

Canada

Introduction

Trade unions and labour laws in Canada are largely based upon the U.S. model of industrial trade unionism, in which unions primarily seek representation rights in each individual workplace (the construction industry being a major exception, where unions are organized on the basis of their craft). Therefore, for example, in manufacturing, the employees in each plant decide whether or not to be represented by a union. Likewise, in retail, the employees in each store (or sometimes all stores in a municipality) decide whether or not to be represented by a union.

Today, unions represent about one-third of Canada's workforce. As a result, they are a powerful political force and maintain a loose connection to one of the country's political parties. However, regardless of which party is in power, labour legislation tends to respect union rights.

Labour law in Canada primarily falls within the jurisdiction of the provincial governments. The federal government's jurisdiction is limited to its own employees and those of banks, inter-provincial transportation companies (including the airlines and major railroads), and communication companies (television, radio, and telecommunications), but not those companies that support and supply such endeavors. Most private enterprise is therefore subject to provincial labour laws. These laws differ from province to province, but the essential model remains the same and, with the exception of Quebec, is founded on common law principals. In Quebec, the system is based on the Civil Code.

The law below is set out as for Ontario, which is the most populous of the 10 provinces. A few major differences, where they exist in other provinces, are noted.

Trade Unions

Certification

Often, the first time an employer knows that its employees have decided to join a trade union is when it receives notice of an application for "certification" from the Labour Board.

The Labour Relations Boards are independent government bodies much like a court. The major difference between the Board and a court is that the Board's authority is limited to labour law matters, and its membership is made up of individual experts in that area. Most Labour Boards are tripartite, which means that they are composed of representatives of management, labour, and neutrals. The neutrals include a chairperson and a number of vice-chairs. Cases before the Boards are often heard by three members – one member representing each side and one of the neutrals, either the chair or a vice-chair.

Prior decisions of the Board are not absolutely binding in any case, but the Boards look to them for guidance. In many areas, 50 years of Board decisions have resulted in policies being set down that are very inflexible.

The Board's primary responsibility is to process applications for certification. In most situations, the right of a trade union to represent employees has come about as a result of a Board Certificate, though it is possible in most provinces for an employer to voluntarily grant recognition to a trade union.

The General Role Of The Trade Union

According to the Ontario Labour Relations Act's provisions regarding certification, "a trade union may... apply... to the Board for certification as a bargaining agent of the employees in the unit." The Act defines a "trade union" as "an organization of employees formed for purposes that include the regulation of relations between employees and employers." Similar provisions are found in each province.

Many groups that are trade unions as defined by the statutes actually refer to themselves by other names, such as "associations." The Labour Relations Board's determine whether a group is a trade union the first time the group makes an application to the Board. The Board examines whether the members of the organization are employees and employers and whether it has officers who are able to carry out the organization's purposes. Once the Board has declared that an organization is a trade union, this declaration is good for all subsequent cases unless challenged.

An application for certification can generally be made when there is no existing trade union that has the right to represent the relevant employees. When there is a trade union already in existence, another trade union can apply only during a designated time. In Ontario it is the last two months of the collective agreement. Where there is no collective agreement, another trade union may only apply a year after expiration of the last agreement or after certification of the current trade union.

Additionally, outside the construction industry, unions can and do represent almost any group of employees. So, for example, United Steelworkers represents some hotel employees, and the Canadian Autoworkers Union represents some fishermen. There have also been numerous union mergers since the mid-1980s, and therefore the number of unions has shrunk. However, average union membership has grown significantly, with the primary unions each having approximately 200,000 members.

Constitution Of The Trade Union

Upon review of an application for certification, one of the Labour Board's primary responsibilities is to determine which employees should be included in the unit that the trade union will represent. This unit is called the "appropriate bargaining unit."

The Board's general approach is to include all those employees who share a community of interest in the unit. To this end, the Board will consider the nature of the work involved, the skills of the employees, and the dependence or independence of the various work groups under consideration. The Board will also look at the history of collective bargaining in the particular industry and the employer's own organizational structure. In general, the Board prefers larger rather than smaller units and is against segmenting groups that could be grouped together.

As a result of these policies, a typical manufacturing enterprise will be made up of two bargaining units: one unit composed of all the employees in the factory, and the second unit composed of all the employees in the office. Part-time employees and summer students are usually separated from full-time employees in a single bargaining unit unless the union and employer agree otherwise.

Special rules regarding the appropriate bargaining unit exist for employees exercising a particular craft, particularly in the construction industry. In this industry, the appropriate bargaining unit consists of employees who are engaged in one of the traditional crafts (e.g., carpentry). General labourers also form one appropriate bargaining unit. A union can make an application for all employees of a construction employer to be included in one unit, but the Act gives applications for craft groups special preference.

The legal basis for, and the nature of, the unions' role in the entertainment business is mostly based upon accepted industry practices peculiar to the trades involved.

In order to be certified by the Board, in most provinces a trade union must win a representation vote of all employees in an appropriate bargaining unit. The Board will order a representation vote when, in an application for certification, the union asserts that a certain defined percent or more employees of a proposed bargaining unit are members of the union, typically by having those employees sign union membership cards. In Ontario the threshold is 40%. If the employer challenges the union's assertions of percent support, the vote will be sealed pending a hearing to resolve the matter.

The vote is held within a short time, in Ontario within five business days, after the Board receives the union's application, unless the Labour Board orders otherwise.

In most cases, the union will be certified without a hearing ever being held. The Board has found that the parties abandon most of their disputes over details once the result of the vote is known.

"Card Check"

Not all provinces have mandatory certification votes. In British Columbia, for example, the Board will automatically certify a union if over 55% of the employees in the bargaining unit files membership applications. In Ontario in the construction sector, where greater than 55% of employees in the bargaining unit file membership cards the union will be automatically certified. Where certification is granted without a vote, all employees of the proposed bargaining unit are subject to unionization regardless of whether the employee signed a membership card. Card check systems can lead to increased complaints of coercion and threats against union organizers.

The Scope Of Trade Union Rights In Businesses

Once the Labour Board has certified a union as the representative for a group of employees, the employer is required to deal exclusively with the union regarding the terms and conditions of employment of those employees.

Following certification, the union will send the employer a notice to bargain for a collective agreement. (In certain portions of the construction industry, the employer will automatically become part of an employer's association, and the association's collective agreement will apply.) The Act requires that the employer meet with the union and try, in good faith, to reach an agreement. Failure to proceed in good faith is an unfair labour practice, as is any attempt to deal directly with employees on such matters.

The grant of certification also continues the “freeze period,” during which the employer cannot unilaterally change an employment condition without the approval of the union. The freeze starts when the employer receives notice of the union’s application for certification and, if the union is certified, lasts either until a collective agreement is signed or until the right to strike and lockout arises.

The Function Of Trade Union Representatives

Following receipt of notice to bargain from the union, arrangements must be made to meet and commence bargaining. The union bargaining team usually consists of a professional from the union’s full-time staff and the bargaining committee of the employees. These committees are usually made up of three to five persons representing the various work groups contained within the bargaining unit.

The employer’s bargaining team should consist of the most senior manager with immediate knowledge of the work involved. If the bargaining unit is a factory group, the plant manager usually fills this position. Also on the team should be the person responsible for personnel matters. Many employers choose to employ a professional to be their spokesperson at the table, as they have the experience necessary to balance the union’s full-time representative, knowledge of the actual effect of the proposed clauses, and knowledge of the union involved and how it operates.

Every negotiated collective agreement must be ratified by a union’s membership before it comes into effect. Ratification occurs when more than 50% of those voting in a secret ballot vote cast their ballots in favour of the new collective agreement. Some union constitutions require a higher threshold.

Collective agreements are usually established for time periods of one to three years.

First Contract Arbitration

A number of Provinces have provisions which allow one of the parties to apply for the appointment of a third party arbitrator to impose a collective agreement on the parties. These provisions are generally found in first contract situations.

Strikes And Lockouts

Collective bargaining for a collective agreement typically lasts through five to ten meetings. If this process is not successful, the next legally required step is to involve a government neutral to assist the parties. If an agreement is still not reached, the parties have a mandatory waiting period of a couple of weeks, after which a strike or lockout is legal.

Termination Of Union Rights

Very few applications are made to the Labour Board to terminate bargaining rights. Of those that are made, many are a prelude to an application for certification by another union or follow the imposition of a trade union on a workforce without an initial representation vote. Certification applications by other unions to displace an incumbent union can be made only during the same time periods as a decertification application can be made by employees (see below). As a result of internal union politics, unions will often secretly support an employee decertification and then apply for certification rather than directly applying to replace an incumbent.

An employer can only bring applications for decertification in very limited circumstances where the union is entirely failing to pursue its bargaining rights. In most such cases, the very application produces union activity that is then considered sufficient by the Board to deny the application.

Employees may file a termination application under the following conditions (in addition to some very technical, rarely used timing rules):

1. If no collective agreement is signed within a specified time following certification; or,
2. Where the parties are or have been party to a collective agreement, during a specified period that starts prior to expiry of the agreement and ends either with the expiration of the agreement or with the appointment of a government officer to help the parties in negotiations, whichever happens later. In Ontario that period is two months.

Employees must make an application for termination to the Board on forms available specifically for that purpose. The application must be accompanied by proof, usually a signed statement, that at least a certain (40% in Ontario) percent of the employees in the bargaining unit support the application. If the application meets these conditions and a certain (50% in Ontario) percent of those voting support termination, then the Board will terminate the union's bargaining rights. The Board will reject the employees' application if it believes it was actually generated by the employer. To check for employer involvement, the Board will hold an inquiry.

Sale Of A Business

The basic rule is that when an employer sells, leases, or otherwise disposes of a business (including via a bankruptcy), the union's rights follow the business. If the company and the union have a collective agreement, the new owner picks up the agreement as it is. If the parties are bargaining, or are at a point in time where the union could give notice to bargain, the union can give notice to bargain to the new employer.

Whether or not a particular transaction represents a "sale of a business" occasionally causes some confusion. It does not matter whether the sale is structured as a share or asset purchase if the business is changing hands, but it is not always clear what constitutes "the business." The Ontario Board has held, for example, that where a lease is the key item to carrying on a particular kind of business, then the sale of the lease is a sale of the business. A dispersal of assets to various concerns not picking up customer lists or other goodwill will probably not be considered a sale of the business.

The Collective Agreement

The Basic Provisions Of An Agreement

The provisions of each collective agreement vary with the nature, size, and complexity of the industry and the concerns that the parties bring to the negotiations. However, virtually every collective agreement in Canada includes provisions regarding wages, vacation and holiday entitlements, benefits, and hours of work. The following paragraphs set out some additional standard provisions.

Recognition

The recognition clause sets out a description of the bargaining unit, which is the group of employees that the trade union represents and for whom it bargains. The union is entitled to represent the unit specified by the Labour Relations Board in its certificate, and neither side can insist upon changing it. Either party can, however, propose changes in the bargaining unit description so long as a dispute over these changes does not reach the point of a strike or lockout.

Union Security And Checkoff

Ontario law and the law in most Provinces now provide that, if the union so requests, an employer must agree to a provision in a collective agreement that calls for mandatory union dues deductions from all employees.

Management Rights

It is generally accepted that management retains those rights that predate the arrival of a trade union except to the extent the collective agreement specifically limits the company's authority. Nonetheless, a management rights clause clarifies and lends support to management's ongoing role after the arrival of a union.

The management rights clause provides an opportunity to ensure that the company has certain rights that it would not otherwise have or that might otherwise be in doubt. Such rights include the right to retire employees at an established retirement age and the right to require that employees get a medical examination from a doctor of the company's choice where a claim on medical grounds is being made.

Grievance And Arbitration Procedure

The law requires that disputes about the interpretation, administration, or application of the collective agreement be submitted to binding third-party arbitration or the Labour Board.

Collective agreements inevitably provide for pre-arbitration discussion of such disputes at various levels of the union and the company. Typically, such discussions are required first between the individual and the foreman; then between the individual, the local union official, and the plant manager; and finally between the individual, the local union official, a full-time union representative, and a senior representative of management. Large employers often establish committees for the last stage of the discussions. If this procedure for discussing the grievance does not resolve the problem, the matter proceeds to arbitration by an outside arbitrator or board of arbitration.

At one time, almost all collective agreements called for arbitration by three-person boards appointed by the parties when required. The boards would consist of a company representative, a union representative, and an agreed-upon neutral chairman chosen by the two representatives. Recently, single arbitrators chosen directly by the parties have become more common. If the parties cannot agree on an arbitrator, there are generally default provisions allowing any one party to have one appointed.

Just Cause, Discharge, And Discipline

Every collective agreement is deemed to require that any discipline or discharge of an employee be for just cause. In discipline and discharge cases, arbitrators have the

authority, not only to uphold or repeal management's decision, but also to substitute a different penalty, unless the collective agreement specifically sets out the penalty that is to follow a particular infraction.

Seniority

Even relatively simple collective agreements for small operations often contain extensive seniority provisions. "Seniority" means the length of time an employee has been with the company. Seniority clauses seek, at the very least, to ensure an employee's security of future employment, primarily by requiring that the company grant the greatest degree of security of employment to the employees who have been with the company the longest. The most common seniority provision requires that any layoff be in reverse order of seniority, subject to the company having to retain workers with special skills.

Seniority may also be the trigger for other rights found in the collective agreement. A provision is often made for a probationary period, typically 60 days, during which the employee does not acquire seniority rights. Probationary employees are also usually excluded from certain benefit coverage, such as holiday pay and life insurance. Unions may also seek to apply seniority to promotion and transfer decisions within the bargaining unit.

Strikes And Lockouts

In Ontario, strikes and lockouts during the term of a collective agreement are prohibited. It is common for a provision restating this requirement of the Labour Relations Act to be found in the agreement.

A legal strike or lockout can occur after bargaining has taken place, a neutral government employee has failed in an attempt to assist the parties, and a waiting period has expired.

Works Councils

Works Councils are not a part of the Canadian system, although some workplaces have labour-management committees designed to provide a forum for union-management discussion. A few enterprises have also experimented with union representation on their board of directors, but this is uncommon. In none of these cases has significant authority been given to union representation.

In some Provinces, workplaces are required to have a functioning joint health and safety committee to address workplace issues.

Trade Union Employee Protection Rights

Most statutes contain a number of provisions designed to protect an employee's right to join a union and the union's right to organize and represent employees, free from employer interference.

The Act prohibits employers and their representatives and agents from:

1. Interfering in a union's organizing campaign;
2. Firing a person, or refusing to employ a person, because of their support for or membership in a union;
3. Restricting a person's right to join a union; and,
4. Intimidating, disciplining, or in any way discriminating against a person because of his or her support for or membership in a union.

Employer support of a trade union is also prohibited.

Complaints that an employer has violated these provisions are often made during a union-organizing campaign. The most common complaint is that the employer has fired an employee because of the employee's support for the union.

Another common complaint made to the Board is that the employer has interfered in the organizing campaign. Such complaints often allege that the employer has threatened employees who join the union, possibly in a speech or in a memo distributed to all employees.

While the Labour Relations Act specifically preserves the employer's right to free speech, the Board has repeatedly found that threats designed to stop employees from joining a union are prohibited by the Act. Such threats are often subtle, such as in suggestions that the company might close down if a union is certified.

If a complaint is made to the Board that the employer has treated any individual in a way that violates the Act, a special provision of the Act requires that the employer prove that the complaint is not true. This reversal of the "burden of proof" requires that employers must be extremely careful about any actions they take once they know a union organizing campaign is underway.

Once a complaint is made to the Board, an officer of the Board is appointed to try and settle the case. In Ontario, the officer's only duty is to try and obtain a settlement. If unsuccessful, the officer does not include what he or she has found out in his or her report to the Board.

If the Board finds an employer has violated the Act, it can order, among other things, that the employer:

1. Rehire people with full back pay;
2. Post a notice that it had violated the Act;
3. Allow the union to meet with employees on company time;
4. Provide a bulletin board for the union's use; and/or,
5. Pay the union's organizing costs.

In addition, if the Board finds that the employer's improper conduct made the results of a representation vote unreliable, the Board may order that the vote be reheld. In Ontario the Board may impose union representation as a remedy regardless of whether there has been a vote of the employees or not.