Overview of Labour Relations and Employment Law in Canada

Division of Powers in Labour Relations and Employment Law

In Canada the regulation of employment relations is divided between the federal and provincial governments. The principal areas over which the Canadian federal government exercises labour relations jurisdiction include radio and television broadcasting, aviation, postal services, inter-provincial and international transport, nuclear power, banking and Canada's three northern territories – the Yukon, the North West Territories and Nunavut. The federal government also has authority over the labour relations of its own employees. Most other aspects of the Canadian labour force, including manufacturing, retail trade and construction, are provincially regulated.

Legal Regimes Governing Employees in Canada

In Canada labour relations and employment law are governed by three interrelated regimes:

- The common law of employment: A body of law governing contracts of employment that are negotiated between individual employers and employees. Civil courts enforce the common law.

- Collective bargaining: The collective negotiation of contracts of employment between a union and an employer. Specialized administrative tribunals such as labour relations boards and arbitration tribunals adjudicate disputes that fall under collective bargaining agreements.
    - The Canada Industrial Relations Board is a federal administrative tribunal that has jurisdiction over employees working in federal industries such as interprovincial transportation, broadcasting, and banking. It also has jurisdiction over private sector employees in Canada's three northern territories – the Yukon, the North West territories, and Nunavut.

    - Each of Canada's 10 provinces has its own independent administrative tribunal that adjudicates provincial labour matters. In Ontario, the Ontario Labour Relations Board has jurisdiction over matters such as the certification and decertification of trade unions, early termination of collective agreements, and illegal strikes and lockouts. In addition the Board has jurisdiction to review decisions of government officers regarding occupational health and safety and employment standards.

- Statutory regulation: A variety of employment standards legislation set base-line standards for matters such as minimum wages, maximum hours, and health and safety issues. Generally such legislation applies to both unionized and non-unionized employees.
    - Some provinces have set up administrative agencies to enforce employment standards legislation. For example, in Ontario non-unionized employees who are governed by the *Employment Standards Act* may file claims with the Ministry of Labour if they believe their employers are not

complying with the law. In addition, specialized tribunals, such as the Workplace Safety and Insurance Tribunal and the Pay Equity Hearings Tribunal deal with issue-specific labour matters. The Ontario Human Rights Tribunal adjudicates matters such as sexual harassment and discrimination in the workplace.

Claims of Individual Employees

The nature of an individual employee's claim will determine which of the various forums is appropriate.

Generally grievance arbitration is the appropriate forum for unionized employees who have complaints that fall within the ambit of the governing collective agreement. Civil courts retain jurisdiction to adjudicate disputes that fall outside the boundaries of the collective agreement (*Allen v. Alberta,* [2003] 1 S.C.R. 128). For example:

- An employee may complain that a union has breached its duty of fair representation, or may apply for a religious exemption from having to pay union dues. In Ontario, such matters would be heard by the Ontario Labour Relations Board.

- In *Goudie v. Ottawa (City),* [2003] 1 S.C.R. 141 the Supreme Court of Canada affirmed the principle that an employee may bring a civil action in the courts to enforce an individual agreement that was entered into before the employment relationship, whether or not the provisions of that agreement are consistent with the collective agreement that applies to the employee once the employment relationship begins. An example of such an arrangement is an agreement that the employee will be employed for a certain number of years.

Non-unionized employees may submit their claims to various different forums, depending on the nature of the claim. For example:

- A non-unionized employee may complain that an employer has failed to pay wages, has discriminated with respect to the benefits plan, or has wrongfully terminated his or her employment. In such cases the employee may either file a claim with the Ministry of Labour or sue the employer in court.

Responses to Questionnaire

I Are there new initiatives to make Labour Court hearings more efficient?

1. Are there any pre-trial procedures?

Canada does not have a single Labour Court charged with adjudicating disputes and enforcing labour and employment law across the country. Rather, the Canadian approach can best be described as a host of overlapping forums, including administrative agencies, tribunals, and civil courts.

Many of the administrative agencies have pre-hearing procedures such as investigation, mediation, and pre-hearing conferences. Often the first step after an employee has made a complaint or application is investigation. An investigations officer will gather facts and documents relevant to the case, contact the parties, and identify the issues. Mediation typically involves the assignment of a neutral, independent, professional mediator to the case whose role is to assist the parties in reaching a settlement of the application or complaint.

The Ontario Labour Relations Board conducts additional pre-hearing procedures such as pre-hearing conferences and consultations. Pre-hearing conferences are held before the Vice-Chair of the Board in order to narrow the issues and deal with procedural matters. Consultations are also held before the Vice-Chair of the Board. The goal of a consultation is to allow the Vice-Chair to focus expeditiously on the issues in dispute and determine whether any statutory rights have been violated.

Pre-trial proceedings for matters before civil courts may involve mediation, case management, and pre-trial hearings.

a. Are they mandatory?

Mediation may or may not be mandatory, depending on the specific administrative agency or tribunal. Other pre-hearing proceedings are at the discretion of the official in charge of the proceedings.

Mediation is mandatory for some civil proceedings. For example, in some parts of Ontario, mediation is mandatory for non-family civil actions.

b. In which way is the court involved?

Civil courts are not involved in pre-hearing proceedings before administrative boards and tribunals.

Courts become involved when an employee has commenced a civil action against an employer, or when the court is called upon to judicially review the decisions of administrative agencies.

c. How long may they go on?

The length of pre-hearing proceedings varies greatly, depending on the forum. They may last half an hour or may continue for several days. Mediators may contact the parties by letter or by telephone, and may conduct the mediation in person or through a series of telephone calls.

d. Who has to bear legal cost?

Generally the parties bear no costs for pre-hearing administrative proceedings, and the "losing" party is not required to pay the "winning" party's costs. Parties may hire their own lawyers, and in such cases are responsible for those legal costs.

For civil cases that fall under mandatory mediation in Ontario the parties must share the cost of the mediation session. Parties pay private mediators directly for their services. Mediation services are provided at no cost to individuals who have legal aid respresentation or who meet financial eligibility requirements.

e. Which effect do they have on the time of prescription?

There are limitation periods for filing a claim. For example, in Ontario, an employee who wishes to file a claim of unpaid wages with the Ministry of Labour must do so within six months from the date the wages become due. If the employee fails to file the claim within six months, she or he is precluded from doing so. Once a claim has been filed with the Ministry of Labour an investigations officer will investigate and render a decision. If the employer wishes to appeal this decision he or she may do so to the Ontario Labour Relations Board. At that stage, the Board may decide to mediate the case. Since the employee has already satisfied the limitation period, mediation has no effect on that element of the claim process.

2. Are there specific ideas to give assistance to the plaintiff to raise his claim more effectively?

Different agencies provide different services to employees. For example, the Office of the Worker Adviser is an independent agency of the Ontario Ministry of Labour that provides free services to non-unionized workers in workplace injury and insurance matters. The Office provides information and advice, and represents workers at all levels of workplace insurance appeals.

Legal aid is also available to employees who meet certain financial requirements. Legal aid lawyers often represent employees before the Ontario Labour Relations Board, and advise employees on matters before the Ontario Ministry of Labour.

Typically, unionized employees receive legal advice and representation from their unions.

3. What interest has to be paid for remunerations, which are not paid at the date of maturity?

Generally administrative tribunals do not award interest for unpaid wages. However, if interest accrues on an award, it is payable to the employee. For example, the Ontario Labour Relations Board may award an employee unpaid wages. If the employer appeals this decision, the money is payable into an interest-bearing trust account. If on appeal the Board's decision is upheld, the unpaid wages plus any accrued interest is payable to the employee.

In civil matters, any award of interest is at the judge's discretion.

4. Are there procedural regulations for mediation

a. Is mediation compulsory?

Mediation is compulsory for some civil actions (see above, question 1.a.).

b. How are the mediators selected? In which way is the court involved? Are judges different from trial judges?

The selection of mediators depends on the nature of the claim and the forum before which the claim is being mediated.

The Ontario Labour Relations Board employs its own mediators who are assigned to each case. These mediators are professional neutral parties with extensive backgrounds in labour relations and employment law. They are not adjudicators and do not provide legal advice to the parties. Rather, they listen to both parties, refer to existing case law to help the parties evaluate their positions, and assist the parties in reaching a resolution of the dispute. The court is not involved in these types of mediations.

In civil proceedings that are mediated in Ontario, the parties must agree on and select a private mediator from a list of mediators maintained by the Mandatory Mediation program. If the parties cannot agree a mediator is appointed for them by the administrator in charge of the Mandatory Mediation program.

c. Is it confidential?

Mediation is confidential. Generally, the mediation process is separate from any hearing or trial, and mediators do not give their notes or mediation documents to the decision-maker at a hearing or trial. Mediators may be required to file a report on the outcome of the mediation session. Confidentiality is considered important in order to encourage frank and open discussion between the disputing parties.

d. How long may mediation go on? How is it finished?

There is no prescribed time limit for mediation. Mediation may last as little as half an hour or continue for several days. If the mediator is successful in facilitating a settlement between the parties, the settlement is reduced to writing, signed by both parties and the matter is terminated. If a settlement cannot be reached the matter proceeds to a hearing or trial.

e. Who has to bear the legal cost?

Generally, the parties do not pay for mediation services that occur during the course of an administrative proceeding. In civil cases before the courts, the parties share the cost.

Parties to a civil matter must pay for mediation services (see above, question 1.d.).

f. Which effect does mediation has on the time of prescription (limitation period)?

See above, question 1.e.

g. What training in law and procedure is given to mediators?

Generally mediators have extensive backgrounds in employment law and labour relations. They may have undertaken formal training in mediation offered in house or by law schools and private organizations. Various certificates are available.

II Collective (class) action

1. What kind of collective actions have you got?

Group Grievances: In the unionized sphere several individual grievances may be brought as a single complaint. The extent to which group grievances can be arbitrated depends on whether the collective agreement provides for them.

Class Actions: In the non-unionized sphere class actions may be available. For example, in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 425 the Ontario Superior Court of Justice granted a certification order for a class action in proceedings for damages for dismissal without cause for thousands of former K-Mart employees.

Prosecution of more than one employer: An employee can file an occupational health and safety complaint with his or her provincial Ministry of Labour. An officer will investigate the complaint, and may find that the employer is liable with respect to many employees. Officers have statutory power to make orders in this respect. Occupational health and safety offences may also be prosecuted as quasi-criminal matters.

2. Who are the parties of these procedures?

Group grievances will be arbitrated if provided for in the collective agreement. In these situations the union and the employer are parties to the arbitration.

Class actions are civil proceedings. Therefore the individual who represents the certified class is the plaintiff. The defendant is the employer.

The parties to a prosecution are the provincial Ministry of Labour and the employer.

3. Which courts are competent?

Group grievances are dealt with via arbitration.

Class actions are heard in the provincial court of first instance – in Ontario this is the Superior Court of Justice. An appeal lies to the Ontario Court of Appeal.

Occupational health and safety prosecutions are heard before the Ontario Court of Justice. An appeal lies to the Ontario Superior Court of Justice.

4. Which effects their decision?

An arbitrator can make an award of damages.

The Superior Court of Justice may grant whatever civil remedy it sees fit. For example, the Court may make an award of damages, an award of costs, or an order to reinstate workers to positions of employment from which they have been wrongfully dismissed.

Since occupational health and safety matters are quasi-criminal, the Ontario Court of Justice may make orders for the payment of a fine or the service of a jail term.

5. To whom is this decision binding?

Decisions of arbitrators are binding on the parties to the collective agreement, including the employer, the union and the employees in the bargaining unit.

Decisions of the Superior Court of Justice and the Ontario Court of Justice are binding on the parties to the case.

6. Is it possible for a works council or trade union to sue or request for ascertainment of rights or legal relations, if some employees are involved? Do they have to specify these employees?

The answer to this question depends on the jurisdiction in which the union brings an action. Some provinces, such as Alberta, have enacted legislation that provides that unions can sue or be sued in matters that fall within the scope of the provincial labour relations statute. Other provinces, such as Ontario, have enacted legislation that seems to preclude unions from suing or being sued.

7. **Who has to bear the cost?**

Generally costs are set out in the collective agreement, and it is often agreed that the parties will share the cost of the arbitrator. Legal costs are rarely dealt with under collective agreements, and arbitrators do not have the power to award such costs unless specifically provided for in the collective agreement.

Legal costs associated with civil or quasi-criminal proceedings in the Superior Court of Justice or the Ontario Court of Justice are borne by the parties. The courts are empowered to award costs as they see fit.

Sources

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