

ACC NCR Employment and Labor Forum and Borden Ladner Gervais: What You Need to Know About Canadian v. U.S. Labour and Employment Laws

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(ALMOST) EVERYTHING YOU NEED TO KNOW ABOUT CANADIAN vs U.S. LABOUR LAW









Topics

1. Some “foundational” differences
2. Unionization rates and processes
3. The Legalization of Cannabis
4. Drug & Alcohol testing
5. Wage and Hour Class Actions

Federal v. Provincial Jurisdiction

- Provincial legislation governs all aspects of the workplace unless employees are employed “on or in connection with the operation of any federal work, undertaking or business...”
- Employers will be federally regulated if:
 - Their business itself is a federal work/undertaking; or
 - Their business is integral to, dependant on, or a vital part of a federal work/undertaking



Legislation

- Regardless of whether an employer is federally or provincially regulated, various types of legislation with respect to employee relations will apply, including legislation regarding:
 - Human rights
 - Employment standards
 - Labour relations
 - Workers compensation/occupational health and safety
 - Privacy

General Considerations

- No employment at will
- Terminations can be challenging (courts tend to be employee-friendly)
- Make sure you have contracts/offer letters in place to cover the most important issues and make sure they are signed BEFORE work starts
- Human rights issues are increasing
 - Protected grounds are generally race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation
 - Unlawful to discriminate
 - Duty to accommodate up to the point of undue hardship
- All employees are entitled to overtime unless they are exempt

No “At Will” Employment – Minimum Notice Requirements

- “At will” employment does not exist in Canada!
- In the absence of just cause, all employees are at least entitled to notice of termination (or pay in lieu of such notice) under employment standards legislation (which provides minimum standards)
- The specific statutory notice (or pay in lieu) required varies from province to province, and there are often special notice requirements for group terminations (50 or more employees)

Contractual Notice

- A written employment agreement may limit an employee's entitlement to notice to that required under applicable employment standards legislation (or some other amount above and beyond the minimums)
- If there is no written employment agreement limiting an employee's entitlement to notice, or if the agreement or specific clause limiting notice is unenforceable (as it would be if, for example, it contains an "at will" termination clause), then the employee is entitled to reasonable notice of termination under the common law

2 WAYS TO BRING THE EMPLOYMENT RELATIONSHIP TO AN END

(i) Dismissal without Notice

- Resignation
- Dismissal for just cause
- Retirement
- Frustration

(ii) Dismissal with Notice

- Without cause Dismissals
- Constructive Dismissal

COMMON LAW REASONABLE NOTICE: THE FACTORS

- Age
- Employability
- Length of service
- Salary level
- Position

FACTORS THAT MAY INCREASE THE AMOUNT PAYABLE ON TERMINATION

- Allurement / Inducement / Enticement
- Improper conduct on the part of the employer (may warrant mental distress, aggravated, and/or punitive damages)
- Human Rights Issues
- NOTE: Unjust dismissals under the *Canada Labour Code* – different process and entitlements

JUST CAUSE DISMISSAL = NO NOTICE

“Serious misconduct on the part of the employee which is inconsistent with the fulfillment of the express or implied conditions of service.”

Conduct that may Breach the Employment Relationship

1. Dishonesty
2. Sexual harassment
3. Off-duty conduct
4. Insubordination
5. Incompetence
6. Absenteeism
7. Theft
8. Competing with Employer
9. Violence
10. Criminal Conduct

Conduct that may not Breach the Employment Relationship

1. Lifting a disabled person on a forklift
2. Harassing during a company event
3. Stealing from lunch program
4. Running away on vacation
5. Hunting on sick leave
6. Drinking on the job
7. Revealing trade secrets
8. Brawling with a customer
9. Fraudulent salary increases
10. Falsifying expense reports

Human Rights Legislative Overview

- **The Ontario *Human Rights Code***

- Section 5 of the Act prohibits discrimination on the following grounds:

*“5(1) 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**.”*

The Disabled Employee

- **Yes:**
 - Post traumatic stress disorder
 - Gambling
 - Lack of stature
 - Smoking
 - Pteromerhanophobia
 - Kleptomania
- **No:**
 - The flu
- **Maybe:**
 - Internet pornography addiction
 - Being tired

The Duty to Accommodate

- The Supreme Court of Canada says:
 - *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 [*Renaud*]:

*“More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term “undue” infers that some hardship is acceptable; it is only “**undue**” **hardship** that satisfies this test.”*

The Duty to Accommodate (cont'd)

- The Supreme Court of Canada says:
 - *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [Meiorin]:

*“To show that the standard is reasonably necessary, it must be demonstrated that it is **impossible to accommodate** individual employees sharing the characteristics of the claimant without imposing **undue hardship** upon the employer.”*

The Duty to Accommodate (cont'd)

- *Hydro-Québec*, [2008] 2 SCR 561
 - “What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of **undue hardship, which can take as many forms as there are circumstances.**”

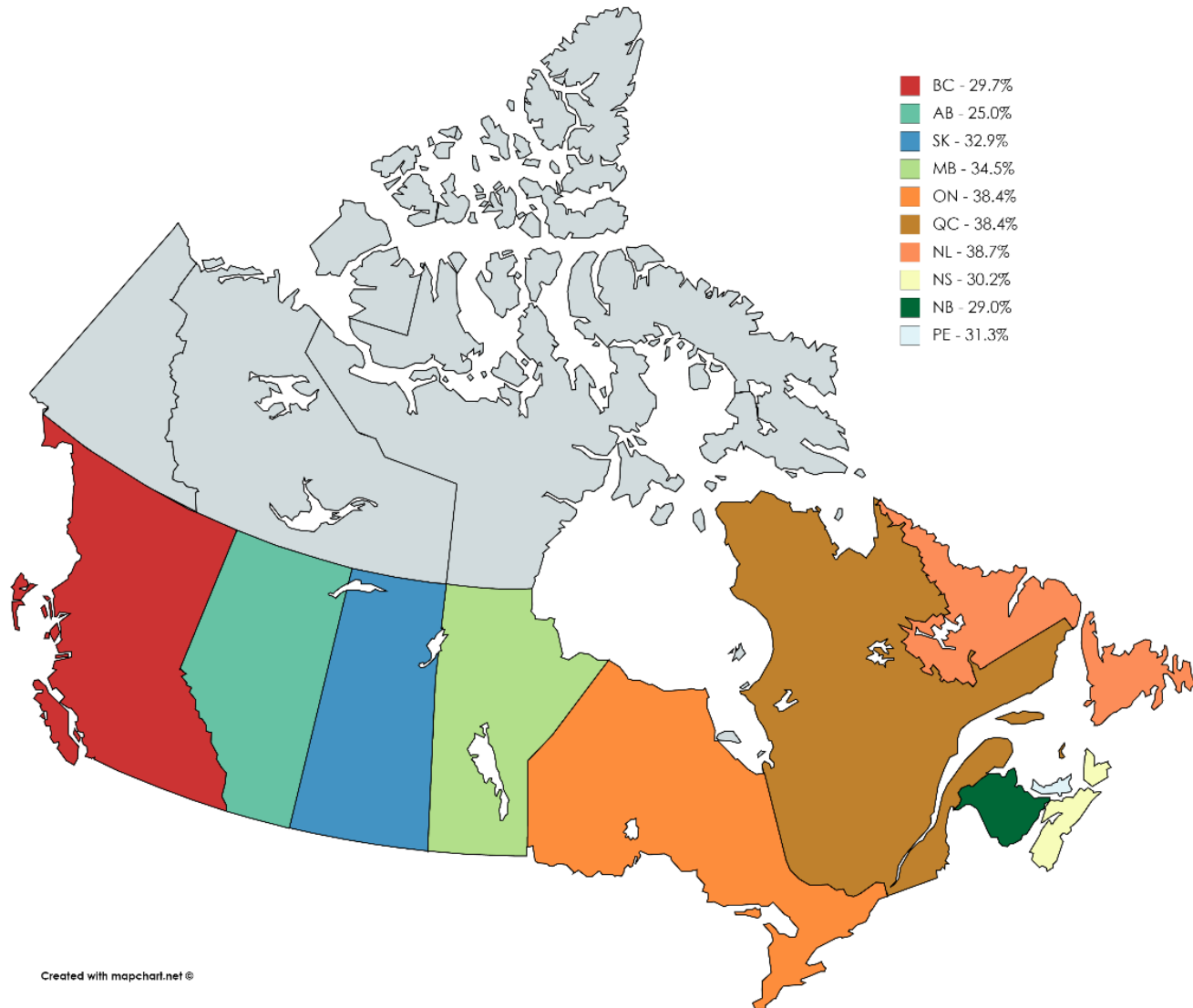
Rates of Unionization in Canada (2017)

○ Canada

- Public Sector – 75.5%
- Private Sector – 17.5%
- Combined – 30.4%

○ Provincial (combined)

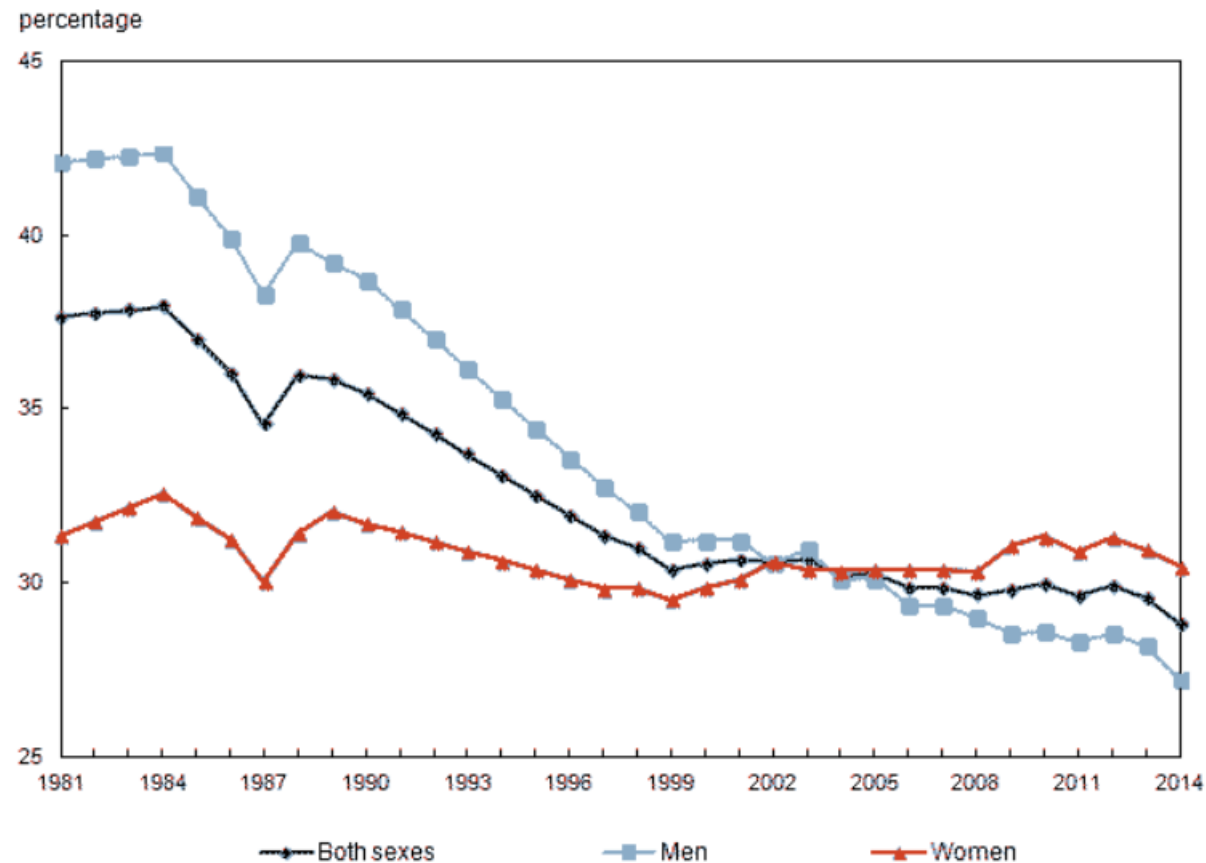
- Newfoundland and Labrador - 38.7%
- Quebec - 38.4%
- Manitoba - 34.5%
- Saskatchewan - 32.9%
- Nova Scotia - 30.2%
- Prince Edward Island- 31.3%
- British Columbia - 29.7%
- New Brunswick – 29.0%
- Ontario - 26.8%
- Alberta – 25.0%
- US – 10.7%



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Historic Trends: Rates are Falling

Chart 1
Unionization rates of employed individuals aged 17 to 64, 1981 to 2014



Sources: Statistics Canada, Labour Force Survey, 1997 to 2014; Labour Market Activity Survey, 1986 to 1990; Survey of Union Membership, 1984; Survey of Work History, 1981.

Reasons for the Trend?

- Loss of manufacturing (i.e. Ontario & Michigan)
- Demographics
 - Younger workers tend to choose flexibility over *perceived* stability
 - *50% of Uber's drivers are between 18-39 years old (Bloomberg, January 2018)*
- Easier access to knowledge and litigation
- Legislation that addresses traditional union demands
 - Increases to minimum wage
 - Pay equity
 - Leaves of absence (paid and unpaid)
 - Scheduling and time off

How Unions Obtain Bargaining Rights

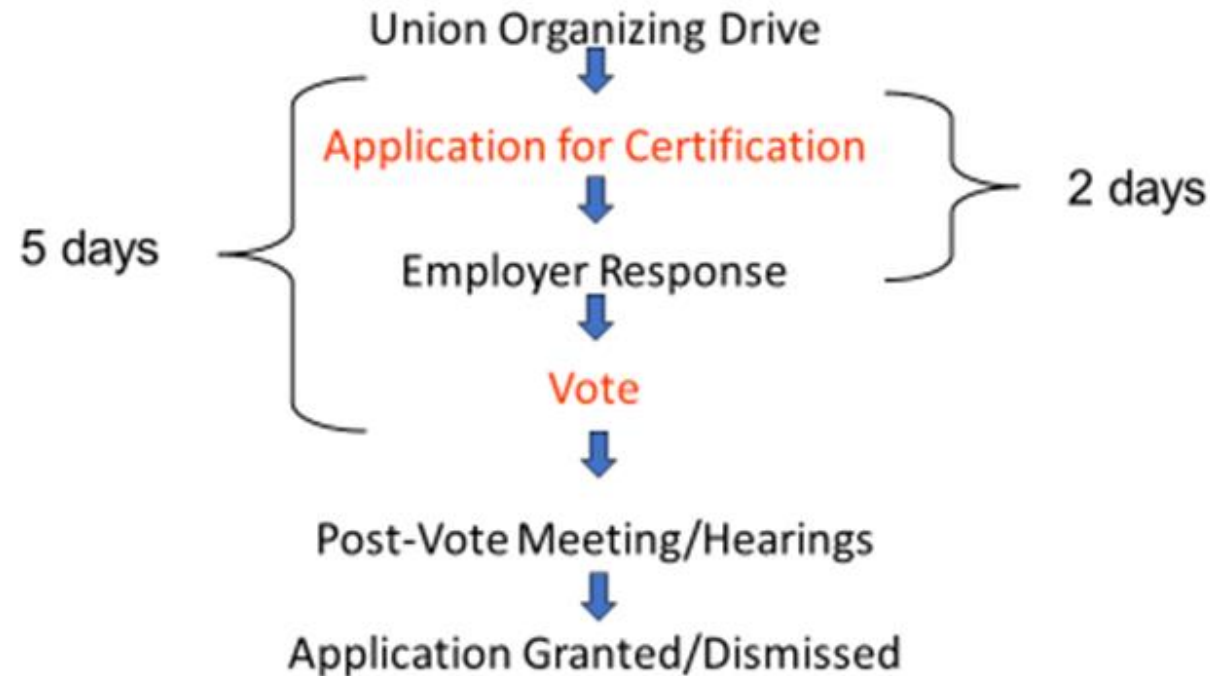
- Voluntary recognition
 - The “dance with the devil you know” approach - employer agrees to recognize the union as the bargaining agent
 - Available in every Canadian jurisdiction except Quebec
- Application (petition)
 - The most common approach
 - Scope and extent of employer’s counter-campaign differs between provinces
- Remedial certification by a labour board
 - Following really bad employer behaviour!
 - Available in all provinces except Saskatchewan

Card vs. Vote-Based Certification

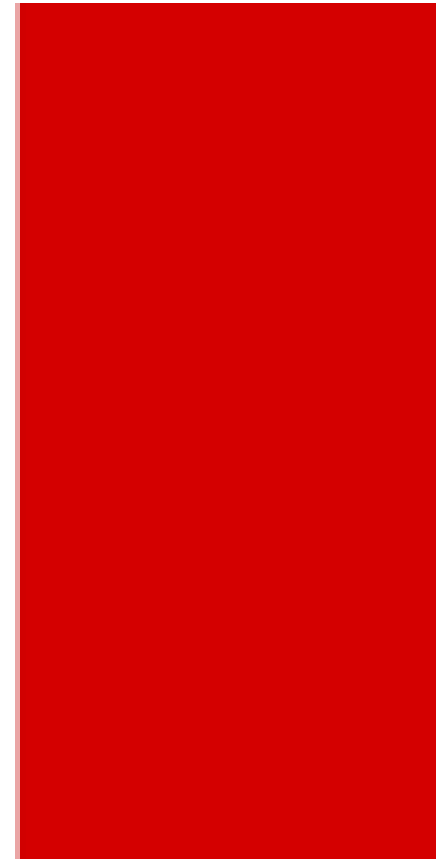
	Card Check Unionization	Support Required to Obtain Ballot Vote	Vote Timing
New Brunswick	60% (Mandatory), 50% (Discretionary)	40%	Not defined
P.E.I	50% + 1	50% + 1	Not defined
Quebec	50% + 1	35-50%	Not defined
Saskatchewan	N/A	45%	3+ days
Nova Scotia	N/A 50% + 1 (Construction)	40%	3-5 days
Newfoundland & Labrador	N/A	50% + 1	5 days
Ontario	N/A 55% + 1 (Construction)	40%	5 days
Manitoba	N/A	40%	Within 7 days
British Columbia	N/A	45%	Within 10 days
Alberta	65% + 1	40-60%	Within 20 Board days
Federal	50% + 1	35-50%	Within 30 calendar days

Example: The Ontario Model (talk about quickie elections!)

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Legalization of Cannabis



Bill C-45: Legalization of Recreational Cannabis

- Bill C-45: *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*
- Cannabis removed from Item 1 of Schedule II of the *Controlled Drugs and Substances Act*
- Bill C-45 permits adults to legally possess and use cannabis without a prescription
 - Permits public possession of up to 30 grams of dried legal cannabis or equivalent
 - Allows cultivation of up to 4 plants per household
 - Creates the criminal offence of selling cannabis to minors, and imposes significant penalties on those who engage young Canadians in cannabis-related offences
 - Offences also relate to “illicit cannabis”

What did not Change?

- Employers still have the legal obligation to provide a healthy and safe workplace for their employees
- Employers can still expect and require that employees come to work fit for duty and to remain fit throughout their workday while performing their duties
- Just as in the case for alcohol, the legal status of cannabis does not entitle employees to use it at work, or be under its influence while they perform their work, except in exceptional circumstances such as when the duty to accommodate is triggered under human rights legislation

What did Change?

- Employers can no longer prohibit their employees from using cannabis outside work hours, as it will be a legal recreational drug; however, employees may not be impaired at work or while working
- Employees under the influence of cannabis at work-related social events will have to be treated in a similar manner to employees impaired by alcohol

The Balancing Act

- There will still be an obligation on the employer to balance rights and duties such as:
 - The employer's right to direct the workplace and the duty to provide its employees with a safe and healthy workplace
- VS.
- The employee's right to privacy and to use medical marijuana where prescribed by their doctor

Issues for Employers

○ Human Rights

- Potential addiction issues
 - *Addiction is considered a disability, which is a protected ground under human rights legislation. There is likely a duty to accommodate*
- Medical use for underlying disability
 - *Why is the employee using medical cannabis? There is likely a duty to accommodate.*

○ Impaired employees

- Occupational Health and Safety legislation
- Ability to perform job duties

○ Drug testing – what is permitted?

- Privacy versus safety

Human Rights and Cannabis

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Ontarians don't have absolute right to be stoned at work: human rights commission



'Safety supersedes etiquette'

Etiquette Expert Lizzie Post weighs in on good and bad pot etiquette for hosts wondering how to handle smokers.

Alcohol and Drug Testing

- In a word - **Restrictive!**
- While employers have greater rights with respect to post-incident or reasonable cause testing, random testing is currently limited to:
 - Dangerous worksites, where there are indications of an increased safety risk; and where there is a specific risk linked to, or a generalized problem with, the use of drugs and alcohol in the workplace
 - In a unionized workplace, if the union approved a screening policy

Alcohol and Drug Testing – Policies

- Any policy on drug detection tests must take into account the employees' rights to **privacy**, **dignity** and **physical integrity**
- **Conditions:** the employer has the right to require an employee to undergo a screening test under specific conditions if:
 - The employer has serious and reasonable grounds to believe that the employee is impaired in performing his/her duties
 - Following a serious incident or an accident
 - Under a last-chance agreement or upon the employee's return to work after a drug or alcohol-related absence

Pre-Employment Testing

- Acceptability of pre-employment testing varies in the case law depending on:
 - Safety sensitive nature of position
 - Whether applicants are external or internal
 - Whether there is a health and safety workplace problem due to alcohol or drug use

Random Drug Testing

- Generally not permitted at the workplace
- Safety concerns at the workplace must be balanced against employees' privacy interests
- Following a Supreme Court decision in 2013 (*Irving*), employers have to lead evidence of
 1. A dangerous workplace;
 2. A general workplace drug or alcohol problem; and
 3. The employer has exhausted other alternatives for addressing the problem
- This may be different where a universal random testing policy is negotiated as part of a collective agreement

Wage and Hour Class Actions

- Canada is experiencing an increase in wage/hour/overtime/misclassification class actions
- Wage and hour settlements in the U.S. resulted in a combined value of \$1.2 billion during 2016 and 2017.
- Seeing an increase in the role of unions in connection with class claims
 - Backing the class claim and organizing at the same time
 - Referring to the class claim in support of campaign

Overtime

- Varies per province
- Determined by:
 - day (usually over 8 hours)
 - week (usually over 40-44 hours)
- Overtime usually paid at 1.5:1
- Overtime payable to all employees unless exempt
- Exemptions usually:
 - Managers/supervisors
 - Certain specific professions (e.g. lawyers, doctors, engineers)



Questions?