

CHAPTER 3

THE EXTERNAL ENVIRONMENT

Preface

In this chapter students explore the six aspects of the external environment—economic, technological, demographic, social, political and legal that impact labour relations. For example, an economic downturn might affect the political process by leading to the replacement of a fiscally conservative or right-wing government with a more left-leaning government. In turn, this may affect the legal environment because the newly elected government may be more or less likely to enact pro-business labour relations legislation.

Unions in Canada are key advocates for the protection not only of their members at work but whole of society regarding the rights afforded by laws and codes that apply in federal, provincial, or territorial jurisdictions. Such advocacy is regularly carried out by union local representatives in the day-to-day administration of collective agreements in organizations. Unions also engage in public campaigns aimed at influencing social norms and beliefs. This wide-ranging involvement can influence change in both broader social and more localized employment environments.

Learning Objectives

- 3.1 Identify the environmental factors that affect labour relations.
- 3.2 Outline the possible effects of economic variables on employer and union objectives and power.
- 3.3 Describe the implications of technology for unions and employer.
- 3.4 Discuss how demographics may cause employers and unions to adjust their respective goals and strategies.
- 3.5 Explain the implications of the social environment for labour relations processes.
- 3.6 Explain the implications of the political environment for labour relations processes.
- 3.7 Outline the legal requirements that affect employers and unions.

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Lecture Outline/Syllabus

I. Economic Environment

The economic environment is critical to employers and unions. If the economy is in a recession, some industries and organizations will be adversely affected. Government policy to regulate the economy will also have its effects. For certain industries, such as air travel, economic factors may present unique threats or opportunities. This was never more apparent than during the COVID-19 pandemic in which air travel dramatically declined, causing WestJet for example to significantly reduce their service employee count by nearly 1,000 employees through layoffs, furloughs, unpaid leaves and reductions of hours. Finally, recent economic trends and issues such as free trade will be considered.

Macroeconomic Environment

The macroeconomic environment refers to the state of the economy as a whole, including whether it is in a period of recession or growth and what are the rates of unemployment and inflation. The macroeconomic environment impacts the objectives and power of unions and employers, and in turn affects labour relations outcomes. In times of inflation, for example, unions will seek larger wage increases to protect the real incomes of employees.

Largely as a result of COVID-19, Canadian inflation has risen sharply, specifically Consumer Price Index (CPI), which measures inflation, increased by 3.4% annually in 2021 which is the fastest increase since 1991. Unfortunately, employee salaries have not kept pace with this increased inflation. This is expected to raise the wage expectations of employees and prompts unions to pursue increases in compensation for their members. Yet, most employers report only planning to offer modest salary increases, with 14% of employers planning to freeze employee salaries. Importantly, 2020 unionized employees' wages rose 1.7 per cent, compared to 1.9 per cent in 2019, and decreasing to 1.6 per cent in 2021.

In a period of growth such as after COVID-19, the employer may wish to avoid the interruption of production caused by a strike, especially when competitors are continuing to operate. Periods of economic growth have thus been associated with higher rates of union organization and a higher incidence of strikes. Conversely, economic downturns cause unions to be more concerned with job security. Union bargaining demands will focus on issues such as increased severance payments and notice of layoffs. Management, seeking to reduce costs, will negotiate to avoid wage increases and may even demand total compensation concessions from the union.

The state of the economy might also affect public support for the demands of one of the parties, which in turn might impact its bargaining power. For example, a strike by a teachers' union would more likely be supported by the public in a period of economic prosperity than in a recession. Public opinion during an economic downturn may reflect the sentiment that public-sector employees are "lucky to have a job" and should not be going on strike. A further

illustration is the global supply chain issues during the COVID-19 pandemic linked to weather, environmental regulations, fuel price increases, and human capital shortages.

The Canadian economy is open, meaning that we import many goods and are heavily dependent upon exports, especially to the United States. This makes our economy vulnerable to foreign trade practices, security concerns and fluctuations in the value of the Canadian dollar. Canadian organizations that engage in cross-border trade and investments in the United States and international markets have been cautioned to be mindful of cross-border trade initiatives that can have a profound impact on their business strategies. These include the North American Free Trade Agreement (NAFTA), now known as the United States-Mexico-Canada Agreement (USMCA), the implementation of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) and the recent Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). A lower-valued Canadian dollar causes increased domestic prices, which adversely affects the purchasing power of consumers. For example, certain commodities—such as gasoline—are priced in US dollars. So, when our dollar drops, people pay more at the pumps. At the same time, a lower dollar value benefits Canadian exporters, as goods are exchanged in US dollars and when repatriated, the American currency buys more Canadian dollars.

II. Government Economic Policy

The government may attempt to regulate the economy, specifically unemployment and inflation, through monetary and fiscal policy. **Fiscal policy** refers to changes in government spending and taxation to regulate employment levels and inflation. The government can reduce taxes and increase spending to stimulate the economy and reduce unemployment. To counter the economic impacts of COVID-19, the federal government adopted a stimulus package referred to as CERB, or Canada Emergency Response Benefit with spending aimed at increasing economic activity and reducing unemployment for those employees and organizations impacted by COVID-19

Industry and Organizational-Level Demand

Federal, provincial and territorial governments' economic policies can also include direct and indirect support for a business sector or industry. The rationale for such financial assistance includes long-term benefits associated with research and development, business growth and employment stability. An example of such support in 2017 was the Ontario government's investment of \$4.9 million over three years to help small cideries and distilleries build their businesses. Unions have shown interest in such government aid, primarily to protect jobs in sectors affected by environmental forces such as globalization or technological innovation.

LABOUR MARKET CHANGES In a competitive non-union labour market, the interaction of the demand for labour by businesses and the supply of labour by individuals determines the level of employment and wages. Labour economics provides a model that refers to the demand and supply of labour that will help explain changes in wages and levels of employment.

Any factor that causes an increase in the demand for labour, such as an economic upturn, should lead to increased levels of employment and higher wages. Any factor that causes a decrease in

the demand for labour, such as an economic downturn, should lead to decreased levels of employment and lower wages. On the supply side, any factor that causes an increase in the supply of labour will tend to increase levels of employment and reduce wage levels. Conversely, factors causing a decrease in the supply of labour will tend to decrease the level of employment and increase wage levels. For example, a shortage of employees in some occupational groups, such as computer animators, has led to higher wages and signing bonuses for employees.

In the absence of unions, individual employees would have to accept the market wage, and it is likely to be low if workers do not have unique skills or abilities. Unions could be viewed as a way to avoid the effects of the labour market that would otherwise be imposed on individual employees. In a labour market without a union, many employees have little or no bargaining power when dealing with their employer. By joining a union, employees can increase their collective power regarding terms and conditions of work. Conversely, it is possible that the wage rates in the labour market might be pushed higher than the wages provided for in collective agreements, and this will pose a problem for both parties, especially employers.

III. Globalization

Globalization is the trend toward organizations obtaining resources and producing and selling their products anywhere in the world. It means that international boundaries have little significance for commerce. An organization may obtain resources in one country, produce in another country, and sell in many other different countries. Globalization also means that capital will move to wherever the highest return is provided. This is significant, because it means increased international competition. Organizations face pressure to reduce costs and prices and will locate production where costs are the lowest. When organizations consider labour costs, they have to take into account differences in productivity and not just the wage rate. There may be situations in which total labour costs are lower in Canada despite the fact that the Canadian wage rate is higher. The globalization of goods also depends on cheap oil prices. The cost of oil will rise as the world's supply of oil diminishes. Notably, Alberta producers of oil were earning US \$53.10 per barrel in December 2021 which is 42.3% higher than 2020. On average Alberta oil prices increased 104.7% in 2021 compared to 2020.

TRADE LIBERALIZATION is the trend to international agreements that reduce tariff barriers between countries.

The most significant such agreement for Canadian unions and employers is the United States-Mexico-Canada Agreement (USMCA), formerly known as the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico, renegotiated by representatives of all three countries in September 2018.

Proponents of this trilateral trade agreement argued that the Canadian economy would benefit from access to markets in Mexico and the United States. Unions initially opposed it, fearing Canadian employers could not compete with the lower wages in Mexico and parts of the United States and would be forced out of business. Labour leaders also suspected that the former NAFTA deal would cause Canadian employers to relocate their operations to Mexico or the United States, resulting in plant closures and layoffs of union members. Yet, this free trade agreement has added to the economic pressure that some employers face and this in turn puts

pressure on unions. In firms for which the agreement poses a threat, the union and the employer will be concerned with job loss and possible plant closures. They will have to be more concerned with job security issues, including layoff notices, early retirement options, and job-sharing. In firms for which the agreement presents opportunities, there will be concerns relating to possible expansion and change. The union and employer will be concerned with increased adaptability, reclassification and the use of seniority as a criterion for promotions. It has also been suggested that such free trade agreements create an incentive for employers and unions to cooperate on workplace issues because disputes cannot be tolerated in the more competitive environment.

DEREGULATION refers to the change from a business regime in which the government regulates market entrants and prices to one in which the market is open to competition. At one time, some industries in Canada, such as airline and phone services, were regulated. There would be one producer, which charged rates approved by a government commission such as the Canadian Radio-television and Telecommunications Commission (CRTC). Deregulation has contributed to increased competitive pressures on former relatively high-wage regulated and publicly provided services that were somewhat removed from competitive pressures. This has led to labour market adjustments, including reductions in wages and employment in the former relatively high-wage regulated and publicly provided sectors.

Deregulation has put pressure on employers and unions. Businesses pay more attention to increasing efficiency and reducing costs. Job security becomes a more important issue for unions. CUPE represents approximately 27,400 members in the transportation sector, including employees in airlines, airports, ferries, port authorities, rail, roads and highways, as well as public and private transit systems. Regulatory changes made by Transport Canada allowed airlines to reduce the number of flight attendants required on board aircraft. The union argued that fewer flight attendants compromised the safety of both passengers and crew, increased flight attendants' workload, eroding the quality of their work, and undermined job security. Reducing the number of CUPE flight attendants required on aircraft was presented as a major health and safety concern. Reducing cabin crew affects all safety procedures—especially in emergency situations—and leads to greater workload and increased fatigue. Though transportation workers face formidable challenges from both employers and governments, CUPE continues to fight back to protect good wages, benefits and working conditions by defending collectively bargained rights. CUPE actively challenges regulations that jeopardize the safety and health of flight attendants and passengers, including a current legal challenge to the reduction in cabin crew, and a sector-wide campaign to press for greater protection against cosmic radiation and toxic fumes during flights. Recent settlements at Air Canada and Air Transat have maintained the safety-proven ratio of one flight attendant per forty passenger seats on some aircraft, even though Transport Canada now allows airlines to fly with fewer cabin crew.

NON-STANDARD WORK refers to work arrangements other than traditional full-time employment, including part-time and temporary work. Statistics Canada defines part-time employment as a job that involves less than 30 hours per week at their main or only job. In 2017, 12 percent of employees 25-54 years old worked part-time. A significant portion of this part-time work, 34 percent of employees in this age group reported working part-time for economic reasons such as they could not find work. Involuntary part-time work rises and falls with the

unemployment rate, an indication that people are forced into part-time work when economic conditions worsen. The vast majority of involuntary part-timers tend to be young persons and women aged 25 to 54. Both of these groups display seasonal patterns: the number of young, involuntary part-timers increases during the summer months when full-time hours are preferred.

Part-time employees pose a challenge for unions. Since part-time employees are generally paid lower wages and receive fewer benefits, employers have attempted to use non-union part-time employees to reduce costs. Unions have found it difficult to organize part-time employees for a number of reasons. Many individuals are younger and do not have experience with unionization. Many work in industries where unions have not had a presence and unionization is not the norm. Part-time employees who work in smaller organizations may have a stronger connection with the employer than those who work in a larger organization where alienation from the employer develops. Where worker turnover is higher, there is less commitment to the workplace. Many part-time employees are more likely to quit when they become dissatisfied and move to another job, so unionization is more difficult. Smaller part-time units are costlier for unions to organize.

Important to this discussion is the gig economy or those individuals working in temporary and flexible jobs most often without benefits. In turn, these employers have reduced costs from the lower hourly rates and lack of benefits. This landscape may well change as Uber has recently signed a collective agreement with United Food and Commercial Workers, one of the largest unions in Canada. This union will represent employees and advocate with Uber for increased job benefits as employees rather than independent contractors.

MERGERS Business mergers create a number of challenges when one or more of the merging organizations include unionized employees. Key among the many labour relations issues are representation rights of existing unions and the possibility of layoffs due to job redundancy. The 2017 **merger** of three large Catholic health care centres in Toronto point to the impact of this continuing corporate realignment of institutional health care services in Ontario. At the time of the merger, the Canadian Union of Public Employees (CUPE) represented 1,600 employees within the hospital network, including nurses, administrative and clerical staff and various health care and support workers. The union sought to gain representation rights for 700 clerical positions at one of the newly merged institutions. The Ontario Labour Relations Board reviewed applications from involved unions, under the *Public Sector Labour Relations Transitions Act*, to reconfigure the various bargaining units across the three hospitals.

DOWNSIZING refers to the elimination of jobs for the purpose of improving efficiency and economic returns. Management rights clauses in collective agreements permit management to make job reduction decisions that affect union members. Specifically, downsizing was associated with higher grievances and increased absenteeism. Downsizing continues to be a frequent strategic move by corporate leaders in many Canadian business sectors that are unionized. In 2021, Bombardier announced 1,600 job losses across Canada as they close their Lear jet division. The International Association of Machinists and Aerospace Workers (IAMAW) that represents many of the laid off, employees stated they will be working with Bombardier to reduce the impact of these layoffs. Downsizing puts unions on the defensive, as they may have to consider reducing their wage demands, or making other concessions, in an attempt to save jobs.

IV. Technology

In terms of environmental challenges, technology refers to developments in knowledge occurring in the external marketplace by organizations such as Microsoft, Google, SAP and others that lead to new products, services, and changes in methods of production. Illustrations of its impact on daily life are everywhere: ultra-thin computer tablets; remote access to home security systems; and autonomous cars.

Technological innovation has important consequences for unions and employers. It will lead to concerns regarding job security because of the possibility of employees being replaced by labour-saving devices or facilitating the transfer of jobs to newly retrofitted plants, often located in lower wage regions. Therefore, unions face a dilemma: technological change may lead to increased productivity that can be the basis for wage increases, however at the same time it may lead to job losses. It might also give rise to concerns regarding ergonomics among other health and safety issues. Pay rates are another area for potential disagreement between the union and employer. Where technological change leads to jobs requiring fewer skills, employers will attempt to reclassify the job and reduce employee compensation. Where change leads to new jobs, or jobs requiring more knowledge and skills, unions will seek increased wages.

Advances in technology have meant that some employees are now able to work at home, an issue unions and employers will have to address in future collective bargaining. This became a substantial issue during the COVID-19 lockdown when employers sent their employees to work from home (WFH) to reduce the spread of the virus. This change of work location moved some employers to closely monitor their employees' productivity. Metrics employers can use to monitor employees' activity include employee monitoring software with dashboards reporting employee screen time, computer mouse activity, and screenshots of what's on an employee's screen at any given time.

Technological advances also allow more opportunities for employers to monitor employee activity. Approximately 40% of Canadian employers use global positioning systems (GPS) to track the location of employees. It is important for employers to inform their employees they are monitoring their activities with this technology demonstrated with employee consent verbally or in writing. Technology will also lead to privacy in the workplace becoming a labour-management issue.

The effect of information technology, including the Internet and intranets, is of interest to unions. Unions can use websites to deliver information to employees they wish to organize and provide services to members. Also, many employers have developed intranets to provide information and communicate with employees. These may pose a threat to unions because technology allows employers to develop more direct communication with employees. Intranets might be used to establish discussion groups and other means to foster closer identification with the organization and weaken the link to a union. It is also argued that the Internet and the Web pose a threat to the traditional relationship between the union and its members. In order to survive, unions will have to do more than simply provide services to their members.

V. Demographics

Demographics may be described as the study of a population by a certain characteristic such as age, gender, race or educational achievement. Studies of such population characteristics have long been used by government agencies, marketing organizations and boards of education planners. These factors are outside the control of both employers and unions and, indeed, cause both parties to adjust goals and strategies over time.

AGING WORKFORCE The workforce is aging, and this may have significance for unions and employers. As the baby boomers (those born between 1947 and 1966) retire, there may be labour shortages, which will put upward pressure on wages and make it difficult for employers to recruit some types of employees. Older workers have preferences that may affect union demands and negotiations. They may be more concerned with increasing pensions than with current wage increases. They may also be more concerned with job security as they approach retirement. Some employees, instead of working full-time until retirement, may wish to have the opportunity to work less in the final years of their work life. Others may wish to extend their careers beyond the traditional retirement age.

YOUNGER EMPLOYEES In 2021, there were 2.4 million youths aged 15 to 24 in the population and 7.1 million people aged 45 to 64, meaning there is a widening gap between the number of younger people entering the labour force and the number of people preparing to exit it. With this data, it becomes evident that there are not as many young employees entering the workforce as there will be older employees leaving work. The multi-generation workforce poses challenges to both employers and unions due to differing employee cohort interests related to key bargaining demands as well as the perceived focus of union energies on workplace versus wider social issues.

DIVERSITY The Employment Equity Act applies to federal government and federally regulated employers, the report is indicative of trends for four demographic groups identified in the 1984 Royal Commission on Equality in Employment as being under-represented in the Canadian workforce. The representation of members of visible minorities continued to exceed the labour market availability for designated groups. The overall representation of three of the four designated groups—Indigenous peoples, persons with disabilities and members of visible minorities has remained unchanged in 2021. Specifically, women, Indigenous peoples and persons with disabilities remained about the same between 2018 and 2019, with only visible minorities employment increased by +0.6%.

Human rights legislation in Canada holds labour unions accountable to take action to protect against discrimination in workplaces. It is important to recognize that equity seeking groups still experience systemic disadvantages.

FEMALE PARTICIPATION From 2017 to 2021, female participation in Canada's unions has remained constant at 33.2% of female employees members of a union.

VI. Social Environment

The social environment refers to the values and beliefs of Canadians relating to unions and employers. Some Canadians may be more supportive of unions and collective bargaining than others. Values and beliefs are important because they might affect the propensity of employees to unionize as well as the bargaining power of the union and employer. An individual who disapproves of unions is less likely to join one. In some labour disputes, the party that has the support of the public is in a stronger position. The values and beliefs of Canadians in general are important because they will affect employment and labour relations legislation. In the United States, some states have passed right-to-work laws, which prohibit the mandatory deduction of union dues. In recent years, while certain Canadian federal and provincial members of parliament have advocated for right-to-work legislation options, it does not appear likely that Canadians are prepared to support such laws.

Most of the Canadian population approves of unions generally; however, there is a negative relationship between approval of unions and perceived union power. As perceived union power increases, public support for unions declines. Accordingly, people do not want unions to be too strong; and if it is perceived that union power is increasing, union approval goes down.

VII. Political Environment

The political environment refers to the Canadian political system and its effect on labour relations. The political environment in turn has a significant impact on the legislation that regulates unions and employers. A critical feature of the Canadian political environment is the divided jurisdiction of the federal, provincial, and territorial governments in employment and labour relations matters.

Divided Jurisdiction

The *Constitution Act* provides a division of powers or authority between the federal, provincial, and territorial governments. Most issues that could be the subject of legislation are under the authority of either the federal, provincial, or territorial governments. For example, banking and criminal law are within the jurisdiction of the federal government, and education is a provincial and territorial matter. For employment and labour relations issues, there is divided jurisdiction: the federal government has the authority to pass legislation regulating some employers and employees, and the province and territories have jurisdiction over other workplaces. The federal government has jurisdiction over approximately 10 percent of the labour force, including federal government departments, interprovincial transport, banking and broadcasting. The provinces and territories have jurisdiction over 90 percent of the labour force, including the manufacturing, retail, service and construction sectors. Accordingly, a distinction must be drawn between **federally regulated employers**, who are subject to federal legislation, and **provincially and territorially regulated employers**, who are subject to the legislation of each province or territory in which they conduct business. In the United States, labour legislation is under the jurisdiction of the federal government.

Whenever legislation is referred to, the preliminary question that must be asked is whether it is the federal or the provincial or territorial legislation that is relevant. For example, suppose a

question arose about how much notice, if any, a union must give before it goes on strike. If the employer is an airline, it is federally regulated and the relevant legislation is the *Canada Labour Code*, which provides for 72 hours' notice. If the employer is a retail store, it is provincially or territorially regulated, and the answer to the question will depend upon which province or territory the store is located in. If the store is in Nova Scotia, the relevant legislation is the *Trade Union Act*, which requires 48 hours' notice to be given to the Minister of Labour. If the store is located in Ontario, the relevant legislation is the *Labour Relations Act*, which does not require notice prior to the commencement of a strike. Similarly, every jurisdiction has its own employment standards legislation, and there might be 13 different rules on the same matter, such as vacation entitlement.

The divided jurisdiction in Canadian employment and labour relations matters has several implications for employers, unions and the labour relations system. Some of these implications might be viewed as advantages and others as potential drawbacks. Employers who are provincially or territorially regulated and carry on business in more than one province or territory will have to deal with different laws in each province or territory. This may cause confusion and increase costs. Depending on the employees they represent, unions also must know about the federal legislation or the relevant legislation in each province or territory. The divided jurisdiction has allowed provinces and territories to manage employment and labour issues differently and has provided an opportunity for experimentation. It has been observed that the Canadian parliamentary system and the presence of a social democratic party supporting labour have historically led to legislation being passed that is favourable to unions. The Canadian Commonwealth Federation (CCF), a federal political party supporting labour, was established in 1932. The New Democratic Party, successor to the CCF, continues to support labour, although political allegiances among unions have tended to sway at election times among political parties and their labour platforms. In Canada, it has been noted that the provinces and territories have distinct political cultures. Alberta is the most conservative province, and that labour relations legislation in that province is generally less favourable to unions. In some other provinces, the NDP has formed a government and enacted legislation more favourable to unions. Although the Canadian parliamentary system and the division of authority between the federal, provincial, and territorial governments make it easier for reforms to be made, the process can work in reverse. That is, it is possible for a pro-business government to be elected in a province or territory, leading to changes in labour policy that are less favourable to unions. The situation in Ontario illustrates this. In 2017, the Liberal government passed labour reform referred to as The Fair Workplaces, Better Jobs Act, or Bill 148. Bill 148 provided Ontario employees two paid, job-protected emergency leave days for all employees, increased holiday entitlement, mandated equal pay for casual and part-time employees doing the same job as full-time employees, improved scheduling protections and boosted protections for temp agency employees. However, in the 2018 election, a Progressive Conservative government came to power and table Bill 47 the Making Ontario Open for Business Act, which largely reversed this law. Bill 47 includes a major repeal of Bill 148 and its prior changes to the Employment Standards Act, 2000 and Labour Relations Act, 1995. In particular, Bill 47 repealed the right for unions to obtain a list of employees from an employer which may be part of a certification drive; remedial certification by the Ontario Labour Relations Board in the event of an unfair labour practice during the certification application or vote process permitting option of a re-vote, and card-based union certification process in the building services, home care, community services and temp-help industries.

VIII. Legal Environment

The legal environment is critical to Canadian labour relations. **Employment standards legislation** mandates minimum terms of employment dealing with vacations, public holidays and wages. These minimums provide a minimum requirement for the negotiation of terms and conditions of employment in the collective agreements. Any contract terms relating to issues covered by employment standards legislation must provide at least the minimum rights provided in the legislation. If contract language does not refer to an issue covered by employment standards legislation, employees are entitled to the statutory minimum. For example, if the collective agreement did not mention parental leave, employees would still be entitled to the leave provided in the employment standards legislation that covered the workplace. **Human rights legislation** prohibits discrimination and harassment and imposes a duty to accommodate. This duty may require unions and employers to make exceptions to the terms and conditions of work in the course of administration of a collective agreement. For example, management may have to agree to a variation on scheduling to accommodate a union employee with a specific medical condition. A collective agreement cannot include contract terms that violate human rights legislation. **Labour relations legislation** regulates the relationship between the union representing employees and the employer. It dictates who can unionize, the process that must be followed to unionize, rules regarding the negotiation and administration of the collective agreement, and when there can be a strike or lockout. Again, the parties to the agreement must comply with the relevant labour relations legislation. For example, all labour relations statutes provide that a collective agreement must have a term of at least one year. The negotiated agreement may be longer but not less than 12 months. It must also be noted that it is not possible to contract out or the terms and conditions of work for any employee must be at least equal to guarantees provided to employees by relevant legislation linked to the employment relationship of employment standards, human rights and labour relations legislation in the collective agreement. In this context, “contracting out”

In addition to employment standards, human rights and labour relations legislation, there are statutes that affect the parties in areas such as health and safety, pay equity, pensions and workers' compensation.

Human Rights Legislation

All Canadian jurisdictions have their own human rights legislation. This legislation and the *Canadian Charter of Rights and Freedoms* are the basis for the law relating to discrimination in each jurisdiction. Human rights law is shaped by the decisions of courts and arbitrators who interpret legislation and the *Charter*. A human rights commission is responsible for the enforcement of the legislation in all jurisdictions except British Columbia and Ontario, which each has a tribunal for this purpose. The Commission websites are good sources of information relating to human rights, and include guides relating to the application of the legislation.

DISCRIMINATION Federal, provincial, and territorial human rights legislation in each jurisdiction in Canada set out prohibited grounds of discrimination. While there are a number of prohibited grounds that apply to all of these jurisdictions, certain protections are not assured in every part of Canada. For example, discrimination on the basis of age, marital status, physical or mental disability and sexual orientation are found in federal and human rights laws throughout

Canada. Certain demographic factors such as family status, pardoned convictions and gender identity do not fall within protected grounds in several Canadian jurisdictions.

An individual or group is discriminated against if they are treated differently on the basis of one of the grounds of discrimination covered in the relevant human rights code. It is important to note that if an individual is treated differently or even unfairly, but the basis for the differential treatment is not one of the grounds of discrimination provided in the relevant human rights legislation, there has been no discrimination. For example, if an employer does not hire an applicant because the employer perceives that they do not like the applicant, and the employer's decision has not been influenced by one of the prohibited grounds of discrimination such as race, gender or religion, there has been no discrimination. This is subject to the provisions of the *Charter*, which are discussed in this section. The *Charter* might protect an individual or group from differential treatment even if the basis for the treatment is not listed as one of the prohibited grounds of discrimination. References to federal, territorial and provincial human rights commission websites are seen in the margin.

FORMS OF DISCRIMINATION The two forms of discrimination that require clarification are **direct discrimination** and **indirect discrimination**. Direct discrimination refers to a rule or conduct that is discriminatory on its face; meaning that it is deliberate or intentional. For example, a manager's refusal to promote an employee because of their gender or because they were over age 45 would be direct discrimination. Indirect discrimination, sometimes referred to as systemic discrimination involves a rule or requirement that does not appear to discriminate; however, the requirement has an adverse impact on an individual or group protected by human rights legislation. For example, a selection screening procedure, such as language comprehension test, may have an adverse impact on certain job applicants even though the procedure was developed in good faith and was job-related. The issue is whether the requirement has an adverse impact.

DUTY TO ACCOMMODATE In line with the human rights legislation, a duty to accommodate requires the employer to take steps to prevent people from being adversely affected by workplace requirements or characteristics on the basis of a prohibited ground of discrimination. Requirements or characteristics that might have an adverse impact include rules, work standards, the terms of a collective agreement or the physical layout of the workplace. For example, consider a person with a disability who is confined to a wheelchair. Human rights legislation protects people with disabilities from discrimination. Prevention of an adverse effect involves reasonable accommodation on the part of the employer, such as installation of a wheelchair ramp or a work-space with a special desk.

Some seemingly routine workplace requirements may give rise to a duty to accommodate. Requiring all employees to start work at 7 a.m. might disadvantage people required to take forms of public transportation, such as HandiVans, that are unavailable so early. Here the duty to accommodate might involve a change in work hours, such as flex-scheduling, for such employees. Although the primary obligation to accommodate lies with the employer, accommodation is a multi-party responsibility. Unions, other employees and the employee seeking accommodation all have obligations under the duty to accommodate. The case incident at the end of this chapter outlines this mutual obligation on the part of the involved parties.

Although the duty to accommodate commonly arises in connection with disability, it might arise in connection with other grounds of discrimination, including religion or family status. There is a limit to the measures which the employer is expected to take in meeting the duty to accommodate. Employers are legally required to provide reasonable accommodation up to the point of undue hardship.

Undue hardship is a difficulty exceeding that which an employer is required to endure when accommodating the needs of a person or a protected group under a human rights code.

Although the cost of accommodation is a factor, an employer attempting to establish cost as the basis of undue hardship must present real financial evidence, not just vague references to increased costs. Moreover, employers are expected to assume significant costs; to constitute undue hardship, the costs involved would have to threaten the viability of the organization. Thus, the size and financial health of the organization would be factors. A small organization that was in financial crisis might be able to establish undue hardship where other organizations might not. The size of the employer is also a factor; as larger employers are more likely to have a larger pool of replacement workers or alternative jobs. The interchangeability of the workforce and facilities relates to the flexibility in the operations of the employer. Where there are more employees who have the ability to do various jobs, it will be easier to accommodate through measures such as rescheduling, lighter workloads or the modification of job duties.

The extent to which an accommodation poses a safety risk to the employee seeking accommodation or other employees is also a factor. Although employers have an obligation to provide a safe workplace, they cannot rely on that obligation to avoid accommodation. Within accommodation, employers are expected to tolerate some risk in the workplace and allow the employee seeking accommodation to assume some risk as well. In *Kearsley v. The Corporation of the City of St. Catharines*, the applicant for a firefighter position was denied a job because of a heart condition identified in a medical screening test. Evidence at trial showed that this heart condition posed a very small risk of stroke. A human rights complaint was upheld, and the municipality was ordered to hire Mr. Kearsley, reimburse him for monetary losses associated with not originally employing him and to also pay him \$4,000 in punitive damages due to discrimination.¹ The extent to which a safety risk will be tolerated as part of an accommodation is not yet clear. It is possible that the provisions of a collective agreement such as seniority or scheduling might also pose a problem when accommodating employees. The collective agreement might provide that employees be given a preference in shifts on the basis of seniority; however, an employee with less seniority might require a particular shift as part of an accommodation.

Employee morale has been cited as a factor in a leading case. The objections of employees would have to relate to real hardship such as job loss or excessively onerous duties before they would be viewed as an undue hardship. An employer will not be allowed to claim that complaints from other employees impose an undue hardship unless the complaints are substantial and real. This means that employers should educate employees regarding the duty to accommodate. Some unions have established joint union-management committees to provide many of these supports when dealing with human rights cases involving reasonable accommodation of bargaining unit members.

IX. Review Questions**1. What are two ways in which the macroeconomic environment affects unions and employers?**

The macroeconomic environment affects the objectives and bargaining power of the union and the employer. When inflation increases, unions will seek to protect the real wages of employees by pursuing higher wage increases and cost of living provisions in collective agreements. In a recession or economic downturn, unions will seek collective agreement provisions to protect job security such as notice of layoff provisions, retraining and transfers, and severance payments. In response to union demands for wage increases and/or cost of living provisions employers will wish to avoid providing wage increases which make them less competitive and reduce profits. Employers will also want to avoid contract terms that reduce flexibility such as provisions requiring retraining. In an economic downturn employers may seek to limit wage increases or seek concessions from the union.

The overall economic environment affects the bargaining power of the union. Employees are more likely to support a strike in a period of economic growth when alternative jobs are available. A period of economic growth may also suggest to employees that the employer has the ability to increase compensation. It is possible that the public is more likely to support a strike in a time of economic growth when it appears that the employer is profitable and has the ability to pay. In contrast, some may think that employees should be happy they have a job in an economic downturn.

2. How might possible bargaining priorities differ for the following employee groups: younger employees, female employees, and visible minorities?

Younger employees prefer increases in wages as opposed to deferred benefits such as pensions; they may also be concerned with family-work balance. Older employees will be concerned with pensions, health benefits, and retirement provisions. Younger employees may bear a disproportionate responsibility for childcare they may be more concerned with issues such as flextime, and day care. Female and visible minority employees may also be more concerned with harassment issues, pay equity and employment equity.

3. Describe two economic trends or issues that might affect labour relations.

1) Labour Market Changes. In a non-union environment the principle of supply and demand will dictate the wages of employees. Any factor that causes a decrease in the demand for labour, such as an economic downturn, should lead to decreased levels of employment and lower wages. On the supply side, any factor that causes an increase in the supply of labour will tend to increase levels of employment and reduce wage levels. Conversely, factors causing a decrease in the supply of labour will tend to decrease the level of employment and increase wage levels. The presence of a union can increase the collective power of employees when dealing with a downturn of wages.

2) Globalization. Globalization is the trend toward firms obtaining resources and producing and selling their products anywhere in the world. It means that international boundaries have

little significance for commerce. A company may obtain resources in one country, produce in another country, and sell in many other different countries. Globalization also means that capital will move to wherever the highest return is provided. This is significant, because it means increased international competition.

3) Trade Liberalization. Trade liberalization is the trend to international agreements that reduce tariff barriers between countries. The most significant such agreement for Canadian unions and employers is the United States-Mexico-Canada Agreement (USMCA), formerly known as the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico, renegotiated by representatives of all three countries in September 2018.

4. Explain how government economic policy might impact unions and employers.

Deregulation leads to increased competitive pressures that may affect the employer's ability to pay. The concessions by unions representing Air Canada employees illustrate this situation.

5. What is a current example of technological change that poses a threat or an opportunity to union-management relationships?

1) Job Security. Technological change will include innovations that allow employers to reduce the number of employees required by replacing employees with capital equipment.

2) Compensation. Technological change will affect the knowledge, skills, abilities, effort required, and working conditions which in turn affect compensation. Where job skill and effort requirements are reduced because of technological change employers may seek to reduce compensation. Where technological change involves the use of more skills, such as computer skills, unions may seek wage increases.

3) Health and Safety. Changes in methods of production may involve reductions in health and safety risks or lead to new health and safety concerns. Using robots in areas where there are fumes and other dangers reduces health and safety risks. However, new compounds and processes could expose employees to previously unknown risks.

4) Monitoring Employees. Technology allows employers to monitor employee activity. This could lead to disputes relating to privacy and standards of production. For example, a **reservation** clerk might be expected to handle a call within a specified period of time.

6. What is the social environment and why is it important to labour relations?

The social environment refers to the values of Canadians relating to work, unions, and employers. The social environment is linked to the political and legal environment because governments will not be able to pass legislation that does not comply with the basic values held by Canadians. For example, right to work laws that have been passed in some states in the U.S. have not been enacted in Canada. Values and attitudes which are particularly relevant to labour relations include the acceptance or rejection of unions as legitimate representatives of employees, whether unions benefit employees, whether employees should.

7. What do the terms federally regulated employer and provincially/territorial regulated employer mean, and why is the distinction important?

The provinces and territories have the jurisdiction or authority to pass legislation regulating employment matters for the majority of Canadian employers. These employers are provincially or territorially regulated. Provincially or territorially regulated employers include manufacturing, retail, education, services and construction organizations. The federal government has the authority to pass legislation regulating employment issues for approximately 10 percent of the Canadian labour force. Federally regulated employers include firms in broadcasting, interprovincial transport, and banking. The distinction between provincially and territorial regulated and federally regulated employers is important because there is separate labour relations and employment standards legislation that governs unions and employers in each jurisdiction. The rules regarding a union obtaining the right to represent employees, or other labour relations issues such as the right to strike, vary across jurisdictions. Similarly, employment standards such as minimum vacation can vary between jurisdictions.

8. Provide examples from the workplace that distinguish among labour relations legislation, human rights codes, and employment standards laws in Canada.

Labour relations legislation regulates the union-management relationship. It covers issues such as how a union gains bargaining rights, how an employer can respond to a union organizing campaign, and the negotiation of a collective agreement.

Human rights legislation covers both union and non-union workplaces and it prohibits discrimination and harassment. The critical duty to accommodate flows from human rights legislation.

Employment standards legislation covers both union and non-union workplaces and it sets out minimum terms of employment including vacations, parental leave, and the regulation of hours of work.

9. Use separate examples to distinguish between direct and indirect discrimination that may occur in a unionized work setting.

Direct discrimination is intentional or known such as refusing to hire a person because of their race, religion or gender.

Indirect discrimination is unintentional. It arises where a rule or requirement that appears neutral has an adverse impact on a person protected by human rights legislation. For example a rule providing that all individuals must be 5' 10" or taller to be hired has an adverse impact on women because this rule will cut out more female applicants. As a result of recent court decisions, the distinction between direct and indirect discrimination is no longer a critical issue. The key point to note is that discrimination can arise unintentionally or even where there is the best of intentions. For example, a rule requiring all employees to work every third Saturday appears to be neutral and fair. However, this rule could be discriminatory for employees who belong to a religion that has Saturday as a religious day of observance. Note that the issue of

whether or not a discriminatory rule can be defended on the basis that it is a BFOQ is a separate matter.

10. Explain and provide an example of the concept of a bona fide occupational requirement (BFOR).

A BFOR is a discriminatory rule or requirement that an employer is allowed to use because it can be established that all three requirements set out in the *Meiorin* case can be met. That is, the employer can show that:

- 1) the standard was adopted for a purpose rationally connected to the performance of the job;
- 2) the rule or requirement was adopted in an honest and good-faith belief that it was necessary to the fulfillment of a legitimate work-related purpose; and
- 3) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. 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.

An example of a BFOR would be a requirement that truck drivers have the vision required to maintain a license. Note that as part of the duty to accommodate the employer would have to establish that there was no other suitable work for a driver who lost their vision.

11. Explain what the *duty to accommodate* means and provide an example of an employer meeting this duty.

The duty to accommodate means that measures to prevent people from being adversely affected by workplace requirements or characteristics on the basis of a prohibited ground of discrimination will have to be adopted if they do not impose an undue hardship. It should be noted that if there is no discrimination there is no duty to accommodate. Examples of an **employer meeting this** duty are allowing an employee time off to observe a religious day of observance or reducing an employee's hours while they recover from an injury.

12. Identify a labour relations issue that has been or might be affected by the *Charter of Rights and Freedoms*.

- a) Protection against discrimination (expansion of human rights protection).
- b) Protection of collective bargaining. Governments will no longer be able to pass legislation that nullifies collective agreements unless it can be established that the legislation is saved by section 1 or the notwithstanding clause is invoked.
- c) Union dues. The compulsory deduction of union dues has withstood a *Charter* challenge.
- d) Right to organize. In the future the courts may rule that legislation that denies some employees the right to organize is unconstitutional.

X. Discussion Questions

1. Describe one consequence to union-management relations regarding a manufacturing company's decision to globalize its operations beyond current facilities in British Columbia and Ontario.

Typically, these decisions will have a negative impact on union-management relations. As companies seek to reduce costs it may mean a movement or creation of jobs to another country. Unions will seek job security for its members.

2. Explain how information technology poses a threat to unions?

Information technology could be a threat to unions for a number of reasons. Technology makes it easier for employers to communicate with and address employee concerns. This could threaten the union's role as the representative of employees or help an employer respond to employee issues so that a union does not appear necessary. For example, employers could make use of e-mail to survey employee concerns and preferences. Some information technology could eliminate jobs. For example, ATM machines replace bank tellers. Information technology could reduce the skills required for some jobs and lead to employers seeking to reduce or freeze compensation.

3. A collective agreement confirmed that there would be no discrimination based on gender and the union and the employer would comply with human rights legislation. Some employees covered by the collective agreement were provided with paid parking on a random basis and others were not. The cost of parking at the workplace or nearby was \$1050 per month. A group of employees who were not provided with parking, all of whom were women, filed a grievance alleging the employer had discriminated against them. If you were a labour relations officer for the employer, how would you respond to this grievance?

The union has claimed that there is discrimination in this situation. The response would be that there is no discrimination because there has been no differential treatment based upon one of the grounds of discrimination referred to in human rights legislation. Both male and female employees were denied paid parking – the fact that a group consisting of only female employees has filed a complaint does not make this discrimination. Refer to *Bainbridge v. the Queen*, New Brunswick Court of Appeal 2005 CLC 220-034.

4. Hodges worked as a child and youth support worker for an association that operated a shelter for women and children. At one time Hodges worked from 8 a.m. to 2:30 p.m. Hodges' son required special attention because he had a major psychiatric disorder and this work schedule allowed her to care for him after school. More children were at the shelter after school, and in order to service them. The employer changed Hodges' hours of work requiring her to work at 11:30am and work until 6:00 p.m. This meant that she could no longer care for her son. Is there any basis on which the union can challenge the employer's change in work hours? What is the legal obligation of the employer and what outcome would you expect in this situation?

This question is based on *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society et al.*, 127 LAC (4th) 1. This case was a judicial review of an arbitrator's decision that there was no discrimination.

The union could claim that there is discrimination on the basis of family status.

If there is discrimination the employer has a duty to accommodate to the point of undue hardship. It was noted that not every conflict between a job and parental duties will be the basis for a discrimination claim. The court stated:

"The vast majority of cases in which there was a conflict between a work requirement and a family obligation would not ground a prima facie case of discrimination. However, a prima facie case would be made out when a change in a term or condition of employment resulted in serious interference with a substantial parental or other family duty or obligation. In this case, that test had been satisfied. The grievor's son had a major psychiatric disorder, and her attendance to his needs after school was regarded as critical. The change in her hours of work represented a serious interference with the discharge of her parental obligation. The arbitrator erred in not finding a prima facie case of discrimination on the basis of family status."

In the *Health Sciences Association* case the court referred the case back to the arbitrator to determine if the employer had met its obligation to accommodate the employee.

The key point that this question is illustrating is that the duty to accommodate only arises when it has been established that there is discrimination.

5. How might certain specific measure to accommodate be an undue hardship for one employer and not for another?

Yes, it is possible that measures to accommodate could be an undue hardship for one employer and the same measures would not be an undue hardship for another employer. Although it is difficult to establish cost as the basis for undue hardship, it is more likely that a small employer, or an employer in financial difficulty, would be able to establish cost as an undue hardship. The size of the employer including the number of employees could be a factor. A larger employer, who has more potential replacement employees, would have less difficulty allowing time off to accommodate an employee.

XI. Web Research

- 1. Go to a website for the Canadian Labour Congress, or a provincial or territorial-federation of labour such as the Ontario Federation of Labour. Find and briefly explain a current initiative that the CLC or a labour federation is involved with regarding the impact of globalization or international trade agreements on Canadian unions.**

The issues identified by students will vary depending on the province or territory and the current political or social justice issues in play at the time. Students should be able to easily identify what these issues are, either from a global, federal provincial, or territorial levels. Unions also

tend to see diversity as a social justice issue. Typically, these initiatives are in the union's best interest include: these issues also affect the union from a legal perspective, they demonstrate that they have the public and members best interest in mind, and as a recruiting tool for those interested in joining a union.

2. Go to a website for a national, provincial, or territorial union in Canada and look for an initiative this union is taking regarding Indigenous people, female, visible minorities, LGBTQ or aging members. Discuss why such an initiative is in the union's interests.

Unions have historically and currently assume the role of social justice and equity, therefore recognizing the challenges groups face and working to correct these challenges support this role.

XII. Vignette

Do Unions Impact Organizational Strategy?

Unions and organizations have often assumed the roles of oppositional business partners. Other times unions and organizational leaders form a cooperative partnership. Current thought suggests that unions should assume a more dynamic role with organizational strategy development-a new role of unions. Union-management strategic partnerships may support the organization's competitiveness and protect the employees' investments in the organization.

Unions could participate in designing organizational strategy and assigning resources to achieve these goals. Unions are well positioned to participate in this planning as they hold considerable organizational knowledge, working directly with the employees and organizational operations. Following this cooperative strategic planning, the union and organizational negotiations could be less adversarial and more collaborative as these two business partners designed the strategy together. Additionally, unions can both observe and monitor organizational strategy and operations for compliance with legislation, the collective agreement, and ethical conduct.

Practically, unions can support employee-employer communications surrounding organizational policies and practices. Additionally, unions have been shown to monitor management's implementation of HRM practices at times seeking short-term gains and improving employee outcomes within HRM policies and practices.

XIII. Case Incident: A Case of Union Discrimination?

This case demonstrates the far-reaching effect of discrimination in the administration of the collective agreement. This decision provided that the union and the company have a duty to accommodate an employee when the collective agreement becomes a barrier to their requirement to accommodate an employee.

1. What form of discrimination is seen in the case?

Indirect discrimination (sometimes referred to as systemic discrimination) involves a rule or requirement that does not appear to discriminate; however, the requirement has an adverse impact on an individual or group protected by human rights legislation. In this case, the union

and the company agreed to certain seniority provisions in the collective agreement in good faith and for job related reasons. This issue is whether the requirement has an adverse impact.

2. What was the “protected ground” under the *Code* revealed in Mr. Bubb-Clarke’s circumstances?

The protect ground in this case was that Mr. Bubb-Clarke was discriminated against based on his disability.

3. Based on the case facts, what argument did ATU advance for its inability to change what had already been done for Mr. Bubb-Clarke?

ATU made the argument that the seniority provisions of the collective agreement was unambiguous, made in good faith, and did not discriminate against Mr. Clarke. They claimed that they did not have the authority to override the provisions of the collective agreement.

4. As the labour relations manager for the TTC, after initially hearing of Bubb-Clarke’s medical diagnosis and also understanding the collective agreement language related to seniority transfer, what steps would you have taken to avoid this situation? Explain why?

As the labour relations manager you should take the following steps:

- a) Obtain medical confirmation that the employees medical condition made meant he could no longer drive for the TTC.
- b) Meet with the union representatives to discuss the facts of the situation with the intent of obtaining written agreement with the union that the employees full seniority will be placed in the new occupational group.
- c) In the event the union does not agree, transfer the employee and his seniority to the new group and proceed with any potential grievance.

These steps will ensure the company has done all things reasonable to accommodate the employees disability and limit the liability in the event of a human rights complaint.

ⁱ Board of Inquiry, Ontario Human Rights Code, Full text of “Antony Kearsley v. Corporation of the City of St. Catharines,” Board of Inquiry, April 2002 BOI 02-005, accessed February 24, 2018.