedom?

- *The Supreme court of Canada has recognized prohibited ground of discrimination under section 15 of the charter that are not expressly listed in that section; these grounds are referred to as **Analogous Grounds**.*

#### B. If an Infringement Exists, is it Justified in a Free and Democratic Society?

- *It is justifiable for a government to violate a charter right or freedom.*
- *It requires a balancing of Interests.*
- *In certain instances in order to protect or pursue an important public interest it may be necessary to impinge upon charter rights and freedoms.*
- **Section 1 Test (Oaks test)** *must be applied whenever balancing interests:*
  - *It is a proportionality test. Which means that it guides judges in their assessment of whether the benefit to society of allowing a charter violation outweighs the harm to the individual of having their charter right violated.*

### The Oaks Test

- **Part One: The Pressing and Substantial Concern Test**
  - *Requires that the objective of, or reason for, the limitation on the charter right must relate to "a pressing and substantial concern".*
  - *Addresses a serious public concern.*
- **Part Two: The Proportionality Test**
  - *A government must satisfy all 3 components of the proportionality test;*
    - 1. Rational Connection:** *they must not be arbitrary, unfair, or based on irrational considerations.*
    - 2. Minimal Impairment:** *the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question.*
    - 3. Balance of Harm or Proportionality:** *must be proportionality between measures which are reasonable for limiting the charter right or freedom and the objective which has been identified as of "sufficient importance"*

### What Rights and Freedoms in the Charter are Important to the Law of Work?

- *The two sections of the Charter that are most important to the law of work are:*

- *Fundamental Freedoms (Especially freedom of thought, belief, opinion and expression)*
- *Freedom of Association*
- *Section 15 (equality rights)*
- *Section 6 (mobility rights)*

<i>Sections of Charter that are most important to Law of Work.</i>	
<b>Guarantee of Rights and Freedoms</b>	<i>1. The Canadian charter of rights and freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.</i>
<b>Fundamental Freedoms</b>	<i>2. Everyone has the following fundamental freedoms:</i> <ul style="list-style-type: none"> <li><i>a. Freedom of conscience and religion</i></li> <li><i>b. Freedom of thought, belief, opinion, and expression including freedom of the press and other media communications;</i></li> <li><i>c. Freedom of peaceful assembly; and</i></li> <li><i>d. Freedom of association.</i></li> </ul>
<b>Mobility Rights</b>	<i>6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.</i> <i>(2) every citizen of Canada and every person who has the statue or permanent residence of Canada has the right to</i> <ul style="list-style-type: none"> <li><i>a. To move to and take up residence in any province; and</i></li> <li><i>b. To pursue the gaining of a livelihood in any province.</i></li> </ul>
<b>Equality Rights</b>	<i>15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</i> <i>(2) subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</i> <b>Analogous Grounds:</b> <i>recently added "marital status" "sexual orientation" "citizenship"</i>

#### **A. The Charter and the Common Law Regime of Work**

- *The Supreme Court of Canada decided that even though the charter does not apply directly to judges deciding contract and tort disputes between private actors, common law judges should never the less be guided by charter values as they develop and apply common law rules.*
- **Secondary Picketing:** *picketing in labour dispute that takes place at a location other than the workplace where the workers engaged in the dispute are employed.*
  - *Has been treated as a tort in Canada since pre-charter 1963.*
  - *Courts ruled that an absolute ban on peaceful picketing and leafleting by workers was inconsistent with charter values, since picketing always involves expression.*

- Supreme court introduced new rule made all forms of information leafleting lawful under common law, provided it was not done in an unlawful manner.

## B. The Charter and the Regulatory Standards Regime

- **Enumerated Grounds:** *The characteristics listed in equality legislation upon which discrimination is prohibited (age, sex, colour, religion).*
- 2 important provisos:
  - *First: the distinction must negative impact individuals in ways that undermine their human dignity by, for instance, perpetuating negative stereotypes, prejudices, and historical disadvantages.*
  - *Second: the distinction must be based on one of the “enumerated grounds” listed expressly in section 15 or an analogous grounds. Analogous grounds have been added to the enumerated list by courts over time on the basis that they reflect a personal characteristic that is unchangeable (immutable), or involve a characteristic that a person out not to be expected to change in order to achieve equality, and people who share the characteristic have been subjected to historical disadvantage, stereotypes, and prejudice.*

*Mandatory retirement and Age discrimination “saved by Section 1”*

### **McKinney v. University of Guelph (1990)**

- *McKinney was forced to retire at age 65 pursuant to the University of Guelph’s mandatory retirement policy. He launched a Charter challenge against the university’s policy and the Ontario Human Rights Code, which protected against age discrimination but only for persons aged 18-64. McKinney asserted that both the policy and the Code violated section 15 of the Charter by discriminating against him on the basis of his age.*
- *The Supreme Court of Canada ruled that the charter did not apply because the university’s mandatory retirement policy because the university was not the “government”. However the Charter clearly did apply to the Human Rights Code.*
- **Issue:** *does the definition of age (18-64) in human rights legislation violate the protection against age discrimination in section 15 of the Charter? If so, is that violation saved by section 1 of the charter?*
- **Decision:** *Yes. the Code’s definition of “age” makes a distinction based solely on the enumerated ground of age, and this distinction imposes a burden on those age 65 and older by taking away benefits available to those not in the class of workers who are aged 18-64. However the violation of section 15 is saved by section 1. The supreme court of Canada applied the Oaks test as follows:*
  - **The Pressing and Substantial Concern Test:**
    - *The objective of the legal rule was to permit the continuance of the widespread practice of mandatory retirement and to address the government’s concern that abolishing mandatory retirement would have serious negative ramifications for Ontario’s labour market and the operation of pension plans.*
  - **The Proportionality Test**
    - *1. Rational connection test: the “age” definition maintains stability and predictability in pension arrangements and permits mandatory retirement.*
    - *2. Minimal impairment test: the issue of whether to permit mandatory retirement is complex, with broad social and economic*

*consequences. Governments should be given latitude in addressing complex problems. The government had a reasonable basis for concluding that the age definition impaired the rights of older workers as little as possible.*

- *3. Balance of harm test: the aim of prohibiting age discrimination was to protect those workers who are most vulnerable (18-64). Workers age 65 and older can access public and private pensions. Governments should be given leeway in making these tough policy decisions.*
- *Since the government satisfied all parts of the Oaks test, the definition of age in the Human Rights Code was permitted to remain and McKinney lost his Charter Challenge.*

**The definition of AGE in the Ontario Human Rights Code at issue in McKinney was amended in 2006 to read “18 years or more”.**

*Charter Requires Governments to Prohibit Discrimination in Employment on the Basis of Sexual Orientation*

***Vriend v. Alberta (1998)***

- *Vriend was employed by an Alberta college, when they found out he was gay they fired him on the basis that being gay was inconsistent with the college’s policy. Vriend attempted to file a complaint under the province’s Individual Rights Protection Act, but unlike most provinces Alberta didn’t prohibit discrimination based on “sexual orientation” so he decided to file a Charter challenge asserting that the omission of sexual orientation from human rights legislation violated his section 15 Charter right to equality.*
- **Issue:** *does the omission of :sexual orientation” from the list of prohibited grounds in human rights legislation violate section 15 of the Charter?*
- **Decision:** *Yes. an underinclusive protective statute can violate the Charter. The deliberate decision of Alberta government to not prohibit discrimination on the basis of sexual orientation amount to a distinction that denied equal protection to gay and lesbians. The SCC already ruled in Egan v. Canada 1995 that sexual orientation was an analogous ground. Failed every elements of the OAKS test.*
  - *It did not address a pressing and substantial concern;*
  - *It was not rationally connected to the objective of protecting Albertans from discrimination;*
  - *It did not impair the rights of gays and lesbians as little as possible; and the harm to gays and lesbians from the exclusion far outweighed whatever benefit the omission was intended to achieve.*

## Chapter 21: Regulating Wages and Pay Equity

### The Scope of Wage Regulation

#### A: Wage Regulation Applies to Employment Contract

- *Wage regulation governs employment contracts. Independent contractors can agree to work for \$2/hour if they want even if the minimum wage is \$10 per hour.*

#### B: Many Employees are Excluded from Wage Regulation

- *Exclusions from wage regulation can apply to an entire occupation or to a specific job.*
- *Students working at a business as part of a practicum component of their college or university program are often excluded from employment standards legislation, and not entitled to minimum wage.*
- *In Alberta: farm employees, extra's in films, real-estate brokers.*

#### C: Wage Laws Vary by Occupation

- *Employment standards laws usually fix a general minimum rate that applies to most employees and then list occupations that require rates different from the general rate.*
- *Some entitled higher rates (at home workers) to cover the costs of energy and additional expenses. Some entitled lower rates like liquor servers based on rationale that these employees earn tips on top of wages. **Tipping Out** the preactive by some restaurant or bar employers of collecting a portion of servers tips and dividing the tip pool among other employees.*

### Minimum Wage, Wage Freeze, and Maximum Wage Legislation

#### A. Minimum Wage Legislation

- *Employers' groups were less hostile to a minimum wage for women workers, provided that it was fixed very low (early 1900's).*
- *The paternalistic notion that men can look after themselves but women require government protection shaped early minimum wage laws in Canada.*
- *Not until 1925 was a minimum legislation finally extended to male workers, first in BC, then later in other jurisdictions.*
- *In beginning male minimum wage rates were often higher than female minimum wage rates because men were assumed to be supporting a family, while women were earning "pin money".*
- *Federally regulated employees are government by the minimum wage applicable in the province or territory in which they perform their work.*
- *Anti-minimum wage caps argues, the unemployment effects are felt mostly by the very people who minimum wage law intends to help - low skilled workers, the young and old, and new immigrants - since they are the first ones to lose their jobs when the minimum wage is implemented.*
- *Pro-minimum wage camps use studies to show that minimum wage laws help the poor break from the cycle of poverty and reduce income inequality by increasing the disposable income of the working poor.*
- *Strive to pay workers a **living wage** that promotes self-dignity and decency.*
- **Wage floor:** *a law that fixes a minimum wage below which an employer cannot pay an employee*

## B. Wage Freeze or Restraint Legislation

- A **Wage freeze** is a practice or law that holds wages at their existing level for a period of time.
- Governments normally do not impose wage restrictions in the private sector, they leave that to the Employers and Employees to dispute be it through strike or quitting.
- In the public freezing wages of non-unionized workers is easy enough: the government can just refuse to include money for raises in its budget, order its managers not to grant any raises, or pass wage-fixing legislation that expressly freezes wages or restrains the level or raises.
- EX:// Public Sector Compensation Act of 1991
- Government may not freeze wages but legislate a fixed wage increase instead: say 1.5% salary increase every year for the next 3 years.
- If government employees are unionized, they must bargain the wage freeze with the union, legislatively void a collectively bargained raise, or enact a law stripping the union of the right to bargain regarding wages.

## C. Maximum Wage Legislation

- Salary disclosure laws for executives and public sector workers were once believed to be a means of applying downward pressure on high salaries.
- Studies indicate that disclosure laws actually have an inflationary impact on salaries, because workers use the information to bargain up their salaries.
- In 1970's, CEO pay ratio to average workers pay was 30 to 1. In 2014 it was 203 to 1.
- No mandatory compensation ratio laws exist in Canada.

## Regulating Wage Discrimination

- A variety of variances based on occupation, education level, employment status, union status, family status and age among other factors contribute to wage discrimination.
- Significant **racial wage gap** exists in Canada too
- Historically there have been separate wage schedules for men and women, which was either condoned by the Canadian governments or in the case of early minimum wage laws that fixed women's wages lower than men's, expressly stated.
- Human rights statutes have long prohibited employers in Canada from discriminating in wages based on race, ethnicity, disability, gender and other designated grounds.
  - Proven inadequate for addressing less obvious forms of wage discrimination, such as a **systemic discrimination** that perpetuates wage differences.
  - Human rights legislation is **complaint based** so it requires employees learn their legal right first, then file a complaint against their employer, and prove that their lower pay rate is related to discrimination on a prohibited ground listed in the legislation.

## A. Equal Pay for the Same Job (Equal Pay Laws)

- 1951 Ontario enacted the *Female Employees Fair Remuneration Act*, which banned blatant gender wage discrimination.

- **Occupational Crowding:** the segregation of women and men into different types of jobs. It is usually used to explain how women tend to be much more highly represented in lower-paying jobs than are men.
- Economists estimate that 85 to 90 percent of the gender wage gap is due to occupational crowding and others such as differences in education, training and experience. Difference in pay due to direct gender bias or systematic discrimination in which traditionally female jobs “women’s work” are undervalued relative to traditionally male jobs.

### Laws Used to Address Gender Wage Discrimination in Canada

Type of Wage Discrimination Law	Example of Wage Discrimination it Covers	Where the Law is in Effect
<b>Equal pay laws:</b> the employer must not maintain differential pay rates for men and women performing the same job, unless some other non-gender-related explanation exists for the difference.	A bank has two rates of pay for tellers, one for men and one for women.	<b>All jurisdictions:</b> this type of direct discrimination violates human rights statutes as well as employment standards and pay equity statutes.
<b>Equal pay for equal work laws:</b> the employer must pay the same wages to men and women who perform “substantially similar work” - work in which the evaluation score of each of the following factors is substantially the same: skill, effort, responsibility & working conditions.	A female bank teller earns less than a male accounting clerk who works in the same office. The two jobs require substantially similar skill, effort, and responsibility, and share similar working conditions.	<b>Private sector:</b> all jurisdictions except Quebec and the federally regulated private sector.  <b>Public sector:</b> Alberta, BC, Newf & Lab, Sask.
<b>Equal pay for work of equal values law:</b> Employer must identify male-and-female-dominated jobs and then evaluate each job based on skill, effort, responsibility, and working conditions. If the total score (value) of a female-dominated job is equal or approximately equal to that of a higher-paying male-dominated job, the employer must raise the wage of the female-dominated job.	A female-dominated job class of secretary earns less than a male dominated job class of machine operator, even though their total aggregate job evaluation scores are approximately equal.	<b>Private sector:</b> the federally regulated private sector, Ontario and Quebec.  <b>Public sector:</b> the federal level, Manitoba, New Brunswick, Nova Scotia, Ontario, PEI, Quebec.

### B. Equal Pay for Equal work and Equal Value

- **1. Equal Pay for Equal Work (EPEW)** model recognizes that sometimes women are paid less by employers because they work in traditionally female jobs that have been undervalued due to their gender dimension.
- EPEW law requires an assessment of four job evaluation criteria: skill, effort, responsibility and working conditions.
- If the jobs are substantially similar it requires that the woman’s wage rate be increased to the man’s wage rate.

#### **Re Leisure World Nursing Homes Ltd. and Director of Employment Standards et al. (1980)**

- Orderlies (male job) were provided a higher pay rate by their union when compared with the nurses’ aides (women’s job). Both jobs involved providing around-the clock care to elderly patients. Job responsibilities were very similar

although orderlies often had to do heavy lifting of patients, whereas nurses' aides did more rehabilitative physiotherapy.

- The nurses' aid filed a complaint under the equal pay for equal work provision in the Ontario Employment Standards Act, arguing they were paid less for equal work as the orderlies.
- Employer argued that the jobs were not "substantially similar" because a greater amount of heavy lifting by orderlies required greater effort. Also said pay rates were the result of collective bargaining with a union.
- **Decision:** Yes, the employment standards referee ruled that although the two jobs were not identical, they were substantially similar in terms of skill, effort, responsibility and working conditions. Ontario Division of Court agreed. Orderlies were not always required to do heavy lifting and sometimes the nurses' aids were required to do lifting. The skills, responsibility and working conditions were substantially similar. Referee found that the wage difference was "on the basis of a stereotype that misconception of the value of woman's work."

## 2. Equal pay for Work of Equal Value Laws (Pay Equity)

- **Pay equity:** statutory model designed to address systemic gender wage discrimination by comparing lower-paying female-dominated job classes to higher-paying male-dominated job classes when the total score is the same or substantially the same in an evaluation of the skill, efforts, responsibility and working conditions of the two job classes.
- Only 7 Canadian jurisdictions have introduced pay equity legislation (federal jurisdiction, Ontario, Quebec, Manitoba, NB, PEI, and NS).
- This model recognizes that men and women often do not perform "substantially similar" jobs, which is a big reason why EPEW laws do little to address gender wage gap.
- Pay equity model assumes that a farmhand earns more than a childcare worker because a farmhand is traditionally a male job and male jobs pay more than female jobs. (farmhand earned \$22,000 in 1983, while childcare worker earned \$13,000, however when evaluated and scored, farmhand totaled 80 points and childcare worker totaled 90)
- Pay Equity Legislation requires an employer (and unions) to take the following series of proactive steps to achieve pay equity.
  - **1. Identify the scope of the pay equity evaluation:** what units will be included in the evaluation; entirety of employer's operations? One factory? One office?
  - **2. Identify the "job classes" that will be used in the evaluation:** job classes can include a variety of job titles provided that the jobs included in the class are similar in terms of duties and required qualifications, or fall within same salary grade.
  - **3. Identify male- and female-dominated job classes:** In Ontario the Pay Equity Act defines a job class as female if 60% or more employees in the class are female, and male if 70% or more of members of that class are male.
  - **4. Evaluate the job classes:** employer must assess each job class using a **gender neutral job evaluation system** that assigns a score for skill, effort, responsibility and working conditions. Total score of each class is tabulated.

- **5. Compare the Evaluation scores and search for comparators:** employer reviews the aggregate scores of male and female-dominated job classes to identify comparators. 3 methods:
  - Job-to-job comparison: comparing the score of a female-dominated job to a male-dominated job with the same or very similar score.
  - Proportional value method: calculating a “wage line” that tracks the relationship between job scores and pay rates for male-dominated job classes and then assessing whether that relationship is the same or comparable for female-dominated job classes.
  - Proxy Method (Ontario & Quebec only): requires employer to compare a female job class with a male job class at another organization.
- **6. Prepare and Post a pay equity plan:** describe evaluation and results.
- **7. Make upward pay adjustments to achieve pay equity.**
- Permissible Wage Differences an explanation for a wage difference between a male and female job class that is accepted as valid and non-discriminatory in a pay equity statute, like seniority systems, merit pay systems, or temporary labour market shortages that required the employer to inflate wages in order to attract qualified employees.

**Public Service Alliance of Canada v. Canada Post Corp. (2011).**

- PSAC the union group of Canada Post employees, filed a pay equity complaint under Sec. 11 of the Canadian Human Rights Act. It alleged that the female-dominated class of clerical and regulatory employees (CR) was paid less than the comparable male-dominated class of postal operations employees (PO). 34% of the CR group had total scores equal to or greater than the lowest-scoring job in the PO group when skill, effort, responsibility and working conditions were measured.
- CR group performed mostly clerical work, PO groups consisted mostly of mail sorters and carriers. Human Rights Tribunal ruled in 2005 that the CR and PO groups were comparable job classes, of equal value. Ordered Canada Post to make payments to bring the wages of the lower-paid CR group up to the wage levels of the PO group.
- **Issue:** Did the Human Rights Tribunal err in ruling that Canada Post discriminated against employees?
- **Decision:** No. The Tribunal's decisions were upheld by the courts, and Canada Post was ordered to adjust the pay of the employees in the CR group (both men and women) upward toward that of the PO group, based on a mathematical formula described in the tribunal's decision.
- Justice Evans wrote that “the resolution of pay equity claims involves a mix of art, science, human rights and labour relations.”

## Chapter 22: Regulating Working Time

### Justifications for and Limitations of Contemporary Working Time Regulation.

- *Maximum hours of work laws are part of government's pursuit to make the lives of working people safer and healthier.*
- *Governments have used working time regulation and overtime pay rules to fight unemployment; by limiting working hours, the intention is to encourage employers to hire more workers rather than retain fewer workers who work very long hours.*
- *Working time regulation is a tool by which governments seek to balance competing social and economic values.*
- *Have to find a balance between Canadians who say they have way too much work and not enough time, with **precarious workers** whose labour market participation is characterized by low paying, job insecurity, lack of job tenure, and or multiple part-time or temporary jobs.*
- *Legal rules discussed are intended to address work distribution.*
- *Concerning trend in recent years is the reclassification by businesses of workers from employee status to non-employee status (independent contractor or "self-employed") to avoid employment-related laws, including working time laws.*
- *25% of the increase in **income inequality** in Canada over past 30 years is due to the rise in "self employment" since the self-employed generally earn less than the employed.*

### Contemporary Working Time Regulation in Canada

#### A. Hours of Work and Overtime Pay

- *"Market-based approach" seeks to discourage long hours by requiring employers to pay an overtime time or wage premium to employees who have exceeded the **standard working hours** threshold fixed by the government.*
  - *Standard working hours threshold can be either a daily or weekly number of hours or both.*
  - *The overtime rate is usually 1.5x the regular hourly rate of pay.*
- *"Regulatory approach" requires employers to pay employees overtime pay after they have worked a certain number of hours but in addition includes a fixed mandatory number of permissible hours that can be worked per day or week.*
  - *EX:// Ontario, overtime is payable after 44 hours worked per week, but the Ontario ESA 2000 also caps the number of hours an employee can be required to work at 48.*
  - **Mandatory Time Off:** *a provision in employment standards legislation requiring that employees be given a specified amount of time off in a day or week.*
  - *In federal jurisdiction, overtime pay is payable after an employee works 8hr per day or 40hr work week, and max of 48hrs per week.*
- *"Averaging agreements approach" is third approach to regulating hours of work and overtime pay. (ontario, BC, Sask, Nova Scotia, Federal jurisdiction and 3 territories)*
  - **Averaging agreements** *are a legislative device designed to facilitate flexibility in the calculation of an employee's entitlement to overtime pay.*

*An averaging agreement permits an employer and employee to agree to average hours worked over a period longer than the standard period of time used to calculate overtime pay entitlement.*

- *EX:// Jean works 50hrs in week one and 24hrs in week two. He works in a province in which overtime payable after 44 hours per week. Normally entitles to 6 overtime hours in week one and none in week two. He entered into an averaging agreement, saying hours would be averaged every two weeks. The average hours worked is  $74/2 = 37$  per week, so Jean is not entitled to overtime pay.*
- *In Ontario, a person employed in a job related to Mushroom or Flower growing is excluded from both maximum hours of work and overtime provisions, but a landscaper is only excluded from overtime pay requirement.*
- *Employment standard rules apply equally to salaried and hourly employees.*
- *Managerial employees are exempt from statutory protections including hours of work and overtime pay requirements.*

### **Scotiabank Settles Huge Overtime Pay Complaint (2014)**

- *15,000 individuals are in the class, those who worked as personal banking officers, senior personal banking officers, financial advisors and small business account managers. The settlement has the bank pay unpaid overtime to employees who file a claim, at 1.5x their rate at the time. Some stretch back to 2001.*
- *One problem with this case is whether overtime pay must be paid to employees who work overtime without having been given expressed authority by the employer to do so.*
- *The Canadian Labour Code says that overtime pay is payable if an employee is "required or permitted" to work more than the standard hours. The banks argued that some of the overtime had not been preapproved and therefore had not been "permitted or required" by the bank. Ontario Court of Appeal wrote during CIBC (similar case) litigation that "arguable that the pre-approval requirement in CIBC's current policy served as an institutional impediment to claims for overtime that would otherwise have been compensable".*

### **Overtime Pay and the Managerial Exclusion**

#### **Glendale Golf and Country Club v. Sanago (2010)**

- *Sanago was executive chef at Glendale Golf club, controlled kitchen budget, created menu, hired/supervised kitchen staff, prepared payroll, set wage levels, distributed overtime, had authority to fire staff, organized work schedule, and decided on work methods.*
- *For 2 months the kitchen was understaffed and he was working up to 7 days a week for 12-16hrs per day. Aside from his duties he also spent many time preparing food. He claimed overtime pay and employer argued that the executive chef position was managerial and excluded him from ESA hours of work and overtime provisions.*
- **Issue:** *is Sanago entitled to overtime pay for hours he worked above the 44hr threshold?*
- **Decision:** *Yes, partially. The exemption for managers in the ESA is very narrow stating they are exempt if "a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis." For a two-month hectic period Sanago worked in excess of 50% of his working time performing non-managerial tasks. However*

*that was due to irregular and exceptional circumstances, unexpected staffing shortage. He was still an excluded manager even though he did a lot of non-managerial work for a period of time.*

- *However in section 22(9) of the Act states that a person who performs both managerial and nonmanagerial tasks in a week in which they work greater than 44 hours is entitled to overtime pay if they spent more than 50% of their working time performing non-managerial tasks. He was entitled to overtime pay for those weeks which amounted to \$9,443.*

## **B. Statutory Holidays and Paid Time Off (Vacation Pay)**

- *A list of dates as **statutory holidays** on which employees must either be given the day off work or be paid a premium rate if they do work.*
  - *Christmas, Good Friday, Easter Monday (christian holidays) Labour Day, Canada Day, Remembrance Day (Canadian, British holidays)*
- *Generally the laws assume that most employees will get the day off work but still be paid their usual daily rate. Some employers want to open on a holiday and therefore, employees and employers are permitted to agree that the employee will work but be paid a premium rate, sometimes as much as 2.5x regular hourly rate of pay. Some receive another day off in the future.*
- **Statutory vacation time** *refers to the amount of time an employee is legally entitled to take off work during a year. Two weeks vacation is a common standard although relatively new employees are sometime excluded, and in some provinces paid vacation time increases to three or four weeks after a period of service (5 or 10yrs).*
- **Statutory vacation pay** *refers to the amount of pay a vacationing employee is legally entitled to receive while taking vacation time. Taken as a % of annual salary (usually 4% of the employee's gross annual pay).*

## **C. Leaves of Absence**

- *Non-union employees often lack the power for fortitude to negotiate leave provisions into their employment contracts.*
- *A statutory leave grants an employee a defined period of time off work, without pay, and requires that the employer save the employee's job until he or she returns, provided that the employee returns within the allowed time period.*
  - *A failure of the employer to reinstate an employee following his or her statutory leave is a violation of the Act.*
- **Maternity Leave:** *a statutory rule requiring an employer to grant a pregnant woman time off from work without pay in the weeks immediately before and or after giving birth.*
- **"Unemployment insurance"**
  - *Government has used that power to provide funding for some workers who take statutory maternity or parental leave. Legislation grants employees the right to take leave without reprisals, and the federal employment insurance scheme provides eligible workers with a source of income during the leave.*
  - *In 2000, the maximum period of parental employment insurance benefits was increased to 35 weeks*
- *The following **Protected Leaves** are recognized in some or all of Canadian jurisdictions;*
  - *Family medical, family caregiver, and critically ill child leaves.*

- *Organ donor leave*
- *Bereavement leave: to attend funerals*
- *Crime related child death, or disappearance*
- *Personal emergency leave*
- *Sick leave*
- *Reservist: to allow those enlisted in military to attend reservist possibilities.*

## Chapter 23: Regulating the End of Employment Contracts

**Just cause provision:** a term in a collective agreement between a union and an employer that requires that the employer demonstrate “just cause” or a good business reason to discipline or dismiss an employee.

### Statutory Minimum Notice of Termination Requirements

- These regulatory initiatives are an outcome of the internal feedback loop, like the common law implied term of reasonable notice, the statutory minimum notice provisions are intended to supply a cushion to employees to enable them to plan for unemployment and seek alternative employment.

Minimum notice Requirements: Time Employed											
	Less than 1 year	1 year	2 years	3 years	4 years	5 years	6 years	7 years	8-9 years	10-15 years	15+ years
Federal	2 weeks (after 3mos)	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*	2 weeks*
Ontario	1 week (after 3mos)	2 weeks	2 weeks	3 weeks	4 weeks	5 weeks*	6 weeks*	7 weeks*	8 weeks*	8 weeks*	8 weeks*

Where a \* is, means severance pay is required for qualifying employees in addition to notice of termination.

### A. Common Features of Statutory Notice of Termination Provisions in Canada

- **Statutory notice of termination:** a term describing the requirement found in employment standards legislation for employers (and sometimes employees) to provide a defined amount of notice that they are terminating the employment contract.
- Employers can choose either to provide working statutory notice of termination or to pay an amount equal to the amount of wages and benefits the employee would have received had he or she worked the statutory notice period (called **termination pay**).
- Notice of termination must be in writing so that disputes over whether notice was given and when it was given are reduced or eliminated.
- **Termination pay and severance pay** are not subject to the common law rule of the duty to mitigate, because it does not constitute damages for breach of contract.

#### 1. Minimum Notice of Termination Provisions

- **Probationary period** which allows an employer to dismiss an employee without any notice until the employee has been employed long enough to meet the qualification threshold.
- Jurisdictions also stipulate the minimum amount of notice of termination required, which ranges from one week's notice to eight weeks notice, depending on the length of time.

## 2. Greater Notice Period for Mass Termination

- All provinces and federal jurisdictions require greater period of notice in the case of "mass terminations" that occur within a finite period of time based on the presumption that it will be harder for a large group of dismissed employees to find new employment and the mass terminations can impose heavy costs on the government and the community.
- In Ontario: 50-199 employees dismissed in a 4 week period must provide at least 8 weeks notice. 200-499 employees, notice rises to at least 12 weeks. 500+ employees terminated require at least 16 weeks notice.

## 3. Definition of Termination of Employment

- Only a "dismissed employee" is entitled to statutory notice of termination and what constitutes a termination of employment is defined in the statutes.
- Constructive dismissals are an example: that a constructive dismissal occurs when the employer commits a fundamental breach of the employment contract and the employee treats as having terminated that contract.
  - Ex:// in the case of *1542335 Ontario Inc v. Tuka*, an employer that unilaterally changed an employee's compensation from a base salary plus commission to commission alone and reduced employee's job status, was found to have terminated the employment contract within the meaning of the Ontario ESA 2000, entitling the employee to statutory notice.
- While permanent and indefinite duration layoffs are treated as terminations under employment standards legislation, **Temporary layoffs** are singled out for special treatment.
  - In the common law regime, a temporary layoff can be treated by the employee as a constructive dismissal unless the contract includes a right of the employer to temporarily lay off the employee.
  - Employment standards legislation defines a temporary layoff, and then the legislation's definition of Termination of Employment explains that termination includes any layoff that is longer than a "temporary layoff".
  - **Temporary layoff** is considered to last no more than 13 weeks in any period of 20 consecutive weeks.
  - The right of an employee to statutory notice is not triggered until a layoff lasts longer than a temporary layoff. Once that occurs most statutes deem the termination to have taken place on the first date of the layoff.
- Most tribunals and courts in Canada have ruled that the statutory right to temporarily lay off workers without triggering statutory notice requirements does not modify the rule that a temporary layoff is a fundamental breach of contract in the common law, absent a specific contractual right to layoff.
  - The temporary layoff provisions in employment standards legislation protect employees' entitlements to eventually recover termination pay when their contract allows them to be temporarily laid off.

- A contract permitting a temporary layoff to extend beyond the date it would become a termination under employment standards legislation is void.

#### 4. The Exemption of Certain Employees from Statutory Notice Entitlements

- Employees whose contracts have become “frustrated” and employees who are employed under a fixed-term or fixed-task contract are exempt from statutory notice entitlements.
- An employee who has been lawfully laid off and then is recalled to work forfeits the entitlement to statutory notice if he or she does not return to work within a “reasonable time”.
- An employee is **disqualified** from statutory notice when he or she has engaged in serious misconduct leading to termination for cause. This is **NOT ALWAYS TRUE** because the statutory definition of cause can differ from the common law principle of proportionality test.
  - Ex:// in Ontario, employment standards legislation disqualifies from statutory notice “an employee who has been guilty of **wilful** misconduct, disobedience, or **wilful** neglect of duty that is not trivial and has not been condoned by the employer”.
  - Employee “willfulness” is the word that changes how the regulatory regime views “cause” for dismissal.

#### *Disqualification from Statutory Notice for Wilful Misconduct*

##### **Oosterbosch v. FAG Aerospace Inc. (2011).**

- Oosterbosch was dismissed by FAG after 19 years of employment for cause without notice. The employer relied on its progressive discipline policy as grounds for dismissal pointing at a series of four disciplinary warnings for shoddy job performance and lateness. The employee files a lawsuit for wrongful dismissal and included that in the action as well a claim for statutory notice.
- **Issue:** did the employer have cause to dismiss without providing contractual notice or statutory notice?
- **Decision:** Yes and No. the court ruled that the employer had satisfied the common law standard of cumulative just cause. A pattern of wrongful acts by Oosterbosch has led to clear warnings and a failure to improve. However the court found that Oosterbosch’s misconduct did not rise to the level of “willfulness” which is required to forfeit entitlement to statutory notice and severance pay.
- The courts said:
  - “All the leaders who testified indicated that the plaintiff was an experienced, competent machine operator with an apparent attitude problem but none suggested his misconduct was intentional... he was undoubtedly careless and the persistence of that carelessness justified his dismissal. I would not, however, characterize his offending behaviour as “wilful misconduct, disobedience, or wilful neglect of duty” that would disentitle him to receipt of termination and severance payments under the provisions of the ESA 2000.
- Therefore Oosterbosch was entitled to statutory notice and severance pay.

#### 5. An EMPLOYEE’S statutory obligation to provide Notice of Termination

- Employment Standard Legislation is principally designed to protect vulnerable employees, and there is already a contractual duty to provide reasonable notice of termination, it is not obvious why governments would statutorily require employees to provide notice to their employers.

## B. The Interrelationship Between Statutory and Contractual Notice of Termination Requirements

- *Dylan's contractual entitlements depend on what his contract specifies, if anything.*
  - *In all but scenario two, dylan is entitled to more notice under the notice term in the employment contract than under the statute.*
- *An employer can be in compliance with the statutory minimum notice of termination provisions and yet still be in breach of the contractual notice of termination provisions.*
  - *In scenarios one and three, the contract requires common law reasonable-notice which judges determine by applying the bardal factors.*

### \*\*Scenario\*\*

*Dylan is dismissed without cause and without notice after 20yrs employment as a grocery store manager in Ontario. He was 55 years old when he was fired.*

- *How much notice is Dylan entitled to?*

<b>Contractual Entitlement</b>		<b>Statutory Entitlement</b>
<i>Scenario</i>	<i>Entitlement</i>	<p><b>Ontario</b> 8 weeks notice (ESA 2000)</p> <p><b>Means of Enforcement</b> To enforce his statutory notice entitlement, Dylan could file a complaint under the Employment Standards Act 2000. An employment standards officer (ESO) employed by the government would investigate and decide if proper notice was given. If not, the ESO can issue an order for the employer to pay Dylan wages he would have earned during the 8 weeks. Either party can appeal the ESO's decision to an expert administrative tribunal called the Ontario Labour Relations Board.</p>
<b>1)</b> <i>The employment contract does not include a notice of termination clause</i>	<i>Reasonable notice, likely in the range of 18-24 months, applying bardal.</i>	
<b>2)</b> <i>The employment contract permits termination with notice equal to the statutory minimum.</i>	<i>8 weeks' notice.</i>	
<b>3)</b> <i>The employment contract permits termination with no notice or less notice than required by statute.</i>	<i>Reasonable notice, because the contract term is void.</i>	
<b>4)</b> <i>the employment contract permits termination with 3 months' notice.</i>	<i>3 months' notice.</i>	
<b>Means of Enforcement</b> <i>To enforce his contractual notice entitlement, Dylan would need to file a lawsuit in a court for wrongful dismissal.</i>		

### **Severance Pay (Ontario and Federal)**

- **Severance pay** *is compensation that an employer must pay to a qualifying employee who has been dismissed; this compensation is an addition to what is required by statutory notice obligations.*
- *In ontario employees with at least 5 years service are eligible for severance pay.*

- *Section 64(1) of the ESA, 2000 also restricts severance pay to employers who meet one of the following two conditions.*
  - *1. (a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six month period as a result, or:*
  - *2. (b) the employer has a payroll of \$2.5 million or more.*
- *These requirements are designed to limit severance pay costs to larger employers and/or employers who undertake mass terminations flowing from workplace closures.*
- *The amount of severance pay an employee is entitled to receive in Ontario is 1 week pay per year of service up to a maximum of 26 weeks. FEDERALLY the formula is 2 days pay for each year of service, with no maximum but with a minimum benefit of 5 days pay.*
- *An employee who quits or is dismissed for cause is disqualified from severance pay.*

### **Statutory Protection Against Unfair Dismissal.**

#### **A. Laws That Prohibit Dismissal Contrary to Public Policy**

- *The doctrine of freedom of contract permitted employment discrimination.*
- *Canadian governments stepped in to restrict this common law right by enacting human rights laws that prohibit employers from dismissing employees for reasons related to personal attributes.*
- *Labour relations legislation makes it unlawful for an employer to dismiss an employee for joining a union or engaging in lawful union activities.*
- *The available remedies for dismissal contrary to public policy usually include reinstatement and backwages and benefits.*
- *Most employment-related statutes include **anti-reprisal provisions** that make it unlawful to dismiss an employee for attempting to enforce his or her statutory rights.*
  - *Attention has turned to protecting **whistleblowers** - employees who disclose information about wrongdoing committed by their employer. Most of this legislation applies to government employees only.*

#### **B. Unjust Dismissal Laws**

- **Unjust dismissal law:** *a statutory law imposes restrictions on the contractual right of employers to dismiss employees for any reason at all.*
- *Unjust dismissal laws do not prohibit dismissal for valid business reasons such as a permanent layoff due to lack of work.*
- *They apply mostly to terminations in which the employer alleges that there was cause for dismissal.*
  - *Employees can challenge that decision and, if he or she wins, the law provides the possibility of reinstatement with back pay, among other remedies.*
- *Some argue the law's intended to protect employees from unfair dismissal were to "provide non-unionized employee with substantially similar protections against unjust discharge as the unionized employee enjoys under a collective agreement.*

- Only 3 jurisdictions have taken this step. Many politicians fear that the general unfair dismissal law will prove too expensive to administer and impose costs and rigidities on employers that will lead to job losses. (neoclassical perspective).
- If the employer alleges cause for termination, the employee can file an unfair dismissal complaint under the legislation, and the employer must then demonstrate that it had a good reason to dismiss the employee.
  - Debate surrounds whether unjust dismissal laws prohibit employers from dismissing employees by simply giving them notice and not asserting and cause.
  - **Sec. 240 of the Canadian Labour Code**
    - The dominant view of this code has been that it prevents an employer from dismissing an employee for no reason at all simply by giving notice.
    - An alternative view was that section 240 did not displace common law right to dismiss with notice but instead granted broader remedial powers than exist in the common law, including reinstatement which an employer's claim of cause is not upheld.

Is dismissal without cause and with notice an “unjust dismissal” under the Canadian Labour code?

**Wilson v. Atomic Energy of Canada Limited (2015).**

- Wilson was terminated without cause after four-and-a-half years of service at Atomic Energy. Atomic Energy offered Wilson a severance package of six months' pay if he signed a release promising not to bring any legal action against the Crown corporation. Wilson refused to sign the release and instead filed an “unjust dismissal” complaint under section 240 of the Canadian Labour Code.
- **Issue:** is dismissal without cause and with notice an “unjust dismissal” according to Sec. 240 of the Canadian Labour Code?
- **Decision:** No, not necessarily. The court noted that the case has been long divided on the matter. The court rejected earlier rulings and academic commentary that concluded that sec. 240 of the code confers on non-unionized employees the same protection from unjust dismissal as is common for unionized employees in Canada.
- The court concluded that the purpose of section 240 was to provide adjudicators with more remedies than existed in the common law and not to impose “just cause” requirement. Therefore the employer did not violate section 240 by firing Wilson with 6 months notice.

## Chapter 26: Putting Human Rights Law to Work

### Human Rights Issues in Employment Recruitment

- *Section 5(1) of the Ontario Human Rights Code:*
  - *Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability.*
- *This section creates right to equal treatment without discrimination with respect to employment.*

### A. Job Advertisements

- *Section 23(1) of the Ontario Human Rights Code:*
  - *The right.... To equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.*
- *The employer would first need to establish that it is not possible to accommodate a disability that enables the possible applicant to perform the essential duties of the job without incurring undue hardship.*

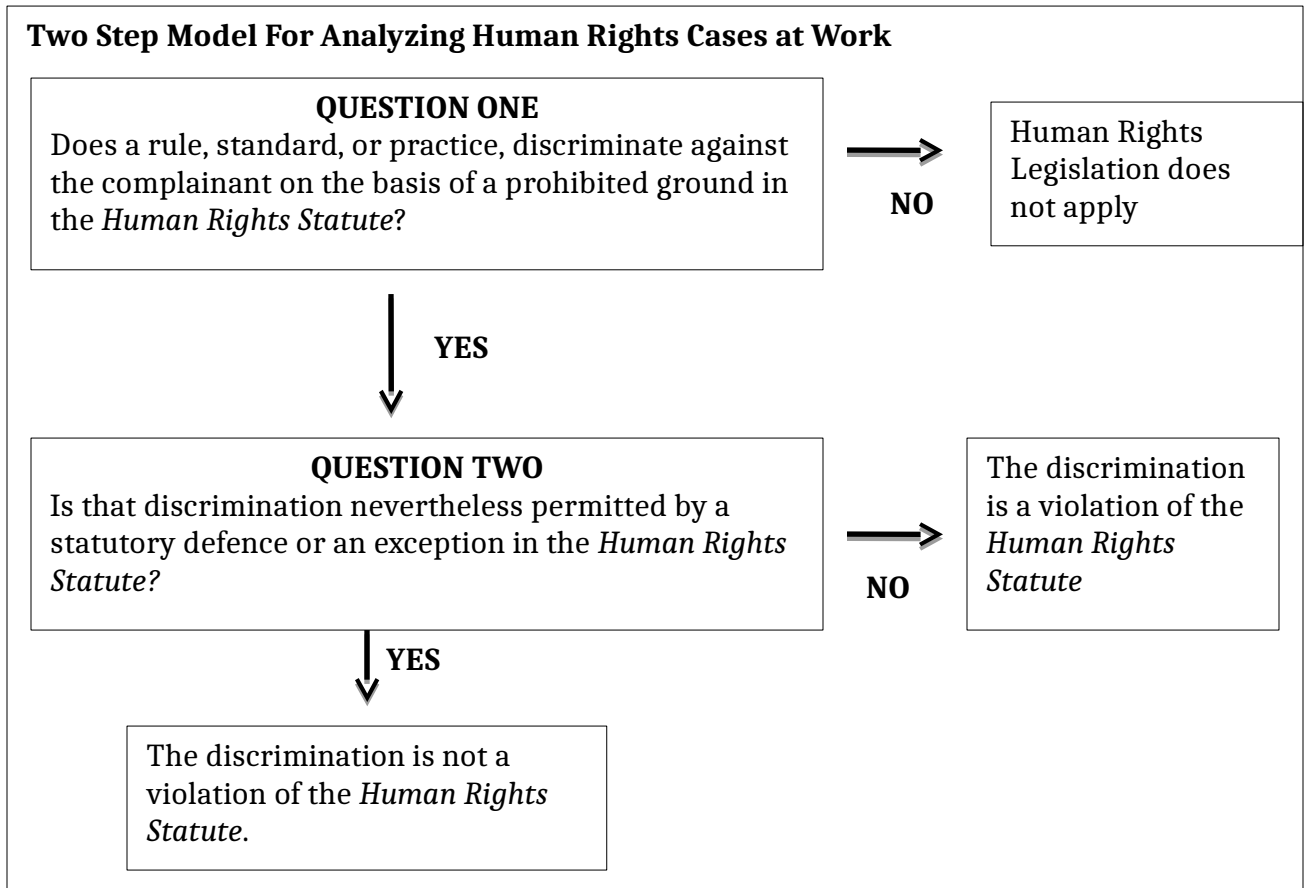
### B. Job Application Forms and Job Interviews

- *It is demeaning to individuals to be placed in a position where access to employment is made conditional on disclosing information that is highly personal and usually irrelevant to job performance.*
- *Section 8(1) of the Alberta Human Rights Act*
  - *No person shall make any written or oral inquiry of an applicant that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation.*
- *Once an employer receives information relating to a prohibited ground, it must be prepared to persuade a human rights tribunal that its hiring decision was completely untainted by it.*
- **Is an Employer's Demand for a Job Applicant's Social Media Passwords a Violation of Human Rights Laws?**
  - *For this reason, the OHRC believes employers should not ask job applicants for access to information stored on social media or other online sites and that doing so could leave an employer open to a claim of discrimination under the code.*

### Human Rights Issues at Work

- *The first step involves assessing whether the employer has discriminated based on a prohibited ground.*

- In order to answer questions 1 and 2 in the model, we must confront the following fundamental questions in human rights law:
  - 1. What is discrimination?
  - 2. What are the prohibited grounds of discrimination?
  - 3. What are the statutory defences or exceptions found in Canadian Human Rights Statutes?



### What is Discrimination?

- Does a rule, standard, or practice discriminate against the complainant on the basis of a prohibited ground in the human rights statute?
- **Prohibited grounds for discrimination:** personal characteristics that are protected from discrimination in human rights statutes, including but not limited to sex, age, race, skin colour or religion.
- **Direct Discrimination:** A type of discrimination in which a rule, standard, or practice, distinguishes an individual or group based on a personal characteristic, such as separate pay scales for men and women, or the practice of hiring people of only one gender or one skin colour.
- **Indirect discrimination:** a type of discrimination in which a rule, standard, or practice, treats everyone the same on its face, yet has an adverse impact on some people because of a personal characteristic.

**Central Alberta Dairy Pool v. Alberta (Human Rights Commission) (1990)**

- Employee became a member of the world-wide church of god during his employment with Central Alberta Dairy Pool. The employer refused to give the employee Easter Monday off of work, because operational needs required employees to be at work that day. The employee did not report to work on Easter Monday and was fired.
- **ISSUE:** was the employer's refusal to grant the employee a regularly scheduled work day off to observe a religious holiday indirect discrimination on the basis of religion?
- **DECISION:** Yes, in the case of discrimination the workplace rule is not struck down as unlawful. However the onus shifts to the employer to demonstrate (1) that the rule is rationally connected to the performance of the job; and (2) that it cannot accommodate the employees religion without suffering undue hardship.
- The employer did not satisfy question 2, did not accommodate for the employee until undue hardship as employees book off Mondays for vacations or call in sick and the employer has contingencies to deal with these possibilities.

**Indirect Discrimination**

Section 11 of the *Ontario Human Rights Code* states:

- (1) A right of a person . . . is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
  - (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances, or
  - (b) it is declared in this Act . . . that to discriminate because of such ground is not an infringement of a right
- (2) The Tribunal or a court shall not find that a requirement, qualification, or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

## Chapter 27: What are the Prohibited Grounds of Discrimination

### A. Disability

- A disability requires: substantial ongoing limits on one's activities
- Does not include: temporary impairments of the type most people experience at one time or another, such as the flu, a simple cold, allergies, or a sprained ankle.

*Disability includes the perception of a disability*

**Quebec Employer v. Montreal (city) (2000)**

- Mercier was denied a job with the city of Montreal because the employer learned that Mercier had a minor spinal anomaly. This condition did not restrict Mercier's ability to perform the job, but the employer believed it could cause her problems in the future. The Quebec *Human Rights Tribunal* ruled that Mercier had not been discriminated against on the basis of disability, since she was not disabled.
- **ISSUE:** is an employer's refusal to hire a worker that is believes to be disabled, even if the worker is able to perform the job, an act of discrimination on the basis of "handicap"?
- **DECISION:** Yes, therefore for the purposes of interpreting human rights legislation, a handicap (or disability) includes not only discrimination based on a person's actual disability, but also discrimination based on the employer's perception that a person has a disability.

### Alcohol or Drug Related Disabilities

- If I'm an alcoholic and I report to work drunk, my employer's contractual right to dismiss me may be restricted by human rights legislation, because my action is related to my disability (alcoholism).
- This does not mean that the employer can never dismiss a substance-addicted employee for work related problems.
- If the employee can establish a link between his or her disability and the misconduct for which he or she was disciplined or dismissed, then that employee may have a **prima facie** case of disability discrimination, which would then require the employer to justify its treatment of the employee by pointing to one of the defenses in the human rights legislation.
- In *Entrop v. Imperial Oil Limited*, the Ontario Court of Appeal ruled that a random mandatory drug and alcohol test for employees in safety sensitive positions which could lead to the dismissal of employees who failed the test was discriminatory on the basis of disability or perceived disability.
  - Since this was *prima facie* discrimination, the employer was required to justify according to one of the defenses provided

- They must prove that there was no evidence the employer perceived the employee to be an addict?

## B. Sex

- **Systemic Discrimination:** practices, behaviour, norms, or policies with an organization that may be unintentional and unobserved yet perpetuate disadvantages for certain individuals due to personal attribute or characteristic.
- **Examples:** CN v. Canada, SSC found systemic sex discrimination based on evidence that only 0.7% of blue collar jobs in a region where the employer operated were filled by women, compared with 13% nationally.
- Sex solicitation, physical fitness standards, dress codes, discrimination against who are, or could become pregnant, sexual harassment.

### Sexual Harassment objective test

- Would a reasonable person know that the conduct is unwanted in the circumstances

## C. Race, Colour, Ethnic Origin (or place of Origin), Nationality, Ancestry

### *Balikama obo others v. Khaira Enterprises and others (2014)*

- Over 50 black employees of Khaira Enterprises alleged they had worked as tree planters for the employer in conditions of near servitude in an isolated area of BC. Allegations included: poor living conditions, continuous racial harassment, and verbal abuse by management that was not directed at white or Asian workers.
- **ISSUE:** did the employer engage in discrimination based on race, colour, ancestry, or place of origin?
- **DECISION:** Yes. The complainants established a *prima facie* case of discrimination. Onus shifted to the employer, and they could not provide a defence.

## D. Age.

Is the Dismissal of an Older Worker Who Cannot Meet Performance Standards Age Discrimination?

### *Riddell v. IBM Canada (2009)*

- Riddell was dismissed at 59yrs old for poor performance after 39 years of service at IBM Canada. He filed a Human rights complaint alleging age discrimination; he claimed prior to termination, the employer offered him early retirement packages on multiple occasions, which he refused. In response the employer initiated a campaign to assign him to jobs an apply job evaluation measurements it knew he could not meet, so that they could fire him for poor performance.

- **ISSUE:** Did the employer discriminate against Riddell on the basis of his age by offering him retirement packages and then by “setting him up to fail” in jobs after he refused to accept any of them?
- **DECISION:** No. The OHRT noted that it is not age discrimination to offer employees an early retirement package. Nor is it discriminatory to dismiss an older worker who is unable to meet performance standards, as long as lose standards are not discriminatory.

### E. Creed of Religion

- **Sincerely held belief:** a legal test applied to determine whether a person has a religious belief that qualifies for protection against discrimination on the basis of creed or religion. The test is met if the person holds a sincere and deep belief that a practice has a relationship or nexus to religion.

### F. Marital Status, Family Status (and Civil Status in Quebec)

- Family status focuses on the relationship between parent and child. Therefore, it prohibits an employer from refusing employment to an applicant because the person is or is not a parent.

Does “family status” include childcare responsibilities?

#### *Canada v. Johnstone (2014)*

- Johnstone was an employee of the Canada Border Services Agency with two small children. To qualify as a full-time employee it is required to work 37.5 hours per week. Start times varied and covered hours in the mornings, afternoon, and evenings with no predictable pattern. Johnstone requested a fixed schedule that would enable her to be home with her children during times when she could not find alternative childcare arrangements. The employer offered to let her work a fixed schedule as a part-time employee. She worked part-time for a period but then filed a human right complaint alleging discrimination on the basis of family status.
- **ISSUE:** Did the employer discriminate on the basis of family status by refusing Johnstone’s request for a fixed-hour full-time schedule that would enable her to care for her children?
- **DECISION:** Yes. In order to make out a *prima facie* case of family status discrimination, the employee must demonstrate the following:
  - (1) that a child is under his/her care and supervision
  - (2) that the childcare obligation at issue engages the individual’s legal responsibility for that child, as opposed to a personal choice.
  - (3) he/she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible
  - (4) the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

- In this case all these were satisfied by the employee, and the employer did not have a defence.

### **G. Sexual Orientation, Gender Identity, and Gender Expression**

- Protects against harassment in the form of derogatory comments derived from stereotypes of gay men, lesbians, and bisexuals, even if the target of the harassment is heterosexual.

### **H. Political Opinion or Belief**

### **I. Language**

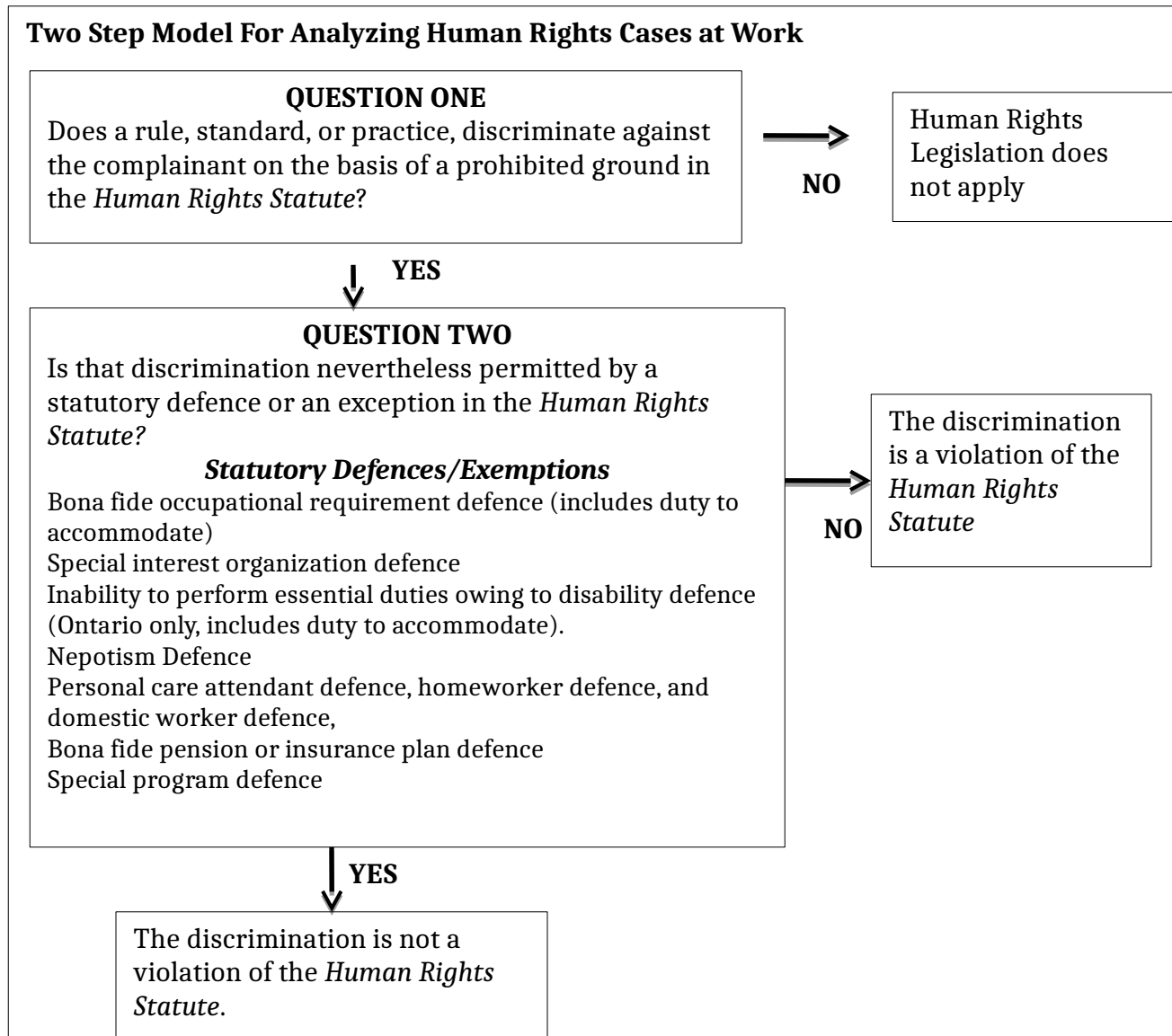
- Refusal to hire based on accented English and French by a worker from a non-English speaking or non-French speaking background has been found to discriminate based on ethnicity ancestry, or place of origin.

### **J. Source of Income, Social Condition, or Receipt of Public Assistance**

### **K. Record of Offences**

- In Ontario, for example, the prohibited ground applies only to offences for which the worker has received a pardon and to provincial offences, which are less serious offences.

## Chapter 28: The Bona Fide Occupational Requirement and Other Discrimination Defences



### The Bona Fide Occupational Requirement Defence BFOR

- The right to not be discriminated against is not absolute.
- A defence to discrimination that an employer may use to prove that a discriminatory rule, standard, or practice, was enacted for legitimate

business reasons; it requires that the employer prove that it cannot accommodate the complainant's needs without causing itself undue hardship.

### The Unified Approach: The 1999 Meiorin Decision

- The pre approach did not make sense that an employer that directly discriminates against employees should have a less onerous standard to meet than an employer that unintentionally discriminates against employees.

The scope of the BFOR Defence

#### *British Columbia v. "Meiorin" (1999)*

- Meiorin was hired as a fire fighter in 1992 by the BC Ministry of Forests and performed well in her first couple of years on the job. In 1994 the BC government introduced new aerobic fitness standards for fire fighters, and required all employees to take a fitness test. She was unable to meet a fourth test standard requiring running 2.5km in 11 minutes; she was 49 seconds late and fired. Evidence bore this out: 65-70% of men passed the test compares with only 35% of women. The Tribunal ruled that the aerobic standard discriminated against women and ordered her to be reinstated to her job. Overturned by court of appeal to the SCC.
- **ISSUE:** Did the aerobic fitness standard discriminate against women and if so was the discrimination justified as a BFOR?
- **DECISION:** Yes and No. The SCC agreed that the standards in the test discriminated on the basis of sex. The Pre-Meiorin approach was considered confusing and the court ruled, it was no longer an acceptable legal model. SCC introduced a NEW test. This test requires the employers to establish the following:
  - (1) that the employer adopted this standard for a purpose that is rationally connected to the performance of the job. (objective)
  - (2) that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of that purpose. (subjective)
  - (3) that the standard is reasonably necessary to the accomplishment of that legitimate purpose, which requires the demonstration that it is impossible to accommodate the employee without imposing undue hardship on the employer. (objective)
- The SCC ruled that the employer had failed to establish a BFOR defence. The government satisfied the first and second elements but failed to satisfied the third. The employer failed to show that running 2.5km in 11 minutes as opposed to 11.49 minutes was reasonably necessary to the safe and efficient performance of firefighting.

### Applications of the BFOR Defence

- *Stevenson v. All-Can Travel Inc.* The employer's rule requiring that travel agents be female because the employer believed that customers prefer females in this job was not found to be a BFOR defence. The employer offered no evidence that males are inferior performers in this job, and therefore the "females only" rule was not "reasonably necessary" for the performance of the job.
- *"AA" v. Halifax Regional School Board.* The employers rule prohibiting teachers from sending personal (and disturbing) emails to high school students during the summer break was upheld as a BFOR when it was applied to dismiss a teacher with a mental disability. The rule was rationally connected to the performance of the job, it was introduced with a good faith belief that it was necessary to protect students, and the employer had no way of accommodating the teachers disability to ensure student safety.

Is a Rule Requiring Mandatory Random Drug and Alcohol Test for Employees in Safety Sensitive Positions a BFOR?

***Entrop v. Imperial Oil Limited (2000)***

- Entrop had an alcohol abuse problem but he had not had a drink in 7 years. The employer introduced a new drug and alcohol policy that required workers in safety sensitive jobs to disclose past substance abuse problems and take random drug and alcohol tests. When Entrop disclosed his prior alcohol problems, he was transferred to a new job. He was eventually reinstated to his former position, but only on the condition that he agreed to a variety of terms, including agreeing to take random alcohol and drug tests. Entrop filed a human rights complaint alleging that the new policy discriminated against him based on disability.
- **ISSUE:** Did the employer's new alcohol and drug testing policy discriminate on the basis of disability, and if so, was it nevertheless a BFOR?
- **DECISION:** The employers BFOR defence argument failed. The first two parts of the Meiorin test were satisfied; the new policy sought to reduce impairment in safety sensitive jobs, a legitimate purpose that was introduced in good faith by the employer. However the alcohol and drug testing policy did not satisfy the third part of the Meiorin test. The policy was not reasonably necessary to identify impaired workers. The drug testing used by the employer did not measure current impairment. Therefore, random drug testing is not reasonably necessary to identify impaired workers.
- **The court ruled** that the random alcohol tests are a BFOR when employees perform safety sensitive jobs, provided that employees who test positive are accommodated and not subjected to automatic dismissal. Accommodation could include sanctions less than dismissal, and if the employee is an alcoholic, time off to attend a rehabilitation program.

**The Special Interest Organization Defence**

- The SCC has stated that exemptions in human rights statutes for certain types of organizations are intended to "promote the fundamental rights of

- individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits.”
- For example, Section 24(1)(a) of the Ontario Human Rights Code states that it is not discrimination where;
    - A religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employees only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.
  - This provision incorporates the BFOR test.
  - It requires that the employer demonstrate that a discriminatory practice is necessary and relevant to the performance of the job. So, for example, whether a religious school that serves students of a particular religion can refuse to hire workers who do not conform to the doctrine of that religion depends on the job the worker would perform.
  - Religious conformity may be a BFOR for a theology teacher in a religious based school, but not for a secretary or janitor in the same school.

#### Can a Religious Organization Discriminate on the Basis of Religion

##### *Ontario Human Rights Commission v. Christian Horizons (2010)*

- CH is an evangelical Christian organization that provides services to people with mental disabilities. In 1992 CH introduced a new morality code for its employees that prohibited homosexuality. Heintz, an employee, realized in 1999 that she was a lesbian. When CH learned of her sexual orientation, it offered her counseling “to restore her to a state of compliance” with the organizations code. Heintz eventually went on stress relief, and then filed a human rights complaint alleging that she had been subjected to harassment and a poisoned work environment due to her sexual orientation.
- **ISSUE:** Can CH rely on the defence to discrimination provided for religious organizations in section 24(1)(a) of the code?
- **DECISION:** No. It was true that CH was “religious organization”. It was also primarily engaged in serving the interests of evangelical Christians, since the purpose of CH was to permit members of the church to perform the religious duty of serving the needy. However, CH failed to establish that not being homosexual was a reasonable and bona fide requirement of Heintz job as a support worker:
  - There is no evidence that anyone, including the Christian Horizon’s leadership, ever considered whether the prohibition on same sex relationships was necessary for the effective performance of the job of support worker in a home where there is no proselytizing and where residence are not required to be evangelical Christians.

#### Other Defences to Prima Facie Discrimination

- **Inability to perform essential duties owing to a disability defence (Ontario)**
- **The Nepotism Defence**

- The Personal Care Attendant Defence, Homeworker defence, And Domestic Worker Defence
- The Bona Fide Pension or Insurance Plan Defence
- The Special Program Defence

## Chapter 29: The Duty To Accommodate

**Duty to accommodate:** a legal requirement in human rights law to take steps to remove discriminatory barriers to employment, including altering schedules, rules, or work patterns, or changing the physical design of a workplace.

### Establishing the Principles of the Duty to Accommodate in Canada

#### *Ont. Human Rights Comm. V. Simpsons-Sears (“O’Malley”) (1985)*

- O’Malley was a retail clerk required to work Thursday, Friday, Saturday and Saturday nights. For religious purposes, O’Malley could not work Saturday shifts. When she asked her employer to schedule an accommodation they replied “these were busy days for the business and it was mandatory that all employees be available during these times”. Instead of accommodating her needs, they reassigned her as a part-time employee, reducing her hours, benefits, and income.
- **ISSUE:** Is indirect or non-intentional discrimination prohibited by Canadian Human Rights Law? If so, is an employer required to accommodate an employee who is the victim of indirect discrimination? Did Sears discriminate against O’Malley?
- **DECISION:** Yes to all 3 questions. The Supreme Court of Canada stated:
  - An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.
  - Where it’s shown that a working rule has caused discrimination it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business.

### Who has a duty to accommodate?

#### *Central Okanagan School District no.23 v. Renaud (1992)*

- Does the duty to accommodate sometimes require violating a collective agreement to enable accommodation, and is a union obligated by that duty to participate in the accommodation process?
- Yes and Yes.

### What Does the Duty to Accommodate Require?

#### A. Accommodating Disability

- Four step process

- (1) The employer determines whether the employee can productively fulfill their existing job, as it is presently constituted.
- (2) If not, the employer determines whether the employee can perform the core aspects of the existing job in a modified or rebundled form.
- (3) If not, the employer determines whether the employee can accomplish the duties of another job in its present form.
- (4) If not, the employer determines whether the employee could perform another job in a modified or rebundled fashion.

#### Accommodating an Employee with a Mental Disability.

##### *Lane v. ADGA Group Consultants Inc. (2007)*

- Employee disclosed after hiring, that he had Bipolar disorder. After informing his employer about his mental disability, employer fired him stating that it had a concern that workplace stress might trigger a manic episode, and it could not easily endure an extended disability leave by Lane.
- **ISSUE:** Can an employer violate the human rights code by dismissing an employee because of their mental condition?
- Yes. The duty to accommodate includes both procedural and substantive duty
  - **Procedural duty to accommodate** includes gathering all relevant information necessary to assess whether accommodation is possible.
  - **Substantial duty to accommodate** includes monitoring Lane, and then calling his wife or doctor if there were signs of an episode would cause the employer undue hardship.

#### **B. Accommodating Religion**

#### **C. Accommodating Sex/Gender**

#### **D. Accommodating Family Status**

#### **What is Undue Hardship?**

- The legitimate defence that an employer may raise to justify why it could not provide an accommodation to an employee. This standard is demanding and requires the employer to demonstrate that significant difficulties – beyond mere inconvenience – would result if it had to accommodate the employee.
- **Six factors to consider when determining Undue Hardship**
  1. Safety
    - a. Employer must establish that the proposed accommodation presents an intolerable safety risk either to employee seeking the accommodation or to others.
  2. Infringement of collective agreement
    - a. Collective agreements are to be respected but a viable accommodation can override the provisions of a collective agreement unless the proposed accommodation would *significantly* interfere with the rights of other employees.
  3. Size of the employers operation

- a. The larger the operation, the more likely it would be that the employer can afford to arrange for a viable accommodation.
4. Employee moral
  - a. The impact of a proposed accommodation on other employees can amount to undue hardship, but only if the impact is significant. If other employees oppose the accommodation because of a preference for the status quo or a discriminatory attitude, then the impact upon employee moral will not amount to a legitimate hardship
5. Interchangeability of the workforce and facilities
  - a. Is the workplace large enough, complex enough, and adaptable enough to implement a flexible work schedule or rebundling of work assignments without undue hardship
6. Cost
  - a. The cost of an accommodation must be so significant that it would impact the very financial viability of the enterprise. Must be grounded upon proven accounting evidence and not upon impressions or assumption

#### Safety and Cost as Undue Hardship Defences

#### *Canadian Union of Public Employees, Local 4848 v. Ambulance New Brunswick Inc. (2013)*

- Saunders worked as a paramedic with Ambulance New Brunswick. She developed a medical condition that caused her periodic seizures, and caused her to lose her license to drive an ambulance. The employer accommodated her for a year by assigning her to be an attending paramedic in two or three team assignments with no driving responsibilities. Eventually the employer informed her that it was placing her on unpaid leave of absence because these conditions were causing undue hardship and no other viable accommodations were available.
- **ISSUE:** did the accommodation provided to Saunders cause the employer undue hardship either on the grounds of safety or cost?
- **DECISION:** No. Arbitrator found that the accommodations had not caused a significant impact on the employers safe handling of operations, its scheduling, or its productivity.
- **Applied the Meiorin Test.**
  - Ruled that the employer's reasons for placing Saunders on disability leave of absence were developed in good faith and rationally connected to the job. However the evidence did not demonstrate that having one paramedic do all of the driving amounted to an undue safety risk.
  - It also did not calculate the impact of the costs of running a three-member paramedic team.

## Chapter 33: Privacy Law at Work

### Federal Information Privacy law: The Federal Personal Information Protection and Electronic Documents Act (PIPEDA)

- Only applies to federally regulated private employers (banks, railways, telecommunications) both unionized and non-unionized.
- Personal information is a very broad concept and includes any information related to an individual that could be used directly or indirectly to identify the individual, including video or photograph.
- PIPEDA is built on two fundamental and sometimes conflicting principles
  - (1) reasonableness
  - (2) consent
- Section 5(3) of PIPEDA states: an organization may collect, use, or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.
- 10 Principles of Behaviour in PIPEDA
  1. **Accountability:** appoint someone to oversee obligations
  2. **Identify Purpose:** why is the info collected?
  3. **Get consent:** voluntary, easily understood
    - a. EX:// het written consent before contacting job references, keep record of consent
    - b. Certain exceptions
      - i. Best interest of individual and consent can't be obtained in timely manner (medical emergency)
      - ii. Would compromise info related to investigation of breach of law or contract
      - iii. Journalistic, artistic, literary purposes
      - iv. Information publicly available already
  4. **Limit collection:** only collect what is necessary for stated purpose
  5. **Limit use, disclosure retention:** use only for stated purposes, don't give to third parties without consent
  6. **Accuracy:** ensure info accurate, up-to-date, complete, give EES opportunity to correct errors
  7. **Provide Safeguards** (protections): protect info against loss, left, unauthorized access
  8. **Be Open:** personal info management policy should be made available
  9. **Give Access to Individuals:** if requested, give details about personal info held by organization about that person
    - a. Exceptions:
    - b. Must deny access if:
      - i. Would reveal protected information about another person

- ii. If directed not to disclose the info by government institutions for law enforcement reasons
  - c. May deny access if:
    - i. Solicitors-client privilege
    - ii. Could harm another person's life/security
    - iii. Would reveal confidential commercial information
    - iv. Was collected as part of an investigation into breach or law of contract
    - v. Was collected in a formal dispute resolution process
10. **Provide Recourse:** procedure to deal with complaints, address complaints fully.

### Video Surveillance of the Workplace under PIPEDA

#### *Eastmond v. Canadian Pacific Railway*

- CPR installed surveillance cameras in the mechanical facility area of its rail yard in response to recent theft and vandalism. The Privacy Commissioner found that the security benefit to the employer was outweighed by the intrusion into the employee's privacy.
- (1) There was an absence of statistics to show demonstrable need for the cameras, and
- (2) The cameras could have an adverse psychological effect on employees who felt that being filmed while working in the yard was an invasion of privacy.
- **ISSUE:** Was the installation of video surveillance cameras acceptable under PIPEDA because a "reasonable person" would consider the cameras appropriate in the circumstances due to concerns over theft and vandalism?
- **DECISION:** Yes. The federal court **DISSAGREED** with the Privacy Commissioner.
- The cameras did not collect personal information, and the film was deleted after 96 hours. Video was only reviewed if a security incident was reported.
- **Court ruled** that the security and deterrence purposes of the employer outweighed the relatively minor privacy interests of employees.

### PIPEDA Amendment

- Removed the requirement to obtain consent for the collection, use, or disclosure of personal information "necessary to establish, manage or terminate an employment relationship" and information "produced by the individual in the course of their employment, business or profession".
- **Reasonableness**
- Removing requirements to obtain consent would be sensible given that several other important protections under PIPEDA would continue to apply.

### Types of Privacy Protected in the Workplace

1. **Corporeal privacy:** the bodily integrity of an employee including bodily fluids and images captured by photographs and video cameras.

2. **Territorial Privacy:** places inside or outside the workplace that are considered private, such as washrooms, change rooms, lockers, and the home.
3. **Temporal Privacy:** off duty hours (including breaks) when an employee is entitled to be free of intrusions.
4. **Informational Privacy:** information about an employee (often collected through an intrusion upon the first three privacy interests) that is irrelevant to the proper administration of the employment relationship.

### Human Rights Statutes and Privacy

- Provide indirect sources of privacy rights based on restrictions on collecting information relating to prohibited grounds
- EX:// in *Thompson v. Selective Personnel* the Ontario Human Rights Tribunal ordered an employer to pay a job applicant \$3000 as damages for illegally asking the applicant if she had received psychiatric care.
- It is acceptable to share information on prohibited grounds with employers, if there is a duty to accommodate, and therefore details about a disability must be shared in order to find an appropriate accommodation for the employee.

### The Common Law and Privacy at Work

#### A new Tort of **Intrusion upon Seclusion**

#### **Jones v. Tsige (2012)**

- Tsige views Jones personal financial information records at least 174 times over a four-year period.
- **ISSUE:**
  - (1) should the court recognize a new tort for breach of privacy?
  - (2) if yes, what are the elements of the tort?
  - (3) what remedies should be available?
- **DECISION:**
  - (1) yes, the tort is called *Intrusion upon seclusion*.
  - (2) Elements of the tort are:
    - (a) the conduct was intentional
    - (b) invasion took place into the plaintiffs private affairs or concerns without lawful justification
    - (c) the invasion was highly offensive, such that it would have caused distress, humiliation, or anguish to a reasonable person.
  - (3) Remedies are compensatory damages: maximum amount available is \$20,000.

**Class action:** a lawsuit which a group of people join together and act as one common plaintiff on the basis that they all allege to have suffered the identical or a similar legal wrong at the hands of the same defendant. A class action must be approved by a court before it can proceed.

### Contract Law

### **Colwell v. Cornerstone Properties Inc.**

- The employer secretly installed a video camera in the office of a manager. When the employee learned of the camera several months later, she was informed by the employer that it was installed to detect thefts by other employees. The employee did not believe that explanation, and felt that her privacy had been violated. One month after learning about the camera, she quit and sued for **constructive dismissal**. The court noted that Ontario does not have privacy legislation, and that a general tort of invasion of privacy did not exist. Therefore, employment law in relation to privacy must be directed at contract rather than tort.
- **Court ruled** that the installation of a camera violated “an implied term at the time the contract was entered into, that each party would treat the other in good faith and fairly, throughout the existence of the contract”. Secretly installing a camera in the employee’s office violated that term and amounted to constructive dismissal.

### **Privacy in the Unionized Workplace**

- **Collective agreement** governs the terms and conditions of employment for the members of the bargaining unit.
- Disputes are often resolved by a labour arbitrator.
- Employees generally have to manage the workplace as they deem fit, subject to three important provisos
  - (1) the employer must act in accordance with the law
  - (2) the employer cannot violate the express collective agreement terms
  - (3) the employer must not implement rules or policies that are “unreasonable”
- EX:// Arbitrators have struck down as unreasonable employer searches of employee property, including lunch boxes and clothing, unless evidence exists that justifies a real suspicion of theft.
- EX:// Video surveillance at a unionized workplace has been struck down as unreasonable unless the employer can demonstrate a legitimate business reason for the surveillance (eg. A serious theft problem), that the surveillance was carried out in a reasonable and non-discriminatory manner.
- EX:// Requirement for employees to provide fingerprints – such that in the case of security checks and for the use in payroll and time-keeping systems – is an unreasonable invasion of employee privacy.

### **Union - Random alcohol and drug Testing Policy**

#### **Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper, Ltd.**

- The board concluded that the employer had not demonstrated the requisite problems with dangerous or increased safety concerns such as workplace alcohol use that would justify universal random testing. Random alcohol

testing was therefore held to be an unreasonable exercise of management rights under the Collective Agreement. I agree.

## Chapter 36: Mapping Collective Bargaining

**Collective bargaining:** Negotiations between an association of employees and an employer or association of employers aimed at reaching a collective agreement.

**Strike:** legislation can assign a particular definition to the word strike. In Canada, strikes are usually defined to include both

- (1) a collective refusal by employees to perform work
- (2) a deliberate collective slowdown by workers designed to restrict the output of an employer (commonly known as work to rule)

### Historical treatment of collectivism under the common law

- Late 19<sup>th</sup> century – act of unionism became *decriminalized*
- No common law right to engage in collective bargaining, no duty on employer to do so, not right to strike or picket.
- **Recognition Strike:** a strike by workers with the aim of pressuring an employer to recognize a bargain with a union on behalf of the employees.
- Prior to collective bargaining legislation, common law judges treated strikes or threats to strike as torts:
  - Nuisance
  - Intimidation
  - Conspiracy to Injure
  - Intimidation
  - Inducing breach of contract
  - Trespass
- Criminal code: “watch and besetting”

### Early Strikes

- (first few decades of 20<sup>th</sup> century) were “recognition strikes”
- No protection against dismissal no right to RTW
- **Interlocutory injunction:** a temporary court order prohibiting conduct that is potentially unlawful until a decision is released by the court on whether the contract is unlawful.
- **Yellow Dog Contracts:** a contract or contract term that requires an employee to refrain from joining a union or permits termination for cause of an employee who joins a union (NOT ALLOWED)

### Statutory Intervention

- **Conciliation:** a form of mediation in which a neutral collective bargaining expert attempt to assist an employee association (eg. A union) and an employer or employer association in reaching a collective agreement.
- **1900**

- **Conciliation Act**
- Made federal conciliation service available
- **1907**
  - **IDIA (Industrial Disputes Investigation Act)**
  - Sought to reduce strikes by forcing unions and employers to engage in conciliation and then wait out a cooling off period before a strike/lockout could commence.
- **1994**
  - **PC1003:** granted workers collective bargaining rights, including protection from anti-union discrimination by employers and a limited protected right to strike, and imposed on employers a legal “duty to bargain” with unions representing a majority of workers.

### Legal Institutions in the Collective Bargaining Regime

Legal Institution	Primary Role in the Collective Bargaining Regime
Labour Relations Boards	-To interpret and enforce labour relations legislation enacted by governments
Labour Arbitrators	-To interpret and enforce collective agreements negotiated by unions and employers
Courts	-To enforce tort law as applied to collective activities -To provide judicial review of decisions of arbitrators and labour relations boards.

**Collective Agreement:** a contract between an employer or employers and a trade union (or trade unions) that sets out the conditions for a group of employees.

**Lockout:** a tactic whereby an employer refuses to permit employees to work and to pay the employees in order to apply pressure on the employees and their union in collective bargaining.

### Membership and Coverage

- **Public Sector:** 74.7% of unionized workers in Canada
- **Private Sector:** 17.4% of unionized workers in Canada

### Trends in Recent Decades

- Since 1980's there has been a slow and steady **DECLINE** in the percentage of private sector workers represented by unions in Canada
- **Private sector** unionization has decreased from 26% in 1984 to 17% today.
- **Manufacturing:** unionization rate fell from 31.2% in 1999 to 24.4% in 2012

## Chapter 39: The Unionization Process

## Introduction

- How unions in Canada obtain the legal right to represent employees.
- Unions can do so in two way
  - (1) by obtaining a government issued license (union certification)
  - (2) of through voluntary recognition, whereby the employer agrees to bargain with a union that has not been certified.

## The Pillars of the Canadian Collective Bargaining Model: Majoritarianism and Exclusivity

- One a union demonstrates that it has the support of a majority of employees and a bargaining unit – a defined group of employees of a single employer – then that union becomes the (exclusive bargaining representative) of all of the employees in the bargaining unit, even those employees who do not seek the unions representation or join the union.
- **Majoritarianism:** a principle of the wagner model, it asserts that a union must secure the support of a majority of employees to win the right to act as their representative.
- **Exclusivity:** a principle of the wagner model, it asserts that the union chosen to represent workers becomes the sole or exclusive legal representative for that group of workers.

## The Union Organizing Campaign

- **Unfair labour practice:** an action undertaken by either the union or the employer that violates one or more articles in the relevant labour relations legislation.
- Employees realize that their employer would prefer to remain non-union, and so they usually keep their interest in a union hidden from the employer for as long as possible.
- Workers can create their own union, but more often they join established unions.
- A typical union organizing campaign
  - (1) begins with private meetings between employees and a professional union organizer outside of the workplace
  - **Union organizer:** an employee of a union who's principle duties include organizing new workplaces and building union membership.
  - (2) Once contact is made, union organizers meet with those employees who initially express interest.
  - (3) the organizer will promote the benefits of collective bargaining over individual employment contracts and explain how an organizing campaign works, including the laws that govern the process and the requirement for the union to demonstrate to the government that it represents the majority of the employees. Evidence of this employee support is collected in the form of signed union membership cards, or in some jurisdictions, union authorization cards, which indicate that

the employee wishes the union to represent them in bargaining with the employer.

- Membership card fee of \$1-\$5 is paid to prove it is not just a petition.
- (4) Unions rely heavily on inside union organizers to speak to their coworkers at the workplace and ask them to sign union cards.
- (5) if the union collects sufficient cards to meet the required legislative threshold, it can file an application for certification with the applicable labour relations board.

## The Union Certification Process

### A. Trade-Union Status

- Since only a trade-union can apply for certification, the first thing a labour relations board checks when it receives an application for certification is that a trade-union filed the application.
- If the organization is newly formed, union status may be challenged.
- **Trade-union** objectives include regulating employee relations through collective bargaining, and that the organization be independent of the employer.
- An organization must demonstrate a degree of formality, by having by-laws or a constitution, and an executive or officers who have the authority to act on its behalf to bargain collective agreements on behalf of employees.
- A **company union** cannot be certified in Canada

### B. Timeliness of Certification Applications

- (1) if the employer is NOT unionized, than any union can apply to represent its employees. The length of the **statutory bar** usually allows the labour relations board some discretion to reduce the period of time.
- **Statutory bar**: a rule found in collective bargaining legislation that prohibits an application from being filed for a defined period of time.
- (2) If the employer IS unionized, then the application for certification by another union to represent the unionized employees can only be filed during an open period defined in the collective bargaining legislation. A newly certified union is given a grace period of 6 months and 12 month to bargain a first collective agreement, during which time no other union can apply to displace it.
- **Union raid**: an attempt by one trade union to organize workers who are represented by another trade union.
- If the agreement is LESS THAN 3 years, open period is final 3 months
- If the agreement is MORE THAN 3 years, open period is in month 34-36 and the last 3 months of every subsequent year.

## Required Employee Support for the Union and Collective Bargaining

- **The golden fraction**

*Number of employees eligible*

$\frac{\text{Number of employees who want the union to represent them}}{\text{Number of employees eligible to participate in collective bargaining}} \in \text{the decision to}$

- As one side of the fraction changes (numerator or denominator) it can drastically change the likelihood or percentage of union support.
- **Bargaining unit employee:** an employee whose job falls within a bargaining unit that a union either represents or is seeking to represent

### 1. Who is an “employee” for the purpose of union certification application?

- Dependent contractors are included as an employee
- EX:// taxi and limo drivers, bike couriers and truck drivers are dependent contractors and entitled to unionize.
- Some employees are **expressly excluded** from the right to unionize such as:
  - Lawyers, medical doctors, engineers
- **EXCLUSIONS**
  - (A) Managerial exclusion:
    - (1) Holds a senior management position with independent authority to make decisions on policy, or
    - (2) The running of the company or exercises real meaningful control over the livelihood of subordinate employees.
    - The person must have the authority to make decisions that substantially impact employees’ wages, job assignments, and job security.
  - (B) Confidential Employee Exclusion:
    - Excludes from the collective bargaining status only those employees whose
      - (1) regular, core duties
      - (2) involve handling confidential information of a nature related to industrial relations that is not otherwise available to the union or employees in the bargaining unit, and
      - (3) that would compromise the employer if disclosed to the union.

#### The Managerial Exclusion

#### ***Langley City Foods Ltd. V. United Food and Commercial Workers International Union***

- The union applied to be certified for bargaining unit of employees at a grocery store. It argues that two employees with the job title “assistant store manager” should be excluded. The assistant store managers supervised the department, attended management meetings; were responsible for running the store when the owner Lee was away; investigated employee wrongdoing; made recommendations to Lee about whether probationary employees should be kept on; no evidence assistant managers ever disciplined anyone.

- Employer argued that the assistant store managers were really just low-level supervisors with little real authority.
- **ISSUE:** did the assistant store managers exercise managerial functions such that they fell within the managerial exclusion and therefore were not entitled to be in the bargaining unit?
- **DECISION:** BC Labour relations board ruled that the assistant store managers did NOT exercise sufficient managerial authority over the employees to bring them into managerial exclusion.

## 2. Who is the Employer?

### Identifying the True Employer

#### *United Food and Commercial Workers International Union v. Nike Canada Ltd.*

- The union applied for certification to represent employees at a Nike distribution centre. The certification law in Ontario required the union to demonstrate that at least 40% of the employees in the bargaining unit were union members to qualify for a certification vote.
- There were 70 full-time Nike employees, and an additional 180 workers supplied by Manpower, a temp agency.
- The contract between Nike and Manpower identified Manpower as the temps' employer, however Nike argued that it was the temps' employer.
- **ISSUE:** was Nike or Manpower the true employer of the temps for the purpose of the Ontario Labour Relations Act?
- **DECISION:** *Factors in determining the identification of the Employer*
  1. The party exercising direction and control over the employees:
  2. The party bearing the burden of remuneration
  3. The party imposing discipline
  4. The party hiring the employees
  5. The party with authority to dismiss the employees
  6. The party who is perceived to be the employer by the employees a
  7. The existence of an intention to create a relationship of employer and employee
- Ontario Labour Relations Board decided that the true employer was Nike, since it had ultimate control over the temps at Nike including disciplinary power and the authority to set the wage rate.
- The union no longer had membership cards on behalf of 40% of the employees, application was dismissed.

### Related Employers

- For a related employer declaration to be made, the board requires that 4 conditions be met
  - (1) There must be more than one business entity
  - (2) The entities concerned must carry on associated or related activities.

- (3) Those activities must be carried out under common control or direction
- (4) There must be a labour relations reason to make the common employer declaration.
- EX:// Metro waste paper recovery, Whitby: Metro used a temp agency to supply almost all of its employees at a factory in Whitby. A union applied to represent metro employees at the factory, but employer argued that all of the employees worked for KAS. The union argues that KAS and Metro were related employers. OLRB agreed, finding that the two companies were carrying on related activities as the Whitby factory under common control and direction. Union was certified to represent employees of both companies at the factory.

### 3. Defining the Appropriate Bargaining Unit

- **Appropriate bargaining unit:** a group of jobs or employees that a labour relations board decides it suitable to be represented together in collective bargaining.
- A union applying to represent employees at a typical Canadian Tire Store might propose a bargaining unit like this:
  - The union applies to represent all employees of Canadian tire at 123 Junction Ave, except automotive service employees, department supervisors, and persons above the rank of department supervisor.
- It is common for collective bargaining legislation to instruct labour relations boards that a unit consisting solely of dependent contractors, professionals, or employees with special technical skills (electricians, brick layers) is appropriate, while a unit consisting of Private Constables, along with other employees is not.
- The Sask Employment Act prohibits a bargaining unit that includes supervisors and the employees they supervise.
- Labour relations boards must decide whether the bargaining unit proposed by the union makes good labour relations sense.
- Labour relations boards emphasize that an appropriate bargaining unit is one in which employees share a **community of interest**
  - A common test used by labour boards in assessing whether a proposed bargaining unit is appropriate for collective bargaining; it asks whether the workers share sufficient commonality that grouping them together makes industrial relations sense.
  - **COMMUNITY OF INTERESTS TEST**
  - (1) similarity of skills, interest, duties, and working conditions

- (2) the physical and administrative structure of the employer
- (3) functional integration of the work and employees
- (4) geography.
- Unions usually prefer the largest bargaining units that they can realistically organize, and therefore labour relations boards tend to give unions the bargaining unit they propose, except when that unit would cause the employer serious labour relations problems.
- The most common problem is **undue fragmentation** of bargaining units that could leave the workplace carved up into little pockets of bargaining units, each with their own collective agreement.
- LRB are also concerned about separating employees into different bargaining units when there is a history of interchange of employees in and out of the proposed unit or where there is functional integration of the proposed unit with other parts of the business.

What is an Appropriate Bargaining Unit at Tim Hortons?

*United Food and Commercial Workers International Union v. Lynn Management Ltd.*

- The union applied to represent employees at one Tim Hortons store in Hamilton Ontario. The employer argued that the appropriate bargaining unit includes all 11 stores it owns (franchised).
- **ISSUE:** Was the union's proposed bargaining unit consisting of one Tim Hortons store an appropriate bargaining unit?
- **DECISION:** No. Board ruled that a unit of just one store was not appropriate in this case, due to the high degree of integration between the various stores owned by the employer. The real issue, therefore, was whether the unions proposed unit of one store would create "serious labour relations problems" for the employer.
- The board concluded that it would. A single store bargaining unit would "cause **undue fragmentation** of the employers functionally integrated enterprise."

#### 4. Measuring Employee Support for Collective Bargaining: The Card Check Model and the Mandatory Certification Vote Model

Jurisdiction	Card check certification	Certification vote ballot details:
Canada Federal	No	40%, the union must win the majority of ballots
Ontario	Only in construction sector	40%, the union must win the majority of the ballots

### **Card Check Model**

- A union can demonstrate majority support without a vote by collecting documentary evidence (union cards) demonstrating support for the union on behalf of a specified majority of bargaining unit employees.
- Once the union proves to the labour relations board that it has reached the required majority threshold, the labour relations board can certify the union.

### **Mandatory Certification Vote Model**

- Involves a two step process.
  - (1) the union must collect union cards from a specified percentage of bargaining unit employees in order to qualify for the second step,
  - (2) a mandatory certification vote conducted by the labour relations board.
- The union must then also win the vote. Even if 100% of the employees are union members, the labour relations board must still conduct a certification vote.
- This quick vote model is designed to avoid a protracted, divisive, and disruptive campaign prior to the vote and to limit the opportunity for employers to use their power to pressure employees to turn against collective bargaining.

### **\*\*Voluntary Recognition**

- Prior to the introduction of statutory union certification in the 1940's, unions and employers engaged in collective bargaining after the employer had voluntarily recognized the union.
- In voluntary recognition, the employer agrees to recognize the union as the representative of its employees and to begin collective bargaining.
- Today, an employer and union can bypass the formal union certification process by agreeing to a voluntary recognition.
- The statutes include checks and balances on voluntarily recognized unions to ensure employees are protected.
- Unions may be challenged by affected employees to demonstrate that they have majority employee support.

## **Chapter 40: Unfair Labour Practices and the Right to Organize**

- Restrictions prohibiting various forms of unfair labour practices were included in 1940-1950's collective bargaining legislation and remain a fundamental pillar of the emerging right to organize
- **Unfair Labour Practices:** an action undertaken by someone acting on behalf of either a union or employer or on their own behalf that violates one or more provisions in the collective bargaining legislation

### Why a Statutory "Right to Unionize"?

- Ex:// Napora signed a union membership card and agreed to act as an **inside union organizer** at the workplace. A few days later Napora's employment contract was suddenly terminated. Employer argued that termination was for various performance related reasons and not Napora's union activities. It ruled that Napora had been fired because he was trying to organize a union and for the purpose of intimidating other employees so that they would not support the union. Board ordered the employer to reinstate Napora.
- Unfair labour practices were enacted to protect workers from such reprisals and to reduce industrial conflict that sometimes resulted when workers were fired for supporting collective bargaining.
- *Dunmore v. Ontario* (Attorney General), the supreme court wrote:
  - *"History has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade."*

### The Substance of Unfair Labour Practice Provisions Regulating Employer Behaviour

- PC 1003 also included, among other provisions, a duty to bargain, and two categories of restrictions on Employer Conduct that could impede the right to organize.
  - **(1) Intimidation and coercion prohibition:** it prohibited employers from punishing workers who join or support employee associations, either by refusing to employ them or by imposing conditions in their contracts that seek to restrain the employees from exercising any rights protected by the legislation.
  - **(2) Interference and Domination prohibition:** it prohibited employers from providing "financial support or other support" to an employee association, and from dominating or interfering with the formation of administration of employee associations.

### A. The Intimidation and Coercion Prohibition and “Anti-union Animus”

- Section 96 of the Canada Labour Code non-intimidation clause:
  - No person shall seek by intimidation or coercion to compel a person to become or refrain from becoming or to cease to be a member of a trade union.
- A more frequent problem concerns **economic threats**: includes comments or actions that cause employees to believe that supporting unionization and collective bargaining poses a threat to job security or working conditions.
- Often there is no direct evidence that the union can point to that definitively proves that the employer knew that the employee was a union supporter. However, LRB will draw inferences from the circumstances surrounding the events, like they did in the Napora case.
  - EX:// I have found it to be more probable than not the employer terminated Napora due to an Anti-Union Animus.
- In some Canadian Jurisdictions, labour relations legislation creates a “reverse onus” in cases alleging adverse treatment of union supporters that effective assumes that the employer acted unlawfully unless it can come forward with a compelling explanation of why it’s actions were completely free of **anti-union Animus**
- **Anti-Union Animus**: the motive element of unfair labour practices, it means acting with an intention to defeat or undermine the exercise of lawful activities by a union or union supporters.
- An employers actions are said to be “tainted by anti-union animus” if any part of the motivation for the action was to avoid unionization or collective bargaining, even if there are also other reasons for the action.

### B. The Interference and Domination Prohibition

- “An employer or person acting on behalf of an employer must not participate in, or interfere with the formation, selection or administration of a trade union to contribute financial or other support to it.”

#### (1) Encouraging Independent Unions and Preventing Employer Domination

- the non interference provisions protect the right of employees to select representation by an **independent union** of their own choosing.
- **Independent union**: a union that is at arms length an independent from the control of any employer.
- **The objective** is to discourage **company unions**, which are associations dominated by the employer and that may not have the employees best interest in mind.

- **Company Union:** an employee association created with the encouragement or assistance of the employer and that is not independent of the employers control or influence. A company union is often created as a union-avoidance strategy. (ILLEGAL IN CANADA)
- An employer that lobbies employees to support a specific union it perceives to be more friendly than another, may also be unlawfully interfering in the selection of a union.
- **Purposive Approach to Statutory Interpretation:** an approach to interpreting an applying a statutory provision that is guided by the purpose of the provision.
- Applying this test, boards have ruled that it is not unlawful for an employer to provide a list of employees, to a union seeking to organize its employees, to invite a union to organize its employees, or to permit union organizing at the workplace provided that the union involved is at arms length from the employer and the employers actions do not interfere with the ability of employees to freely choose whether to support the union.

## (2) Preventing Employer “Interference” with the Functioning of the Union

- Labour relations boards have ruled that the following employer conduct unlawfully “interferes” with union activities:
  - Attempting during the hiring and recruitment process to screen out employees who may be union supporters
  - Refusing to provide a certified union with contact information for employees in the bargaining unit and information about their terms of employment
  - Bargaining working conditions directly with employees instead of their union
  - Refusing to collect and remit union dues to the union in accordance with a union dues clause in a collective agreement
  - Restricting an employee from taking a position as a union official
- An employer can violate the non-interference provisions without having a specific intention to undermine a union or its employees’ effort to organize. This type of action is known as a **non-motive unfair labour practice**
- Balancing tests of sorts to determine when employer actions that lack-anti-union animus nevertheless unlawfully interfere with union rights.
- If the employer’s business purposes is considered weak or unpervasive, a violation of the non-interference provision may be found.

## Employer Property Rights Versus the Right to Organize

### *Cadillac Fairview Corp Ltd. v. R.W.D.S.U (1989)*

- RWDSU commenced an organizing campaign of employee's of Eatons. The only access to the doors where employees entered and exited the workplace were in the mall.
- Union organizers set up at those doors before the store opened and before the public entered the space to distribute literature to employees entering work.
- CF enforced the malls "no solicitation" policy to exclude all such leafleting and organizing on mall property.
- Union filed an unfair labour practice complaint alleging that CF was "interfering in the formation of a union" contrary to what is now **section 70 of the Ontario Labour Relations Act.**
  - No employer and no person acting on behalf of an employer or an employer's organization shall participate in or interfere with the formation, selection, or administration of a trade union.
- **ISSUE:** did CF unlawfully interfere in the formation of a union by banning union organizers from the Eaton Centre?
- **DECISION:** Yes. OLRB ruled that CF was a "person acting on behalf of" Eaton's when it enforced its "no solicitation" policy and, therefore, that section 70 applied to the actions of CF. CF may have valid, business related reasons and must be weighed against the statutorily protected right to organize.
- The business purpose for the application of the "no solicitation" policy was weak or non-existent here, since the unions organizers were not interfering with any mall business.

## Employer Expression Rights

- Employers can prohibit union organizing during working hours, when the employees should be performing their jobs.
- They can enforce their property rights to exclude professional union organizers.
- Employers are permitted to express opinions about unions and collective bargaining, provided that they do not use threats, intimidation, or coercion and do not make promises, such as promising benefits if employees reject collective bargaining.
- Provisions have been interpreted to restrict employers from bad mouthing unions with claims such as: "unions just want your dues" and "Employees would be better off without a union".

- However, in most Canadian jurisdictions, Employers are permitted to actively lobby employees to “vote no” and even to say negative things about unions, provided that there are no threats, intimidation, or coercion.
- Labour Relations Boards apply an **Objective Test**, asking whether an employee of “average intelligence and fortitude” would be intimidated by the employers expression in the circumstances.
- Employer **captive audience meetings** are usually permitted in Canada, labour relations boards recognize too, that the act of forcing non-union, vulnerable employees to listen to the employers anti-union message can itself be coercive.

### An Employer’s Speech During an Organizing Campaign Crosses the Line

#### *United Steel Workers of America v. Walmart Canada Inc (1997)*

- USWA commenced an organizing campaign at a Walmart Canada store in Windsor. The union had collected union membership cards on behalf on 91 employees out of just over 200 total employees in the bargaining unit sought. Vote was held a week later, and the results were 150 votes against unionization and 43 votes in favour.
- The union filed an unfair labour practice complaint alleging that in the days preceding the vote, the employer had engaged in a campaign of threats and intimidation of employees that tainted the outcome of the vote.
  - Telling an employee that a benefit program would be revoked by the employer if the union succeeded
  - Would Walmart close the store if the union won? When employees asked that, the employer answered that “it would be innappropriate” for the employer to comment on what might happen if the union won.
  - Permitting an anti-iunion employee to give a speech against the union at an employee meeting, but not granting a union supporter the same opportunity.
  - Not distancing itself from the comment by the anti-union employee at the meeting that Walmart “would not stand for” a union.
- **ISSUE:** did Walmart Canada commit an unfair labour practice by its pre-vote actions, and, if so, did those illegal acts taint the outcome of the vote?
- **DECISION:** Yes and yes. An explicit threat to remove a benefit was made and more importantly Walmart conveyed to employees the message that there was a real possibility that if the union succeeded, it would consider closing the store. It did this in a number of ways.
- First, It permitted an employee to tell co-workers at a store meeting that a vote for the union could threaten their jobs.

- Second, Walmart planted the seed in the minds of employees that the store could close if the union won.
- Third, the employers strategy of having five managers circulate around the store for six days straight, repeatedly engaging employees in one-on-one discussions about the union surpassed simply providing information and crossed the line into “undue influence”.

### **Remedies for Unfair Labour Practices**

- Give the job and benefits back to the person.
- Routinely reinstate employees whose employment was terminated for union activity, usually with full back pay and compensation for lost benefits.
- The Ontario LRB has the power to order a fired employee to return to work on an interim basis, until the persons unfair labour practice complaint is decided.
- **Interim reinstatement:** an order by a labour board that the employer reinstate a terminated employee to their job pending the outcome of litigation that will determine if the employer was within its legal rights to terminate the employee.
- We cited studies that conclude that when employers act unlawfully during organizing campaigns the odds of the union winning a certification application fall dramatically. Therefore, the harm to the union is the damage to its organizing campaign, and maybe the opportunity to win the campaign.
- **Meaningful Remedy to Unions**
  - Ordered employers to post and distribute notices to employees explaining how the employer broke the law and will not do so again.
  - Disregarded failed certification votes and ordered second votes permitting the union to decide the timing.
  - Ordered employers to provide the union with an office or other access to the workplace.
  - Ordered employers to allow the union to make speeches at work during working time, or use company bulletin boards.
  - Ordered employers to provide unions with personal contact information for employees.
  - Ordered that the union be permitted to show pro-union videos at the workplace.
  - Ordered that the employer reimburse the union for organizing costs.
- These sorts of remedies do not always fully compensate the union for its lost opportunity to organize a workplace.

- **Remedial certification:** an order by a labour relations board certifying a union that may not have established that it has majority employee support as a remedy for seriously unlawful acts by the employer – Ie, convincing employees that supporting a union could cost them their jobs.
- **Remedial certification laws** permit a LRB to certify a union as the representative of employees as a remedy for unfair labour practices when the board believes that the employers conduct effective destroyed the possibility of testing employee wishes through a ballot or card check.
- Grants the union a license to try and bargain a first collective agreement that employees will accept.

## **Chapter 41: Collective Bargaining and the Making of a Collective Agreement**

### **The Effects of Union Certification**

- Transition from the common law regime to the collective bargaining regime.
- Laws require the employer to recognize and bargain with the union and the official, exclusive representative of employees in the bargaining unit.
- There is a legal obligation imposed on the employer and union to bargain with each other, even if one of them would prefer to walk away or ignore the other party altogether.
- PC 1003 put an end to **recognition strike** by offering unions a means to force employers to the bargaining table.
- The duty to bargain was central to this statutory scheme.

### How Collective Bargaining Works

- Stage 1:
  - Pre-negotiation stage: compile their bargaining wish list by taking a survey of the employees in the bargaining unit
- Stage 2:
  - Negotiation stage: parties will have meetings and attempt to identify and reach an agreement “zone of agreement”
- Stage 3:
  - Settlement stage: requires bargaining committee to write up the agree upon collective terms

### **Types of Legal Rules in Collective Bargaining**

#### **A. Statutory Freeze Provisions**

- Intended to maintain the pattern of the employment relationship and its entirety.
- Employers is prohibited from altering terms and conditions of employment of bargaining unit employees without the unions consent
- Two types of statutory freeze:
  - **Certification freeze:** a rule found in collective bargaining legislation that prohibits an employer from altering terms of employment without the union’s consent during the process of an application for certification.
    - Lasts until either
    - (1) the labour relations board dismisses the union’s application because the union’s organizing attempt failed
    - (2) the union wins certification and then serves the employer with a “notice to bargain”

- **Collective bargaining freeze:** a rule that prohibits an employment from altering terms of employment without the unions consent during the period of collective bargaining.
  - Used because the employer is in the position to influence the preceding's at the bargaining table by making decisions affecting its operation without prior consultation with the union. Employer can undermine authority of employee's bargaining agent, and poison environment, contrary behaviour to the cooperative environment envisioned.
  - Applies during each new round of bargaining
  - Triggered each time either employer or union tells the other party it would like to begin bargaining toward new collective agreement.

## **B. The Duty to Bargain in Good Faith, and Make Reasonable Efforts to Conclude a Collective Agreement**

- Sec. 17 of Ontario Labour Relations Act
- “The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they SHALL BARGAIN IN GOOD FAITH and MAKE EVERY REASONABLE EFFORT TO MAKE A COLLECTIVE AGREEMENT.”
- Contains both a **subjective** and **objective** component.
  - Not only must the parties bargain in good father, they must also make very reasonable effort to enter into a collective agreement.
  - **Subjective Standard**
    - Requires the labour relations board to assess the party's motive
  - **Objective Standard**
    - Compares the party's behaviour to that of others in the industry.

## **The Procedural Duty to Bargain: the HOW of Collective Bargaining**

### **A. The duty to meet and be prepared to negotiate.**

- Don't waste other party's time rule.
- Have a negotiator ready
- Meet within reasonable time
- Make reasonable efforts.

### **B. The Duty to provide information and respect the union's role as the employee's exclusive representative**

- Employer must provide union with info it requires
- In the case of a newly certified union, this included
  - Names, contact info, terms and conditions of employment of bargaining unit employees.
- If not provided it is a violation of duty to bargain
- Employer has no direct communication with employees.

### **C. The Duty to be honest and to disclose plans that will affect bargaining unit employees.**

- No lying
- Must answer direct questions truthfully
- "Unsolicited disclosure" must you disclose info even if not asked about it?

The duty to disclose information in collective bargaining

#### ***International Woodworkers of America v. Consolidated Bathurst Packaging Ltd. (1983)***

- In negotiations, the union proposed language that would give employees greater benefits in the case of a plant closure, but eventually dropped that proposal.
- Employer never mentioned that it was considering or expecting to close the Hamilton plant. In April 1983 they closed the Hamilton plant.
- Union filed a bad-faith bargaining complaint, arguing that they employer had decided during the negotiation period to close the plant and had failed to disclose that information to the union.
- **ISSUE:** did the employer violate the duty to bargain in good faith by failing to disclose its intention to close the Hamilton plant to the union during collective bargaining?
- **DECISION:** Yes. First, an employer must answer union questions truthfully. Second, an employer must disclose on its own initiative decisions that have already been made and that "will have a significant impact on the terms of employment". The employer was under legal duty to disclose to the union that it was at least contemplating the closure. Court ordered that monetary damages be paid to the union and employees calculated based on an assessment of the additional severance amounts the union would likely have bargained had it been aware during negotiations that the factory was closing.

## **2. The duty to Bargain and the Substance of Bargaining Proposals: The WHAT of collective bargaining.**

### A. Bargaining Illegal Terms

- Neither party can propose an illegal term such as one that would violate human rights, occupational health and safety or employment standards legislation.
- It also requires some terms be included in every collective agreement and it is a violation of the duty to bargain for a party to refuse to include such terms.
- **Mandatory arbitration clause:** a clause that requires all disputes arising under the collective agreement to be referred to binding labour arbitration to be resolved.

### B. Terms That Can Be Proposed, but Not “Bargained to Impasse”

- Parties who are unable to agree on a particular term must drop the term from their proposals and cannot use the term as the basis for a strike or lockout.
- Bargaining to impasse occurs when the proposed term in dispute holds up a settlement.
- EX:// expanding the scope of a bargaining unit cannot be bargained to impasse, neither party can provoke a strike or lockout over the issue.

### C. Hard Bargaining versus Soft Bargaining

- **Hard bargaining;** a lawful strategy that involves a party using its superior bargaining power to insist upon collective agreement terms that favour its own interests
- **Surface Bargaining:** a strategy that involves a party going through the motions of bargaining but having no intention of ever concluding a collective agreement. It is violation of duty to bargain in good faith.

### Proposing Untenable Contract Terms

#### *Royal Oak Miners Inc v. Canada (labour relations board)*

- For 18 months a bitter strike took place at Royal Oaks giant mine in Yellowknife. Employer used replacement workers and hires a security company to deal with violence on the picket line. During the strike the employer terminated the employment of 49 strikers for alleged picket line misconduct.
- Four months into strike, an explosion at the mine killed 9 miners. Government assigned senior mediators to help.
- Employers insistence that under no circumstances would it agree to a grievance or arbitration process that would permit the employees who were fired during the strike to challenge their dismissal.

- **ISSUE:** did the employer violate the duty to bargain in good faith and to make reasonable efforts to conclude a collective agreement by refusing to agree to a grievance and arbitration process for fired workers?
- **DECISION:** Yes. The employer was engaged in unlawful surface bargaining. The requirement to make a “reasonable effort to enter into a collective agreement” wasn’t fulfilled. Since no union would accept a collective agreement without an arbitration clause, the refusal of the employer to negotiate that clause indicated a lack of bad faith.

### Lawful Hard Bargaining

#### *Retail, Wholesale & Department Store Union v. Eaton Company Limited.*

- There were over a dozen bargaining units certified to represent Eaton’s employees at six GTA stores. Union proposed they negotiate one “master collective agreement” that would apply to all the stores, but employer insisted on conducting separate negotiations for each bargaining unit and on a process that involved extensive discussions of each one of the unions proposals. Union wanted higher wages for unionized employees than Eaton’s non-unionized employees.
- The union struck at all six GTA stores. Eaton’s stayed open during the strike using non-unionized workers to run the store.
- **ISSUE:** Did Eaton’s violate the duty to bargain in good faith by, among other actions, insisting on bargaining separate agreements for each of more than a dozen bargaining units and be refusing to offer a raise beyond what non-union workers receive?
- **DECISION:** No, the OLRB explained that this was a case of hard bargaining by Eaton’s. There was nothing improper in Eaton’s use of its bargaining power to insist on a collective bargaining process and collective agreement terms that benefit the employers interests, provided that it was prepared to meet and engage in extended discussions about the union’s proposals and that it was prepared to sign a collective agreement.

## Chapter 42: The Law of Industrial Conflict

### Mapping the Options for Resolving a Collective Bargaining Deadlock

- When collective bargaining reaches an impasse, two legal routes are used in Canada.

## 1. The “Economic Warfare Route”

- For workers and the union, the main weapon is the **strike**.
- For the Employer it is a **Lockout** or **unilateral imposition of contract terms**.

## A. Union and Employee Weapons: A Strike

### 1. What is a strike?

- **Strike**: Defined to include (1) a collective refusal by employees to perform work, (2) a deliberate collective slowdown by workers that is designed to restrict the output of an employer (work to rule)
- **Work to rule**: a form of strike in which workers collectively and deliberately slow down for the purpose of restricting the employer’s output.
- **Strike Pay**: a payment made by a union to a union member or person in a bargaining unit during a work stoppage, often as consideration for performing a shift as a picketer.
- Employees on strike are not eligible for government assistance and cannot claim unemployment insurance.
- In all jurisdictions, a **strike is defined** to include cessation or refusal to work by two or more workers acting
  - *in combination*
  - *with a common understanding*
- A single worker protesting her employer’s low pay is not on strike; but if two or more workers agree to drop their tools and picket, they may be.

### a. The Broad, Objective Definition of Strike

- Definition of Strike varies. Some define a motive and some don’t.
- It does NOT matter why employees are refusing to work.
- Definition has two parts
  - (1) refers to concerted refusals to work and
  - (2) to a “slow down” designed to restrict output.
- **Sympathy Strike**: a strike undertaken by workers who do not have an immediate and direct grievance against their own employer, but who strike as a means of showing support and solidarity with other striking workers who do have such a grievance with their employer.

Is the Refusal to Work Voluntary Overtime a Strike?

***Dick’s Lumber & Building Supplies Inc v. United Steelworkers of America***

- The United Steelworkers of America (union) represented employees at 3 separate locations of the employer. Workers at the Surrey location were on

strike. Workers at the Burnaby location were not on strike, and there was a standard “no strike” cause in the collective agreement that prohibited them from engaging in strike.

- After the union had reminded the Burnaby employees that overtime was voluntary, 18 out of 23 Burnaby employees declined to the employer’s request to work overtime.
- **ISSUE:** Was the refusal by the employees to work voluntary overtime a strike?
- **DECISION:** Yes. The labour relations board concluded that the workers had collectively agreed, with the encouragement of the union, to refuse overtime. The union had subtly encouraged the employees to decline overtime when it told them of their right to do so. The fact that the union or some employees believed it was important to support the striking Surrey workers was irrelevant. There was a collective refusal to work overtime, and that action meets the definition of a strike.
- The LRB declared the strike illegal and ordered the union and employees to cease and desist from refusing to work overtime.

#### **b. The Narrower, Subjective Definition of Strike**

- Adds a *motive element*
  - For the purpose of compelling their employer to agree to terms or conditions of employment or to aid other employees in compelling the employer of those other employees to agree to terms or conditions of employment.

## **2. When is a Strike Lawful?**

- A strike is unlawful unless all of the reconditions for a lawful strike have been satisfied.
- All jurisdictions say a lawful and therefore protected right to strike exists only for employees whose jobs fall within a bargaining unit of unionized employer, and then only during a very narrow window of time during collective bargaining and after a series of statutory preconditions have been satisfied.
- Unionized workers who strike **AFTER** these legal reconditions have been satisfied experience a limited protection from dismissal or adverse treatment at the hands of the employer
- Workers who strike **BEFORE** the preconditions have been satisfied are said to have engaged in a **wildcat strike** and may be disciplined by their employer (ordered to pay damages to the employer, as can their union if they actively engaged in the unlawful strike).

- **Wildcat Strike:** a strike by employees that occurs during a period of time when a strike is not permissible according to collective bargaining laws, such as during the terms of a collective agreement,

Preconditions to a Lawful Strike Found in Canadian Collective Bargaining Legislation	Canadian Jurisdictions Requiring the Precondition
<ul style="list-style-type: none"> <li>• The workers are unionized. (non-union employees who strike are probably breaching their individual employment contracts)</li> <li>• No collective agreement covering the striking employees in effect.</li> <li>• The union and the employer have engaged in collective bargaining with the intention of reaching a new collective agreement, but failed to reach an agreement.</li> <li>• The union has conducted a strike vote, and a majority of bargaining unit employees' ballots support a strike</li> </ul>	All Canadian jurisdictions
<p>Mandatory conciliation or mediation and a "cooling off" period:</p> <ul style="list-style-type: none"> <li>• A government-appointed conciliation officer has met with the parties, but has been unable to assist the parties to reach a new collective agreement.</li> <li>• A mandatory "cooling off" period has passed since a date specified in the statute. Precise details vary across jurisdictions, but in general, the "cooling off" period is from 7 to 21 days after the minister of labour has notified the parties that no more conciliation will be ordered.</li> </ul>	Alberta, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, New Brunswick.

### 3. The Legal Rights of Strikers and Replacement Workers

- Employers are entitled to continue to operate during a strike or lockout by assigning work to non-striking employees, including non-bargaining unit employees and bargaining unit employees who elect to continue to work.
- Employers can also hire new **replacement workers**: a person who is employed to take the place of another worker who is on strike or locked out.
  - Once the work stoppage ends, employer cannot retain replacement workers instead of reinstating employees who have been on strike
  - If a strike **lasts longer than 6 months**, the employer may be permitted to give preference to a replacement worker.
  - Ontario requires the employer to allow a striker to return to work **during a strike** as long as the work is still being done.
  - The legislation permits an employee to cross a picket line staffed by bargaining unit co-workers and return to work.

#### 4. Labour Picketing

- Workers picket for 4 main reasons
- (1) through picketing, workers seek to persuade customers, suppliers, non-striking employees, and replacement workers to stop doing business with the employer, or at least to inform these ground of the issues in dispute and elicit their support.
- (2) through picketing, workers have an opportunity to come together for a common cause and support one another during a difficult and stressful time.
- (3) workers usually receive strike pay from the union in exchange for picketing, which is much less than their usual wage but nevertheless provides some income during work stoppage.
- (4) the **interest** of the picketers and the union are to communicate their message and apply economic pressure on employer.
  - The interest of the employer are to continue operating without disruption and to ensure that a picket line does not obstruct people, supplies, and products from entering and leaving the business' property.
  - the interest of other “innocent third parties” is to avoid economic harm from picketing and the presence of a picket line
- Two Components of Picketing
- **Expressive Component**
  - Expression of ideas, and freedom of expression
- **Physical Component**
  - Large numbers of people congregating in a small area, possibly with the explicit intention of preventing or impeding the ability of people to cross an area.
- **Law of Picketing in Canada**
  - Judges use torts to regulate what picketers say, where they say it, and how they behave on the picketing line.
  - **Interlocutory Injunction:** a temporary court order prohibiting conduct that is potentially unlawful until a decision is released by the court on whether the conduct was unlawful.
    - Precondition to obtaining an injunction: employer demonstrate that the police were called and that the police were unable to prevent “alleged danger of damage to property, injury to persons, obstruction of or interference with the lawful entry or exit from the premises or breach of the peace”

- **Originating lawsuit must allege a proper cause of action; a legal rule must have been violated**
- Three types of causes of action:
  - (1) breach of contract (unlawful strike)
  - (2) breach of statute (unlawful strike)
  - (3) a tort (most common)

<b>Tort</b>	<b>Picketing Behaviour</b>
Nuisance	Picketers physically obstruct or prevent entry to or exit from a property, such as blocking roadways.
Defamation	Picketers make false and disparaging statements about the employer or others
Trespass	Picketers stand on private property and refuse to leave when asked
Inducing breach of contract	Picketers knowingly encourage or cause someone to breach a contract they have with the employer. EX:// picket line that prevents a supplier from making a delivery. Or encouraging employees not on strike to breach their contracts by not reporting to work.
Economic Tort	Applies when (1) picketers know there is a contract between the employer and a third party and intended by picketing to cause the third party to breach that contract, (2) the third party does breach contract; (3) the employer suffers damages as a result

- **Primary picketing:** picketing that takes place at the location of the employer directly involved in the labour dispute
- **Secondary picketing:** picketing that takes place at a location other than the workplace of the employees involved in the labour dispute.

### The Right to Picket and the “Wrongful Action” Model

#### *RWDSU v. Pepsi-Cola Canada Beverages (west) Ltd.*

- During a lawful work stoppage at Pepsi factory in Sask, employees initially picketed in front of the employer’s factory, but then also established picket lines at some managers’ homes, at a hotel where replacement workers were staying and at various retail outlets that sold Pepsi products, hoping to dissuade workers from accepting delivery of Pepsi products.
- Employer applied seeking an injunction to restrain the picketing; some was clearly tortious because it involved violence, intimidation and trespass.
- Judge issued an injunction prohibiting not only the tortious picketing but also all picketing at secondary locations.
- **ISSUE:** is secondary picketing during a lawful work stoppage illegal per se?
- **DECISION:** No. Ruled that the common law should nevertheless evolve in a manner consistent with “charter values”. Picketing is an expressive activity,

and therefore “it engages one of the highest constitutional freedoms: freedom of expression”.

- **SCC** introduced a new “wrongful act model”: all labour picketing is lawful unless done in a manner that constitutes a tort or violates some other law.
- Picketers were entitled to picket outside of retail stores selling Pepsi.

## **B. Employer Weapons: Lockouts and Unilateral Alteration of Terms of Employment**

- Final vote offer: a provision that entitles an employer to have the last offer it presented to the unions’ negotiating team put to a ballot of employees. Employers can only exercise this right once per round of bargaining.

### **1. Lockout**

- The moment workers can legally strike, their employers can legally lock them out.
- A lockout is unlawful if it takes place when the employer is not in a legal lockout position.
- The reason that the employer is not allowing employees to work must be to pressure the employees to agree to terms of employment or to refrain from exercising legal rights.
- Therefore a layoff due to a business downturn is not a lockout.
- If an employer believes a strike is inevitable, it may want to control when the work stoppage begins.
- The employer can remove that union advantage (of being able to pick when to strike) by locking out the workers earlier.
- Sometimes workers and their union would be happy allowing the bargaining to drag on because the prevailing terms and conditions of employment are superior to what the employer is seeking to obtain in negotiation.

### **2. Unilateral Alteration of Terms of Employment**

The Employer’s Right to Unilaterally Amend Terms of Employment

#### ***United Steelworkers v. Neenah Paper Company of Canada***

- The collective agreement between the union and the employer expired on Aug 31, 2005. The employer told the union that it was losing money and that it would require employees to accept a pay cut. The parties met with a government conciliation officer, but no deal was reached, and as of Dec, 5, 2005, the parties were in a legal strike/lockout position. Prior to that date, the employer sent the union a letter that advised the union that unless a deal was reached before Dec 5, it intended on that date to implement a new terms of employment, including a 6.4% wage cut and substantial changes to the

- pension plan, among other changes. On Dec 5, the employer began to apply the new terms. The employees continued to work but advised the employer that they did not accept the change. The union filed an unfair labour practice complaint, arguing that the employer was unlawfully bargaining directly with employees.
- **ISSUE:** Can an employer unilaterally alter terms of employment without the union's consent, once the parties are in a legal strike/lockout position?
  - **DECISION:** Yes. Once the legal strikeout/lockout date has been reached, there is no longer a collective agreement in force, and the **collective bargaining freeze**, which prohibits changes to terms of employment without the unions, consent it over.
  - An employer is free to treat the old agreement as expired and introduce new terms of employment. Employees are not required to accept the changed terms, because the act allows them to respond by going on strike.
  - If the union and employees did not wish to operate under the new terms and conditions they did not have to.

### **The Interest Arbitration Route**

- First, unions and employers may agree to refer a bargaining dispute to arbitration. That process is governed by legislation and is known as;
  - **Voluntary interest arbitration:** a procedure in which a union and employer agree to refer outstanding collective bargaining issues to an interest arbitrator to resolve.
  - Not used very often because one side or the other often believes its interests are better served by sticking with the economic warfare route.
- Second, some unionized public sector workers and bargaining disputes involving these workers are referred by statute to **mandatory interest arbitration**
  - This mandatory interest arbitration requires interest arbitration to resolve collective bargaining impasses. Replaces the right to strike and lockout.
  - Police, firefighters, medical providers, public transit, mail delivery
  - **Essential Services Agreement:** between an employer and union that identifies which and how many employees are "essential" to protect public safety and therefor cannot participate in a work stoppage.
- Third, parties may end up at interest arbitration as a result of:
  - **Back-to-work Legislation:** for the specific purpose of bringing an end to a lawful work stoppage by declaring a strike or lockout

immediately over, orders workers back to work, and referring outstanding bargaining issues to an interest arbitrator for final resolution.

- May be brought to an end by the government because of concerns that the work stoppage is causing too much disruption, risk, or harm to third parties or the economy.
- Fourth, parties may end up at interest arbitration through:
  - **First contract arbitration:** refers to a collective bargaining impasse during negotiations for a first collective agreement to interest arbitration.
  - Available only in the cast of collective bargaining for the first collective agreement after a union has just been certified.
  - This is because the collective bargaining process is new, the employer and employees are inexperienced, and the bargaining relationship is immature.
  - Like a trial marriage one that could allow the parties to get used to each other and lay the foundations for a more mature and enduring relationship.
- Falls on the arbitrator to decide and impose a final collective agreement on the parties.
- **Final Offer Selection:** a form of interest arbitration in which the interest arbitrator is restricted to imposing either the employer's or the union's collective agreement in its entirety.

## Chapter 43: The Collective Agreement

### State Regulation Of Collective Agreements

#### A. Common Mandatory Collective Agreement Terms

Collective Agreement Term Required by Statute	What the Term Does
Union Recognition Clause	Describes the bargaining unit that the collective agreement covers.
No strike or Lockout Clause	Prohibits strikes and lockouts during the term of the collective agreement
Mandatory Arbitration Clause	Requires that all disputes arising during the collective agreement over the interpretation, application, or enforcement of the agreement be referred to binding

	labour arbitration
Mandatory Union Security (only in Manitoba) Clause	Requires that the employer deduct union dues from the wages of all bargaining unit employees and remit this amount to the union
Mandatory “Just Cause” for discipline or dismissal Clause (only in BC and Manitoba)	Requires a clause providing that the employer must have “just cause” to discipline or terminate the employment contract of bargaining unit employees

### Common Mandatory Collective Agreement Terms

- Labour arbitrators can order damages for breach of these clauses caused by a mid-contract strike or lockout.
- **Labour Arbitration:** a binding dispute resolution process used to resolve disputes involving alleged breaches of collective agreements,
- **Just Cause Provision:** a term in a collective agreement between a union and employer that requires that the employer demonstrate “just cause”, or a good business reason, to discipline or dismiss an employee.
  - Unions and employers nevertheless almost always agree to include these provisions in the collective agreement.
- **Union Dues Check off:** a “union security” clause whereby all members of a bargaining unit must pay union dues and employers must check off these dues from workers wages and remit them to the union.

### B. Default Collective Agreement Terms

- A **Default contract clause** is one that is read into a contract, unless the parties agree otherwise, or that is read in provided that one party insists on its inclusion.
- Rand Formula
  - The rand formula is supported (indirectly) in Ontario, NL & L, and the federal jurisdiction by legislation that creates a default
- **UNION DUES CHECK OFF CLAUSE.**
  - **Sec. 47(1)** of the *Ontario Labour Relations Act 1995*
  - This provision effectively grants the union the right to decide whether it wants a union dues check off clause to be included. It is unfair labour practice for it to insist on language other than that found in the default statutory language if the union wants the clause included.
- Another Default Clause Provision deals with the;
- **MINIMUM LENGTH OF COLLECTIVE AGREEMENTS**
  - All jurisdictions impose a minimum collective agreement term of at least one year from the date the agreement commences “to operate”.
  - The parties can agree to a term that is longer than one year, but if they agree to less than one-year, or do not include a duration clause at all, the statutes read in a one-year term.

- The law requires a defined end date in order to identify the “open periods” during which applications to displace existing unions (union raid) or to decertify the union can be filed.
- Scope of government regulation of the unionization and collective bargaining process;
  - It involves a remedial certification,
  - A final offer vote,
  - The application of mandatory collective agreement terms,
  - An open period, and
  - The application for termination of a unions bargaining rights.

#### Minimum Collective Agreement Duration

#### *United Steelworkers of America v. Bennet Chevrolet Geo Oldsmobile Cadillac Ltd. (1999)*

- After the remedial certification order on April 22, 1998, the parties began negotiations for a first collective agreement. Bennet requested a final offer vote. That offer included a 1-year term clause beginning on April 22, 1998 (date of certification), and concluding on April 21, 1999. The vote was held on Nov 3, 1998 and a majority of employees voted in favour of the collective agreement. The parties signed the new collective agreement on Nov 25, 1998. On March 1, 1999 approximately six months after the final offer vote, a group of employees filed an application to terminate the bargaining rights of the union. The union argued that the decertification application was not “timely” because it did not fall within the final 3 months of the collective agreement, which is the “open period” which termination application can be filed for a one year collective agreement in Ontario.
- **ISSUE:** Was the employees application for termination of the unions bargaining rights “timely”?
- **DECISION:** No. There was no evidence that any of the contracts terms were applied retroactively back to April 22, 1998. Requires that a collective agreement be in operation for at least one year. Start date was Nov 25, 1998, contract did not end until Nov 24, 1999. The application for termination of the unions bargaining rights did not fall within the open period and it was dismissed.

#### C. Prohibited Collective Agreement Terms

- Terms that violate statutes, such as human rights, employment standards, or criminal law statutes.

#### Sources of Collective Agreement Terms and Rules of Interpretation

##### A. Express Collective Agreement Terms

##### 1. Why collective agreements are usually more extensive than individual employment contracts.

- Collective agreements usually contain much greater written detail than individual employment contracts.
- First, unions employ professional negotiators trained and experienced in the art of negotiating collective agreements that prioritize employee interests.
- Second, unions (usually) negotiate from a position of greater bargaining strength than individual employees in the non-union setting
- Third, labour arbitrators long ago adopted a principle known as reserved management rights, which encourages unions to bargain contract language that expressly restricts managerial authority.
  - **Reserved Management Rights:** an interpretive principle applied in labour arbitration that presumes that unionized employers retain the basic rights to run their business how they deem fit, subject to any statutory or contractual restrictions bargained by the union.
  - Reserved management rights are applied by labour arbitrators.
- Laskin found that the agreement did not grant the employer the unilateral right to decide on a “whim” how employees are paid.
  - The **LASKIN APPROACH** required the employer to negotiate managerial prerogatives with the union rather than simply inherit them from arbitrators through the concept of reserved management rights.
- Reserved management rights operate similarly to implied terms in the common law regime; they confer a default distribution of contractual rights in favour of the employer that is subject to restrictions bargained into the collective agreement.
- If a union wants to ensure that its members will NOT LOSE THEIR JOBS due to the employer contracting out work to a third party, it needs to negotiate a restriction on the employers right to contract out bargaining unit work.

#### Reserved Management Rights in the Collective Bargaining Regime

##### *U.S.W.A. v. Russel Steel Ltd. (1966)*

- Russel decided that it wanted to contract out bargaining unit work. The employers former truck drivers were offered a lower paying job in the warehouse. The union filed a grievance and argued that the collective agreement did not confer on the employer the unilateral right to contract out work normally done by bargaining unit employees. The employer argued that absent a specific restriction on its right to contract out work, it retained that right by virtue of having the reserved right to manage the enterprise.
- **ISSUE:** did the employer violate the collective agreement by contracting out the truck driver work?
- **DECISION:** No. Arthur dismissed the unions grievance. The parties must have known that an arbitrator was more likely to adopt the reserved managements right approach than the “laskin approach”.
- The collective agreement included no restriction on the right of the employer to contract out the trucking jobs. Therefore the employer has the right to do so and the grievance was dismissed.

## 2. Common Expressed Collective Agreement Terms

Type of Collective Agreement Term	What the Term Does
<i>Management Rights Clause</i>	Lists subjects over which the employer has discretion and authority to make decisions about the operation of the enterprise, subject to any restrictions appearing elsewhere in the collective agreement
<i>Union Security Clause</i>	Explains whether employees are required to become union members and or pay union dues and the process by which union dues are to be collected from employees
<i>Grievance Procedure Clause</i>	Describes the procedure and rules governing the filing and processing of grievances filed by employees, the union, or employer
<i>Seniority Clause</i>	Explains how seniority will be calculated and what rights, entitlements, and obligations are associated with seniority
<i>Job Rights Clause</i>	Explains the rules for deciding which employees receive promotions, transfers, layoffs, and recalls.
<i>Just Cause Clause</i>	Requires that the employer have just cause to discipline or dismiss a bargaining unit employee
<i>Hours of Work and Overtime Clause</i>	Explains regular hours of work and any rules governing changes to those hours and the assignment and pay required for overtime
<i>Wages, Benefits, and Leaves (Eg. Insurance coverage, vacations, bereavement, and other leaves, pensions) Clauses</i>	Describe the rates of pay and other benefits coverage and leave entitlements for employees
<i>Duration Clause</i>	Defines the term (beginning and end) of the collective agreement.

### Common expressed collective agreement terms

- Important differences exist between collective agreements and individual (non-union) employment contracts.
- **# 1 - TERMINATION**
  - Collective agreements usually include a clause requiring the employer to have a good reason (just cause) to discipline or dismiss an employee, and there is no implied contractual term granting employers the right to dismiss employees simply by providing them with notice, as in the common law regime.
  - Collective agreements usually provide unionized employees much greater job security than do individual employment contract.
- **# 2 - SENIORITY**

- Seniority refers to the length of time that an employee has been employed by the employer.
- May be defined as the: length of time employed in the bargaining unit, or in a particular department or division of the employer.
- More senior employees may be paid at a higher rate, receive greater vacation entitlements, have first access to overtime opportunities, or be given preferential treatment in the event of promotions, layoffs, and recall from layoffs.
- **Bumping rights**: an entitlement found in the terms of the collective agreement that permits a more senior employee to displace a junior employee in the case of a temporary or permanent downsizing of the workforce (this entitlement to bump is not absolute).
  - Most collective agreements include a requirement that a senior employee possesses the skills and ability to perform the job that they are seeking to bump into, perhaps with some training.
  - A collective agreement right to bump in the event of layoffs can trigger a complex train of bumping down through an organization

#### The Intersection of Collective Agreement Seniority Rights and the Duty to Accommodate.

##### *Chatham–Kent Children’s Services v. OPSEU (2014)*

- CKCS decided to shut its residential group homes and, as a result, an employee (Elley) was given a notice of layoff. Elley advised the employer that she wanted to bump into the volunteer coordinator position. Elley possessed the necessary qualification to perform that position. Junior employee (Bowen) who held that position at the time, suffered from a disability, as a result, would likely have no position that she could bump into herself if she were displaced from the volunteer coordinator position.
- Bowen sought to remain in the volunteer coordinator position as a form of accommodation of her disability.
- **ISSUE**: does the collective agreement entitle Elley to bump Bowen from the volunteer coordinator position even if Bowen’s disability may prevent her from bumping into any other position?
- **DECISION**: Yes. The duty to accommodate in human rights legislation requires a balancing act of the right of employees seeking accommodation and the interest of employers, unions, and other employees. If Elley was not able to bump into the volunteer coordinator position, her only option would have been to bump into a lower classification that would result in an annual pay cut of nearly \$9000.
- That constituted a significant interference with her collective agreement rights. Therefore, Elley was entitled to exercise her collective agreement seniority rights to bump into the volunteer coordinator position.

- **# 3 – WAGES AND BENEFITS**
  - Collective agreements define precisely what wages and benefits employees are to receive, and the employer usually has no discretion to veer from those amounts.
  - Unions usually bargain restrictions on the right of employers to unilaterally decide who gets raises and bonuses.

### B. Implied Contract Terms

- Some arbitrators have applied the **business efficacy** test and the **officious bystander** test when asked to imply contract terms.
  - **Business efficacy:** an approach used by common law judges to justify implication of a contract term on the basis that the term is necessary in order to make the contract effective.
  - **Officious bystander:** an approach used by common law judges to justify implication of a contract term based on the presumed intention of the parties. The idea is that a contract term is implied if it would be obvious to an uninterested bystander that both parties intended the term to be part of the contract.

### Implied Duty of Fairness of Reasonableness in Exercising Management Rights

#### *TTC v. Amalgamated Transit Union (2004)*

- An employee (the grievor) filed a grievance against the TTC alleging that a supervisor engaged in harassment of the grievor over several years and that the employer failed to take reasonable steps to bring the harassment to an end. The grievor required medical care for anxiety and depression caused by the harassment, which resulted in periods of absence from work on sick leave. The employer argued that the harassment did not occur. It also objected to the jurisdiction of the arbitrator to hear the grievance on the basis that the union had not identified a collective agreement term that had been violated, since the agreement did not include a “no harassment” clause.
- **ISSUE:** did the employer violate the collective agreement by allowing one of its supervisors to engage in prolonged harassment of an employee?
- **DECISION:** Yes. The arbitrator ruled that an implied term required that management exercise its authority in a manner that prevents harassment of employees. The arbitrator also referred specifically to collective agreement language that required protection of employees “safety”, protects the physical and mental safety of the employees.
- **REMEDIES**
  - Reimburse the grievor for the difference in his normal pay and the lower amount he received while on sick leave due to harassment.
  - Pay \$25,000 to the grievor for general damages
  - Henceforth ensure that the harassing supervisor had no contact with the grievor at work.
  - Implement a harassment policy and ensure all managers complete anti-harassment training.

### **Implied Contract Terms**

- Some collective agreements similarly include an expressed term requiring employers to exercise their discretion in a reasonable manner.
- When such a clause exists, an employee or union could file a grievance challenging an employer action as unreasonable.

### **Requirements for Employers to act REASONABLY**

- (1) Employers must exercise discretion expressly conferred on them by the collective agreement in a manner that is reasonable, and not discriminatory, arbitrary, or in bad faith.
  - If the collective agreement simply states a rule without granting the employer discretion over implementation of the rule, then the inference is that the employer has the exclusive right to apply and enforce the rule, and no implied reasonableness standard exists.
- (2) An employers actions will be assessed against a standard of implied “reasonableness” involves the unilateral introduction by the employer of company rules while a collective agreement is in force.
  - **Company Rules:** a term used in labour arbitration to describe rules unilaterally introduced by the employer the violation of which can lead to an employee being disciplined or dismissed
  - Company rules must be reasonable if violating the rule could lead to employee discipline.
  - Test applied to measure the legality of a rule unilaterally introduced by employers is to this day referred to as KVP Test.
  - A rule unilaterally introduced by the company, and not subsequently agreed to by the union must satisfy the following requisites:
  - **KVP Test**
    - (1) It must not be inconsistent with the collective agreement
    - (2) it must not be unreasonable
    - (3) It must be clear and unequivocal
    - (4) It must be brought to the attention of the employee affected before the company can act on it.
    - (5) The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
    - (6) Such rule should have been consistently enforced by the company from the time it was introduced.
- A new company rule that could lead to employee discipline and that fails to satisfy any one of these requirements may be found by an arbitrator to be unenforceable, although most decisions come down to an analysis of whether these rules are reasonable.

### Company Rules, Reasonableness and the KVP Test

***Communications, Energy and Paperworks Union of Canada v. Irving Pulp and Paper Ltd.***

- Irving pulp and paper introduced a mandatory alcohol testing policy that subjected 10% of employees working in “safety sensitive” jobs to random alcohol testing over the course of a year. A failed breathalyzer test could result in discipline up to and including dismissal.
- Union filed a grievance alleging that the requirement to submit to random alcohol testing constituted an unreasonable rule that was not justified by any pressing business interest and that violated employee privacy.
- **ISSUE:** was the employers introduction of mandatory random alcohol testing a reasonable exercise of management rights?
- **DECISION:** No. The SCC upheld the arbitrators decision that the mandatory testing was unreasonable applying the KVP test.
- Employers are not permitted to “promulgate unreasonable rules and then punish employees who infringe them”. In the case of alcohol testing, an employer may test an employee in a safety sensitive job when there exists **reasonable cause** to believe impairment is a risk, such as when an employee demonstrates evidence of impairment, when there has been a serious accident and the employer is seeking its cause, or an employee has a past history of impairment and testing is part of a rehabilitation plan.

**C. Ancillary Collective Agreement Terms**

- Many arbitration cases have considered whether ancillary documents form part of the collective agreement and therefore whether terms and conditions found in them are legally enforceable.

**Four Categories of Collective Agreement Language**

1. An insurance plan or policy exists, but is not mentioned in the collective agreement.
  - a. *A dispute about the plan is not arbitrable, since the insurance plan or policy is not incorporated into the collective agreement.*
2. The collective agreement provides that employees will be paid a specific benefit if certain conditions are met.
  - a. *A dispute over the failure to provide the benefit is arbitrable, since the employer has promised to provide the benefit.*
3. The collective agreement requires only that the employer pay premiums on an insurance policy.
  - a. *A dispute over the denial of a benefit by the insurance company is not arbitrable, however a dispute over the failure of the employer to pay premiums is arbitrable.*
4. A specific plan or policy is incorporated by reference into the agreement.
  - a. *A dispute is arbitrable since the terms of the plan form part of the collective agreement.*

