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TAB 3

The Six-Minute LABOUR LAWYER

Federal Labour Law 2015: 7 Critical Changes

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June 5, 2015

cpd Continuing Professional Development

Federal Labour Law 2015: 7 Critical Changes

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I. Introduction[1]

In the 12 months since the last Six-Minute Labour Lawyer Conference, some significant legislative and jurisprudential changes have impacted the federal jurisdiction.

Most of the 7 changes described in this paper impact the Canada Industrial Relations Board (CIRB) directly. For example, effective June 16, 2015, the *Canada Labour Code* (*Code*) will contain a new mandatory representation vote regime[2]. Certification, revocation, and raid applications, which meet the *Code's* support requirements, will now all require a representation vote.

The CIRB itself has also changed significantly. The Administrative Tribunals Support Service of Canada (ATSSC) now employs the Board's former employees and has control over many of the administrative functions the CIRB formerly managed itself. The CIRB as an entity now focuses its expertise on adjudicating cases.

Parliament has also amended Part II of the *Code* (Occupational Health and Safety) to change employers' and employees' obligations in health and safety matters. Those changes impact, in part, the Board's jurisdiction over reprisal complaints.

[1] The comments in this paper are of a summary nature only and do not bind the CIRB or any of its members. Live links (use Ctrl + click to follow link) have been provided where possible to the cases and legislation to which the paper refers.
[2] Bill C-525, *infra*

Finally, a recent decision from the Federal Court of Appeal has examined the Unjust Dismissal complaint regime found at Division XIV (section 240 et ss.) of Part III of the *Code* (Standard Hours, Wages, Vacations and Holidays). The CIRB has no jurisdiction over Part III matters. Instead, the Minister of Labour appoints the adjudicators who hear and determine Unjust Dismissal complaints.

All of these changes will have a significant impact on how labour lawyers handle federal labour law cases.

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II. Interpreting bilingual legislation

Federal legislation like the *Code* is written in both official languages[3]. As noted in *VIA Rail Canada Inc.*[4], the CIRB's interpretation of the *Code* frequently compares the English and French versions:

> [35] The English and French versions of the *Code* are equally authoritative. The Board cannot give preference to one linguistic version over the other, but instead must arrive at an acceptable and common meaning:
>
> > The basic rule governing the interpretation of bilingual legislation is known as the shared or the common meaning rule. When there is a discrepancy between the two versions of bilingual legislation, the meaning that is common to both or shared by both ought to be adopted unless that meaning is for some reason unacceptable.
> >
> > - R. Sullivan, *Sullivan on the Construction of Statutes*, 5th Ed. (Canada: LexisNexis Canada Inc., 2008)

[3] The "Justice Laws Website" at http://laws-lois.justice.gc.ca/eng/index.html provides extremely useful and up to date office consolidations in pdf format. Those consolidations, such as the one for the Canada Labour Code, allow for a side by side comparison of the English and French text for each section.
[4] 2011 CIRB 569

The Supreme Court of Canada (SCC) recently demonstrated the importance of examining federal legislation in both official languages when it considered Mr. Justice Marc Nadon's eligibility to sit on the court[5].

In the Nadon Reference, the SCC's legal analysis included comparing the English and French language versions of its constituent Act:

> [32] **We reach the same conclusion by applying the shared meaning rule of bilingual interpretation, which requires that where the words of one version may raise an ambiguity, one should look to the other official language version to determine whether its meaning is plain and unequivocal**: Ruth Sullivan, Sullivan on the Construction of Statutes (5th ed. 2008), at pp. 99-116; Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, The Interpretation of Legislation in Canada (4th ed. 2011), at pp. 347-49; R. v. Daoust, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28. The English version of the text is unambiguous in its inclusion of former advocates for appointment, while the French version is reasonably capable of two interpretations: one which excludes former advocates from appointment, and one which includes them. The meaning common to both versions is only found in the unambiguous English version, which is therefore the meaning we should adopt.
>
> (emphasis added)

The "shared meaning rule" of statutory interpretation can only be applied after examining the legislative text in both official languages.

This paper will include both linguistic versions of any legislative provision cited, where available.

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III. The 7 Critical Changes in Federal Labour Law

1. Mandatory Certification Votes

a. Current Practice

Since 1973, both the Canada Labour Relations Board (CLRB) and its successor, the CIRB, have administered a card-based certification regime. A trade union which provided membership

[5] Reference re Supreme Court Act, ss. 5 and 6, 2014 SCC 21 (Nadon Reference)

evidence demonstrating majority support of the employees in the appropriate bargaining unit would be certified without a vote[6].

Under that card-based certification regime, a trade union required 50% plus one support in order to be certified based solely on its membership evidence[7]. Sections 30 and 31 of the Board's *Canada Industrial Relations Board Regulations*[8]*, 2012* (*Regulations*) deal with evidence of membership in a trade union, including the current need for the payment of $5.00.

In *Rooley*[9], the Board commented on its practice under the card-based certification regime:

> [63] Section 28(*c*) of the *Code* expressly states, inter alia, that where the Board is satisfied of majority support, it "shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit".
>
> [64] While the Board always has the discretion to order a representation vote under section 29(1), section 28 contains a clear statutory preference for certification without a vote. That is the essence of a card-based certification regime.
>
> [65] The nature of a certification application similarly explains why the Board does not hold a representation vote if an applicant has demonstrated majority support. In the usual certification application, there is only one entity, the applicant trade union, seeking to represent a bargaining unit.
>
> [66] There is no other competing entity arguing that it too has majority employee support.
>
> [67] This differs from the situation in revocation and displacement (raid) applications. For those applications, there is an incumbent trade union, which previously demonstrated majority support. There is also a competing entity claiming to have majority employee support, be it another trade union or a group of employees asking the Board to remove the incumbent trade union's certification.

In a regular certification application, where a trade union's support exceeded 35%, but did not exceed 50%, the *Code* required that the Board hold a representation vote[10].

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[6] Sections 29(1) and (2) of the *Code*, which will be repealed under Bill C-525, did provide the Board with the general authority to order a representation vote. On rare occasions, the Board could order a vote, even if a trade union had majority support: *Atomic Transportation System Inc*. (1995), 99 di 122 (CLRB no. 1146). The Board still retains a general power to order representation votes in its cases: see section 16(*i*)(i) of the *Code*.

[7] In *Rooley*, 2015 CIRB 759, the Board commented why it would certify a trade union based solely on membership cards for regular certifications, but would generally order a vote when a rival trade union filed a displacement (raid) application: paras 76-79.

[8] Canada Industrial Relations Board Regulations, 2012, SOR/2001-520

[9] *Supra*, note 7.

Traditionally, the CLRB and the CIRB held representation votes in raid applications[11] even though they were similarly governed by section 28 of the *Code*. The Board required an applicant to demonstrate over 50% support among employees in order to obtain a vote. The Board would dismiss a raid application when support did not reach this level.

b. June 16, 2015: New Practice

Bill C-525[12], which received Royal Assent on December 16, 2014, will require mandatory certification votes. Effective June 16, 2015, which is six months following the date Bill C-525 received Royal Assent[13], the CIRB will be obliged to hold mandatory representation votes for all certification applications which meet the *Code's* support requirements.

In order to obtain a representation vote, a trade union will need to demonstrate to the Board, via its membership evidence, that at least 40% of the employees in the unit support it. As it has routinely done in the past, the Board will evaluate this support as of the date of the filing of the certification application[14]. The Board does not generally consider evidence of employee wishes received after the filing date[15]. The 40% support threshold required to obtain a representation vote will also apply to displacement (raid) applications.

The results of the mandatory representation vote are calculated based on those bargaining unit members who actually vote[16].

c. Comparison Before and After: Section 28 of the *Code*

The current wording of section 28 of the *Code* reflects the card-based certification regime:

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[10] Section 29(2) (repealed as of June 16, 2015)
[11] *Rooley*, *supra*, at paras 73-75.
[12] *Employees' Voting Rights Act*, S.C. 2014, c. 40
[13] Section 13
[14] *Rooley*, *supra*, note 7 at paras 52 et ss.
[15] *FedEx Ground Package System, Ltd.*, 2010 CIRB 522 at paras 32-35.
[16] Bill C-525 at first reading (June 5, 2013) had initially required a 45% threshold to obtain a vote. The results of the vote were to have been based on a majority of the employees **in the bargaining unit** voting in favour of the applicant.

Current section 28	**Article actuel 28**
28. Where the Board (*a*) has received from a trade union an application for certification as the bargaining agent for a unit, (*b*) has determined the unit that constitutes a unit appropriate for collective bargaining, and (*c*) **is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application** as the bargaining agent for the bargaining unit. (emphasis added)	28. Sous réserve des autres dispositions de la présente partie, **le Conseil doit accréditer un syndicat lorsque les conditions suivantes sont remplies** : *a*) il a été saisi par le syndicat d'une demande d'accréditation; *b*) il a défini l'unité de négociation habile à négocier collectivement; *c*) **il est convaincu qu'à la date du dépôt de la demande, ou à celle qu'il estime indiquée, la majorité des employés de l'unité désiraient que le syndicat les représente à titre d'agent négociateur.** (caractères gras ajoutés)

The amended section 28 will read:

Amended section 28	**Article 28 modifié**
28. (1) **If the Board is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in a unit who have cast a ballot have voted to have a trade union represent them as their bargaining agent**, the Board shall, subject to this Part, certify the trade union as the	28. (1) Sous réserve des autres dispositions de la présente partie, **le Conseil accrédite un syndicat à titre d'agent négociateur d'une unité s'il est convaincu, sur le fondement des résultats d'un scrutin de représentation secret, que la majorité des employés de l'unité qui ont participé au scrutin désirent que le syndicat les représente** à

bargaining agent for the unit. (2) **The Board shall order that a secret ballot representation vote be taken** among the employees in a unit if the Board (*a*) has received from a trade union an application for certification as the bargaining agent for the unit; (*b*) has determined that the unit constitutes a unit appropriate for collective bargaining; and (*c*) **is satisfied on the basis of evidence of membership in the trade union that, as of the date of the filing of the application, at least 40% of the employees in the unit wish to have the trade union represent them as their bargaining agent.** (emphasis added)	titre d'agent négociateur. (2) **Le Conseil ordonne la tenue d'un scrutin de représentation secret** au sein d'une unité lorsque les conditions suivantes sont réunies : *a*) il a été saisi par un syndicat d'une demande d'accréditation à titre d'agent négociateur de l'unité; *b*) il a déterminé que l'unité est habile à négocier collectivement; *c*) **il est convaincu, sur le fondement de la preuve du nombre d'employés membres du syndicat, qu'à la date du dépôt de la demande, au moins quarante pour cent des employés de l'unité désiraient que le syndicat les représente à titre d'agent négociateur.** (caractères gras ajoutés)

Ontario labour lawyers may be more familiar with the mandatory representation vote wording found at section 8(2) in Ontario's *Labour Relations Act, 1995*[17]:

Voting constituency 8. … Direction re representation vote	Employés habiles à voter 8. … Ordonnance relative au scrutin de

[17] SO 1995, c 1, Sch A

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency. 1995, c. 1, Sched. A, s. 8 (1, 2).	représentation (2) Si elle détermine que 40 pour cent ou plus des particuliers compris dans l'unité de négociation proposée dans la requête en accréditation semblent être membres du syndicat au moment du dépôt de la requête, la Commission ordonne la tenue d'un scrutin de représentation auprès des particuliers qui font partie du groupe d'employés habiles à voter. 1995, chap. 1, annexe A, par. 8 (1) et (2).

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2. Mandatory Revocation Votes

a. Current Practice

The Board has traditionally held representation votes in revocation applications, even if the applicant demonstrated majority support among employees in the bargaining unit. If the applicant failed to demonstrate majority support, then the Board would dismiss the application.

This practice, which was also applied to displacement (raid) applications, arose from the fact that the incumbent trade union had previously demonstrated majority support. A vote allowed the Board to resolve whether the new entity now had majority support.

In *Rooley*[18], the Board summarized its longstanding practice:

> [68] The *Code* at sections 38 and 39 establishes the revocation process. Unlike the *Code's* wording in section 28 for situations where an applicant demonstrates majority support, section 39(1) explicitly mentions the holding of a representation vote as a method to ascertain employee wishes in a revocation application:
>
> > 39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, **and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances,** the Board is satisfied that a majority of the employees in the bargaining

[18] *Supra*, note 7.

> unit no longer wish to have the bargaining agent represent them, the Board shall, subject to subsection (2), by order.
>
> (emphasis added)

[69] The Board has established two main policies for revocation applications. Firstly, the application will be dismissed if there is evidence of employer interference: *Robinson*, 2003 CIRB 209 (*Robinson 209*).

[70] Secondly, the Board will usually order a representation vote, even if a majority of employees have seemingly supported the revocation application. This reflects the wording of section 39(1).

[71] In Claude H. Foisy et al., *Canada Labour Relations Board Policies and Procedures* (Toronto: Butterworths, 1986) (*Foisy*), the authors, at page 123, described the approach to revocation applications of this Board's predecessor, the Canada Labour Relations Board (CLRB):

> An application made under s. 137 is a means to provide employees with the opportunity to revoke the certificate of their bargaining agent, and its determination rests on the evidence that a majority of the employees in the bargaining unit wishes the bargaining agent to be removed. The wishes of the employees may be ascertained by a representation vote or by other means. **The Board has indicated that, as a rule, it will favour a determination of employee wishes by a representation vote, but where the wishes of the employees are not in doubt, no vote will be ordered. Where the wishes of the employees are rendered doubtful because of employer interference, a previous order calling for a representation vote may be cancelled and the question decided by other means, or the application may simply be dismissed.**
>
> (emphasis added)

[72] The CIRB routinely orders representation votes for revocation applications if no employer interference exists and the application has the support of a majority of employees: *Bourgeois*, 2013 CIRB 695. A vote allows the Board to deal with the competing evidence regarding employee wishes. The incumbent trade union originally received sufficient support in order for the Board to certify it. The revocation application calls into question that majority support.

The Board has always dismissed revocation applications if there was evidence of employer interference.

b. June 16, 2015: New Practice

Bill C-525's new requirement to hold a representation vote will not change significantly the Board's past practice for revocation applications: a vote will continue to be held. However, the

threshold to obtain a representation vote in a revocation application will fall from 50% plus one to "at least 40%"[19].

A majority of those who cast a ballot must vote in favour of revocation for the application to succeed[20].

The protection certain bargaining agents received from revocation applications under the current section 39(2) will no longer exist once Bill C-525 comes into force on June 16, 2015. The current section 39(2) restricted revocation applications aimed at first time bargaining agents, as well as against bargaining agents who had acquired the right to strike, as long as they had made a reasonable effort to negotiate a collective agreement and had kept their members informed about negotiations.

In *Genge*[21], the Board commented on this protection under section 39(2) of the *Code*:

> [24] Given the CLRB's interpretation of the *Code*, it had no choice in *J. Phillips et al.*, *supra*, but to reject the trade union's argument that section 39(2) applied to any bargaining situation, as long as a bargaining agent had made a reasonable effort to conclude a collective agreement:
>
> > The union argues for an interpretation of "in force" that would give it application in all states of union-employer relationship, even where there has been a long bargaining relationship, successive collective agreements and the employees have had the experience of the collective bargaining regime and their bargaining agent. It submits the intent is to encourage collective bargaining and to achieve this intent section 138(2) [now section 39(2)] restricts employee freedom to revoke certification but section 124(2) [now section 24(2)] allows for change of bargaining agents. The mischief perceived by the union is too wide. There is a sound experiential base for section 138(2) [now section 39(2)] applying in the two situations we have concluded it was intended to apply. We can see no sound policy reason for Parliament to restrict employee freedom to the extent advocated by the union in its interpretation. ...
> >
> > (*J. Phillips et al., supra*, pages 613; and 188)
>
> [25] If section 39(2) does apply to a particular case, then *J. Phillips et al., supra*, and subsequent Board decisions have held that a bargaining agent will be protected as long as it demonstrates that it

[19] Bill C-525 at first reading (June 5, 2013) had required "at least 45%" support in order to obtain a vote.
[20] Bill C-525 at first reading (June 5, 2013) had required a majority of employees **in the bargaining unit** to vote in favour of continued representation by the bargaining agent.
[21] 2007 CIRB 395

has negotiated with the employer and consulted/ communicated with members of the bargaining unit.

[26] In short, the CLRB, in *J. Phillips et al., supra*, was not prepared to limit employee freedom of choice so that a reasonable effort by the bargaining agent to conclude a collective agreement would prevent any revocation application. Rather, by interpreting the *Code* and the different states of the bargaining relationship between employers and trade unions, the CLRB concluded that Parliament intended section 39(2) to apply only to a bargaining agent that was certified but had yet to conclude a collective agreement or when the parties had acquired the right to strike or lockout.

[27] The CLRB, in *J. Phillips et al., supra*, also determined that the Board examines the situation as of the date of the filing of the revocation application rather than at the date of the Board's decision, given that the parties' situation could change in the interim.

[28] This Board has accepted and applied this longstanding interpretation of section 39(2) in similar situations (see *Les Meszaros et al.*, [2002] CIRB no. 188; and 95 CLRBR (2d) 124).

[29] In summary, a bargaining agent can seek the protection available under section 39(2) of the *Code* if:

1. it is negotiating a first collective agreement or if the parties have acquired the right to strike or lockout;

2. it has made a reasonable effort to enter into a collective agreement with the employer; and

3. subject to the nuances in the Board's case law, it has consulted with and kept members of the bargaining unit informed about the progress of the negotiations.

c. Comparison Before and After: Sections 38 and 39 of the *Code*

Bill C-525 amends sections 38(1) and (3) of the *Code*. Section 38(1) applies to certified bargaining agents. Section 38(3) applies to voluntarily recognized bargaining agents. Bill C-525 has also replaced the entire section 39.

The current sections 38(1), (3) and 39 read:

Current sections 38(1), (3) and 39	**Articles actuels 38(1), (3) et 39**
Revocation of Certification and Related Matters 38. (1) Where a trade union has been	Révocation de l'accréditation et questions connexes 38. (1) **Tout employé prétendant**

certified as the bargaining agent for a bargaining unit, **any employee who claims to represent a majority of the employees in the bargaining unit** may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.	**représenter la majorité des employés d'une unité de négociation** peut, sous réserve du paragraphe (5), demander au Conseil de révoquer par ordonnance l'accréditation du syndicat à titre d'agent négociateur de l'unité.
…	…
(3) Where a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, **any employee who claims to represent a majority of the employees in the bargaining unit may**, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the bargaining unit.	(3) Dans les cas où l'agent négociateur partie à une convention collective n'a pas été accrédité par le Conseil, **tout employé prétendant représenter la majorité des employés de l'unité de négociation** régie par la convention peut, sous réserve du paragraphe (5), demander au Conseil de rendre une ordonnance déclarant que l'agent négociateur n'a pas qualité pour représenter les employés de cette unité.
…	…
39. (1) Where, on receipt of an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, and after such inquiry by way of a representation vote or otherwise as the Board considers appropriate in the circumstances, the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, the Board shall, subject to subsection (2), by order,	39. (1) Si, à l'issue de l'enquête qu'il estime indiquée — tenue sous forme d'un scrutin de représentation ou sous une autre forme — , il est convaincu que la majorité des employés de l'unité de négociation visée par la demande ne désirent plus être représentés par leur agent négociateur, le Conseil doit rendre une ordonnance par laquelle :
(*a*) in the case of an application made under subsection 38(1), revoke the certification of the trade union as the bargaining agent for the bargaining unit; or	*a*) dans le cas de la demande prévue au paragraphe 38(1), il révoque l'accréditation du syndicat à titre d'agent négociateur de l'unité;
(*b*) in the case of an	*b*) dans le cas de la demande prévue au paragraphe 38(3), il déclare que l'agent négociateur n'a pas qualité pour représenter les employés

application made under subsection 38(3), declare that the bargaining agent is not entitled to represent the employees in the bargaining unit.	de l'unité.
(2) **Where no collective agreement applicable to a bargaining unit is in force, no order shall be made pursuant to paragraph (1)(*a*) in relation to the bargaining agent for the bargaining unit unless the Board is satisfied that the bargaining agent has failed to make a reasonable effort to enter into a collective agreement in relation to the bargaining unit.**	(2) **En l'absence de convention collective applicable à l'unité de négociation, l'ordonnance visée à l'alinéa (1)*a*) ne peut être rendue par le Conseil que s'il est convaincu que l'agent négociateur n'a pas fait d'effort raisonnable en vue de sa conclusion.**
(emphasis added)	(caractères gras ajoutés)

The new sections 38(1), 38(3) and 39, as amended by Bill C-525, read:

Amended sections 38 and 39	**Articles modifiés 38 et 39**
38. (1) If a trade union has been certified as the bargaining agent for a bargaining unit, **any employee who claims to represent at least 40% of the employees in the bargaining unit** may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.	38. (1) **Tout employé prétendant représenter au moins quarante pour cent des employés d'une unité de négociation** peut, sous réserve du paragraphe (5), demander au Conseil de révoquer par ordonnance l'accréditation du syndicat à titre d'agent négociateur de l'unité.
…	…
(3) If a collective agreement applicable to a bargaining unit is in force but the bargaining agent that is a party to the collective agreement has not been certified by the Board, **any employee who claims to represent at least 40% of the employees in the bargaining unit may**, subject to subsection (5), apply to the Board for an order declaring that the bargaining agent is not entitled to represent the employees in the	(3) Dans les cas où l'agent négociateur partie à une convention collective n'a pas été accrédité par le Conseil**, tout employé prétendant représenter au moins quarante pour cent des employés de l'unité de négociation régie par la convention peut**, sous réserve du paragraphe (5), demander au Conseil de rendre une ordonnance déclarant que l'agent négociateur n'a pas qualité pour

bargaining unit.	représenter les employés de cette unité.
…	…
39. If the Board has received an application for an order made under subsection 38(1) or (3) in respect of a bargaining agent for a bargaining unit, the Board shall grant the order if	39. Lorsqu'il est saisi d'une demande présentée en vertu des paragraphes 38(1) ou (3), le Conseil rend l'ordonnance visée par la demande s'il est convaincu, à la fois :
(*a*) **it is satisfied on the basis of written evidence that, as of the date of the filing of the application, at least 40% of the employees in the bargaining unit no longer wish to have the bargaining agent represent them, and**	*a*) **sur le fondement d'une preuve documentaire, qu'à la date du dépôt de la demande, au moins quarante pour cent des employés de l'unité de négociation ne désiraient plus être représentés par leur agent négociateur;**
(*b*) **it is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in the bargaining unit who have cast a ballot no longer wish to be represented by the bargaining agent.**	*b*) **sur le fondement des résultats d'un scrutin de représentation secret, que la majorité des employés de l'unité de négociation qui ont participé au scrutin ne désirent plus être représentés par leur agent négociateur.**
(emphasis added)	(caractères gras ajoutés)

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3. Administrative Tribunal Support Service of Canada (ATSSC)

The Administrative Tribunals Support Service of Canada Act[22] came into force on November 1, 2014. The ATSSC provides support services and facilities to administrative tribunals. The tribunals no longer control the budget for these items.

The Board is just one of many federal administrative tribunals[23] which now receive their support services from the ATSSC.

The ATSSC has taken over the Board's former role as the employer of its employees[24]. The ATSSC's chief executive officer[25], called the "Chief Administrator"[26], has the following responsibilities:

10. The Chief Administrator is responsible for the provision of the support services and the facilities that are needed by each of the administrative tribunals to exercise its powers and perform its duties and functions in accordance with the rules that apply to its work.	10. L'administrateur en chef est chargé de fournir à chaque tribunal administratif les services d'appui et installations dont il a besoin pour exercer ses attributions en conformité avec les règles régissant ses activités.

The Chief Administrator also has the power to enter into contracts, including those to engage outside legal counsel to assist the tribunals:

[22] S.C. 2014, c. 20, s. 376 (contained originally within Bill C-31)
[23] Schedule 2 to the ATSSC Act lists the 11 tribunals currently being served.
[24] ATSSC Act, s. 15
[25] The Chair of the CIRB is no longer described as the Board's chief executive officer, but continues to have extensive authority over the work of the Board: *Code*, section 12.01.
[26] ATSSC Act, s. 9

11. (1) The Chief Administrator has all the powers that are necessary to perform his or her duties and functions under this or any other Act of Parliament. (2) **The Chief Administrator may enter into contracts, memoranda of understanding or other arrangements, including contracts to engage the services of legal counsel or other persons having professional, technical or specialized knowledge to advise or assist an administrative tribunal or any of its members.** (emphasis added)	11. (1) L'administrateur en chef a tous les pouvoirs nécessaires à l'exercice des fonctions qui lui sont conférées sous le régime de la présente loi ou de toute autre loi fédérale. (2) **Il peut conclure des contrats, ententes ou autres arrangements, notamment des contrats pour retenir les services de conseillers juridiques ou autres experts afin d'aider ou de conseiller un tribunal administratif ou l'un de ses membres.** (caractères gras ajoutés)

The CLRB traditionally engaged outside labour lawyers to defend its interests in key court cases. The Federal Court of Appeal found no appearance of bias existed in the CLRB's choice of legal counsel, even if those same counsel might also have had other active cases pending before the Board[27].

In order to differentiate the ATSSC's support services from the administrative tribunals' adjudicative work, the ATSSC Act[28] comments on their respective authorities:

12. The Chief Administrator's powers, duties and functions do not extend to any of the powers, duties and functions conferred by law on any administrative tribunal or on any of its members. … 14. For greater certainty, the chairperson of an administrative tribunal continues to have supervision over and direction of the work of the tribunal.	12. L'administrateur en chef ne peut exercer les attributions qu'une règle de droit confère à un tribunal administratif ou à l'un de ses membres. … 14. Il est entendu que le président d'un tribunal administratif continue d'assurer la direction du tribunal et d'en contrôler les activités.

[27] *Quebec Ports Terminals Inc.* v. *Canada (Labour Relations Board)*, [1995] 1 FCR 459, 1994 CanLII 3526 (FCA)
[28] ATSSC Act, s. 12 and 14

The Board has long had a network of regional offices in order to better serve Canada's labour relations community. The Chief Administrator now has the power to establish offices[29]:

4. (1) The principal office of the Service is to be in the National Capital Region described in the schedule to the *National Capital Act*. (2) The Chief Administrator may establish other offices of the Service elsewhere in Canada.	4. (1) Le siège du Service est fixé dans la région de la capitale nationale, délimitée à l'annexe de la *Loi sur la capitale nationale*. (2) L'administrateur en chef peut établir des bureaux du Service ailleurs au Canada.

Bill C-31 repealed the Board's power to establish regional offices[30].

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4. Occupational Health and Safety: Amended definition of "Danger"

Effective October 31, 2014, Bill C-4[31] significantly amended Part II of the *Code* which governs occupational health and safety matters in the federal jurisdiction.

The previous definition of danger in section 122 read:

Previous definition of "danger"	**Définition précédente de «danger»**
122. (1) In this Part, ... "danger" means any existing or potential	122. (1) Les définitions qui suivent s'appliquent à la présente partie. …

[29] ATSSC Act, s. 4
[30] *Code*, former section 13
[31] A second act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures, 2nd Sess, 41st Parl, 2013, (S.C. 2013, c. 40) (Bill C-4)

hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;	«danger» Situation, tâche ou risque – existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats - , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.

The new definition of danger in section 122 reads:

New definition of "danger"	**Nouvelle définition de «danger»**
"danger" means any hazard, condition or activity that could reasonably be expected to be **an imminent or serious threat** to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered; (emphasis added)	« danger » Situation, tâche ou risque qui pourrait vraisemblablement présenter **une menace imminente ou sérieuse** pour la vie ou pour la santé de la personne qui y est exposée avant que, selon le cas, la situation soit corrigée, la tâche modifiée ou le risque écarté. (caractères gras ajoutés)

Among the changes to the definition of "danger" is the addition of the word "imminent"[32]. For long time federal practitioners, the use of this term harkens back to the 1980s when the provision governing the exercise of the right to refuse dangerous work also used the term "imminent". At that time, the *Code* contained no definition for the term "danger".

[32] The new definition also adds the term "serious".

The definition of danger is important given that an employee must have reasonable cause to believe that something constitutes a danger in order to exercise his/her right to refuse work. Section 128(1) introduces an employee's right to refuse:

128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, **if the employee while at work has reasonable cause to believe** that	128. (1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche **s'il a des motifs raisonnables de croire que**, selon le cas :
(*a*) the use or operation of the machine or thing **constitutes a danger** to the employee or to another employee;	*a*) l'utilisation ou le fonctionnement de la machine ou de la chose **constitue un danger** pour lui-même ou un autre employé;
(*b*) a condition exists in the place that **constitutes a danger** to the employee; or	*b*) **il est dangereux** pour lui de travailler dans le lieu;
(*c*) the performance of the activity **constitutes a danger** to the employee or to another employee.	*c*) l'accomplissement de la tâche **constitue un danger** pour lui-même ou un autre employé.
(emphasis added)	(caractères gras ajoutés)

An employee's "reasonable cause to believe" and the definition of "danger" go hand in hand in Part II cases. *Aleksandrov*[33] illustrated the Board's analysis before the recent amendment to the definition of danger:

> [26] The Board is satisfied that Mr. Aleksandrov had reasonable cause to believe danger existed. The Board does not examine whether Mr. Aleksandrov was correct in his belief. Indeed, the HSO's later investigation concluded that danger as defined in the *Code* did not exist.
>
> [27] However, the facts demonstrate that Mr. Aleksandrov had concerns that the skin rash which had forced him to see a doctor, and for which he received a medical prescription, resulted from a situation in his workplace. Moreover, Mr. Aleksandrov had asked for permission the day before to install in his truck his own mattress for those occasions when he slept in the truck when carrying out his assignments.

[33] 2011 CIRB 602

> [28] As noted in the HSO decision at section II subsection 5, Zavitz "suggested installing the new mattress **after** the assigned trip was completed" (emphasis in original).
>
> [29] Zavitz contested before the HSO, as it was entitled, whether any danger existed, but did not suggest that Mr. Aleksandrov's refusal was in any way a pretext designed to deal with some other work situation, such as an ongoing employment dispute.
>
> [30] Mr. Aleksandrov has met his obligation to have reasonable cause to believe there was a danger to him in the workplace. The *Code* foresees that such situations will then be properly investigated, including, if necessary, having an independent HSO review the situation.

The Board noted in *Isinger*[34] that the right to refuse cannot be used to bring other ongoing safety matters to a head:

> [90] As was mentioned by the CLRB in Pratt, supra, the right to refuse is not the primary vehicle for attaining the objectives of Part II of the *Code*. In the Board's view, Mr. Mike Isinger's October 26, 2011 refusal document was an effort to bring to a head the ongoing compliance issues on which TSI, the Committee, the HSO and others had been working.
>
> [91] The right to refuse is not an appeal mechanism to deal with frustrations arising from the *Code*'s compliance regime.
>
> [92] The Board had no doubt when listening to Mr. Mike Isinger's testimony that he, along with his brother, has a sincere interest in safety at TSI. But despite their sincerity, the overall context must be examined when determining if they had reasonable cause.

In the 1980s, the *Code* contained no definition for the term "danger". However, section 82.1[35] of the *Code* gave an employee the right to refuse to work in a situation of "imminent danger":

82.1(1) Where a person employed upon or in connection with the operation of any federal work, undertaking or business **has reasonable cause to believe** that	« 82.1 (1) Quiconque, étant employé dans le cadre d'une entreprise fédérale, **a des motifs raisonnables de croire**
(a) the use or operation of a machine, device or thing would **constitute an imminent danger** to the safety or health of himself or another employee, or	a) que l'utilisation ou le fonctionnement d'une machine, d'un dispositif ou d'une chose **constituerait un danger imminent** pour sa propre sécurité ou santé ou pour celle d'un autre employé, ou
(b) a condition exists in any place that	b) qu'il existe, dans un lieu de travail, des

[34] 2013 CIRB 688

[35] Now section 128(1), as amended.

would **constitute an imminent danger** to his own safety or health, that person may refuse to use or operate the machine, device or thing or to work in the place." (emphasis added)	circonstances qui **constituent un danger imminent** pour sa sécurité ou sa santé peut refuser d'utiliser ou de faire fonctionner la machine, le dispositif ou la chose ou de travailler dans ce lieu. » (caractères gras ajoutés)

In *Bell Canada*[36], the CLRB was tasked with reviewing a safety officer's determination that "imminent danger" existed[37]. The Board commented on the concept of "imminent danger":

> Fundamentally, it is a situation of high probability that something out of the ordinary which will be injurious to the individual's safety and/or health is so likely to occur almost immediately and without warning that the individual should withdraw himself from the scene.
>
> (page 159)

The Board did not overturn the safety officer's finding of "imminent danger":

> There may be no authoritative and recognized outside experts who can say that it is – or is not – unsafe to climb these poles. But the Board cannot dismiss the expertise of Bell's own employees whose job it is to climb poles and who in fact must have a better idea of what is hazardous for them and what isn't than anybody else associated with this case. It is true, as Bell's counsel maintained, that the employees who testified hardly constitute a cross-section of Bell's climbing staff, but nobody successfully contradicted them. On balance, giving particular weight to their opinions, and bearing in mind all of the circumstances of the direction, the Board concludes that the direction should be confirmed.
>
> (page 161)

Evidently, what the CLRB did in the 1980s, at a time when it had the jurisdiction to review a safety officer's determination regarding imminent danger, under a differently worded *Code*, will not bind the CIRB going forward. Nonetheless, parties may find the CLRB's long ago practice of interest when preparing future arguments about the impact of the new definition of "danger".

[36] *Bell Canada* (1984), 56 di 150 (CLRB no. 469)
[37] The Board no longer has this review jurisdiction; it only deals with reprisal complaints.

****

5. Occupational Health and Safety: Requirement for written reports during the work refusal process

Bill C-4 has added an explicit requirement for employers and other participants to prepare written reports during the investigation of an employee's work refusal.

The Board in the past had commented on the challenges it faced if no investigation occured into an employee's work refusal.

In *Court*[38], the Board noted:

> [108] The fact the Board has determined that Mr. Court modified the Inspection Report does not necessarily mean that his initial safety concerns were fictitious. The Board has found it incongruous that Mr. Court would be asking for an air-conditioned tractor under the collective agreement when, as JGH argued, tractor 1316 had proper air conditioning. **Without the benefit of the Safety Officer's investigation, the Board is deprived of the helpful objective evidence which might have illuminated whether Mr. Court was trying to create a non-existent case or instead trying to improve an already existing case that fell within the protections found at Part II of the *Code*.**
>
> (emphasis added)

Bill C-4 has made fundamental changes to the process governing a work refusal. Firstly, the *Code* no longer contains any references to Health and Safety Officers (HSO). Prior to Bill C-4, an HSO would investigate a work refusal if the parties had been unable to resolve the issue themselves[39].

Bill C-4 has eliminated this mandatory HSO investigation into a work refusal and has instead imposed additional obligations on the parties to investigate, gather evidence and prepare written reports.

[38] 2010 CIRB 498

[39] S. 129 of the *Code*, prior to Bill C-4's amendments, set out the HSO's process.

If an employee has reported the circumstances of a refusal to the employer[40], the new process now contemplates the employer preparing a written report:

128.(7.1) The employer shall, immediately after being informed of a refusal under subsection (6), investigate the matter in the presence of the employee who reported it. **Immediately after concluding the investigation, the employer shall prepare a written report setting out the results of the investigation.** (emphasis added)	128.(7.1) Saisi du rapport fait en application du paragraphe (6), l'employeur fait enquête sans délai en présence de l'employé. **Dès qu'il l'a terminée, il rédige un rapport dans lequel figurent les résultats de son enquête.** (caractères gras ajoutés)

If the employee continues to refuse to work, he or she will report it to the employer, as well as to either the work place committee (Committee) or the health and safety representative (Representative)[41]:

128.(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.	128.(9) En l'absence de règlement de la situation au titre du paragraphe (8), l'employé, s'il y est fondé aux termes du présent article, peut maintenir son refus; il présente sans délai à l'employeur et au comité local ou au représentant un rapport circonstancié à cet effet.

This process will lead to a further written report[42] from either the Committee or the Representative. The employer then considers the written reports and decides whether a danger exists:

[40] *Code*, section 128(6). This notification is a condition precedent for any later complaint: section 133(3).
[41] A Committee exists for employers with more than 20 employees (s. 135), while a Representative suffices for employers with less than 20 employees (s. 136).
[42] *Code*, section 128(10.1) and (10.2)

128. (13) After receiving a report under subsection (10.1) or (10.2) and taking into account any recommendations in it, the employer, if it does not intend to provide additional information under subsection (10.2), shall make one of the following decisions: (*a*) agree that a danger exists; (*b*) agree that a danger exists but consider that the circumstances provided for in paragraph (2)(*a*) or (*b*) apply; (*c*) determine that a danger does not exist.	128. (13) Après avoir reçu un rapport au titre des paragraphes (10.1) ou (10.2) et tenu compte des recommandations, l'employeur, s'il n'a pas l'intention de fournir des renseignements complémentaires en vertu du paragraphe (10.2), prend l'une ou l'autre des décisions suivantes : *a*) il reconnaît l'existence du danger; *b*) il reconnaît l'existence du danger mais considère que les circonstances prévues aux alinéas (2)*a*) ou *b*) sont applicables; *c*) il conclut à l'absence de danger.

If the employer agrees danger exists, then it shall take immediate action to protect employees from the danger[43].

If the employer determines that no danger exists, or believes the situation is one for which the employee cannot refuse[44], then the employer shall notify the employee in writing[45]. If the employee continues the refusal, the employer shall inform the Minister and provide copies of the written reports which were created during the work refusal process:

128. (16) If the employee continues the refusal under subsection (15), the employer shall immediately inform the Minister and the work place committee or the health and safety representative of its decision and the continued refusal. **The employer shall also provide a copy of the report on the matter prepared under subsection (7.1) to the Minister along with a copy of any report referred to in**	128. (16) Si l'employé maintient son refus en vertu du paragraphe (15), l'employeur informe immédiatement le ministre et le comité local ou le représentant de sa décision et du maintien du refus. **Il fait également parvenir au ministre une copie du rapport qu'il a rédigé en application du paragraphe (7.1) ainsi que de tout rapport visé aux paragraphes**

[43] *Code*, s. 128(14)
[44] *Code*, s. 128(2)(*a*) or (*b*)
[45] *Code*, s. 128(15)

subsection (10.1) or (10.2). (emphasis added)	**(10.1) ou (10.2).** (caractères gras ajoutés)

Bill C-4 foresees the creation of a written record during the internal investigation into a work refusal. This allows the Minister to make certain decisions under the amended section 129 of the *Code*.

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6. Occupational Health and Safety: Minister's discretion over further steps

Unlike in the past where the *Code* obliged an HSO to investigate a continued work refusal, the Minister[46] is not obliged to investigate every work refusal. The Minister "shall" investigate the refusal, unless, in the Minister's opinion, another legal procedure could apply, the matter is frivolous or there is bad faith:

129. (1) If the Minister is informed of the employer's decision and the continued refusal under subsection 128(16), the Minister shall investigate the matter unless the Minister is of the opinion that (*a*) the matter is one that could more appropriately be dealt with, initially or completely, by means of a procedure provided for under Part I or III or under another Act of Parliament; (*b*) the matter is trivial, frivolous or vexatious; or (*c*) the continued refusal by the employee under 128(15) is in bad faith.	129. (1) Le ministre, s'il est informé de la décision de l'employeur et du maintien du refus en application du paragraphe 128(16), effectue une enquête sur la question sauf s'il est d'avis : *a*) soit que l'affaire pourrait avantageusement être traitée, dans un premier temps ou à toutes les étapes, dans le cadre de procédures prévues aux parties I ou III ou sous le régime d'une autre loi fédérale; *b*) soit que l'affaire est futile, frivole ou vexatoire; *c*) soit que le maintien du refus de l'employé en vertu du paragraphe 128(15)

[46] The Minister can delegate these powers, duties or functions: *Code* s. 140.

	est entaché de mauvaise foi.

If no further investigation takes place, the Minister must provide a decision in writing to the employer and the employee:

129. (1.1) **If the Minister does not proceed with an investigation, the Minister shall inform the employer and the employee in writing, as soon as feasible, of that decision.** The employer shall then inform in writing, as the case may be, the members of the work place committee who were designated under subsection 128(10) or the health and safety representative and the person who is designated by the employer under that subsection of the Minister's decision. (emphasis added)	129. (1.1) **Si le ministre ne procède pas à une enquête, il en informe l'employeur et l'employé, par écrit, aussitôt que possible.** L'employeur en informe alors par écrit, selon le cas, les membres du comité local désignés en application du paragraphe 128(10) ou le représentant et la personne désignée par l'employeur en application de ce paragraphe. (caractères gras ajoutés)

If the Minister decides not to investigate[47], the employee cannot continue to refuse to work.

The Board is only starting to consider parties' arguments on the proper interpretation and resulting impact of these October 31, 2014 Health and Safety amendments. The Board's jurisdiction under Part II of the *Code* is limited to reprisal complaints[48].

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[47] *Code* s. 129(1.2)

[48] See *Perron-Martin*, 2014 CIRB 719 and *Leslie*, 2013 CIRB 694 for a description of the Board's role for reprisal complaints under Part II of the *Code*.

7. Part III of the *Code*: Unjust Dismissal complaints

a. Division XIV of the *Code* (Unjust Dismissal)

Part III of the *Code* is comparable to employment standards legislation in many provinces. It contains various provisions, such as those related to minimum termination and severance obligations. Unlike most provincial employment standards legislation, however, Division XIV of Part III contains a regime entitled "Unjust Dismissal".

This type of regime blends employment and labour law concepts, given that the remedy of reinstatement may be available in certain situations.

The CIRB has no role in any matter arising under Part III of the *Code*. For Unjust Dismissal cases, the Minister appoints the adjudicators who hear the complaints.

In *Wilson* v. *Atomic Energy of Canada Limited*[49], the Federal Court of Appeal (FCA) confirmed an earlier Federal Court decision[50] that the *Code*'s Unjust Dismissal provisions did not prohibit dismissals on a without cause basis[51].

Atomic Energy had dismissed Mr. Wilson without cause and paid him six months' severance pay. Mr. Wilson filed a complaint under section 240 of the *Code* alleging his dismissal was unjust:

Unjust Dismissal	**Congédiement injuste**
240. (1) Subject to subsections (2) and 242(3.1), any person (*a*) who has completed **twelve consecutive months** of continuous	240. (1) Sous réserve des paragraphes (2) et 242(3.1), **toute personne qui se croit injustement congédiée** peut déposer une plainte écrite auprès d'un inspecteur si : *a*) d'une part, elle travaille **sans**

[49] 2015 FCA 17 (FCA), application for leave to appeal to the SCC filed March 23, 2015 (*Atomic Energy*)
[50] 2013 FC 733
[51] An application for leave to appeal to the Supreme Court was filed on March 23, 2015.

employment by an employer, and (*b*) who is **not a member of a group of employees subject to a collective agreement**, may make a complaint in writing to an inspector if the employee **has been dismissed and considers the dismissal to be unjust**. (2) Subject to subsection (3), a complaint under subsection (1) shall be made within **ninety days** from the date on which the person making the complaint was dismissed. (3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority. (emphasis added)	**interruption depuis au moins douze mois** pour le même employeur; *b*) d'autre part, **elle ne fait pas partie d'un groupe d'employés régis par une convention collective.** (2) Sous réserve du paragraphe (3), la plainte doit être déposée dans les **quatre-vingt-dix jours** qui suivent la date du congédiement. (3) Le ministre peut proroger le délai fixé au paragraphe (2) dans les cas où il est convaincu que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait, à tort, habilité à la recevoir. (caractères gras ajoutés)

Division XIV sets out certain conditions for complainants who want to file an Unjust Dismissal complaint:

i. employees must have completed 12 consecutive months of continuous employment[52];
ii. employees cannot be subject to a collective agreement[53];
iii. complaints must be filed within 90 days[54];
iv. "Managers" cannot file complaints[55]; and
v. a layoff ("licenciement") falls outside the Unjust Dismissal regime[56].

[52] Section 240(1)(*a*)
[53] Section 240(1)(*b*)
[54] Section 240(2)
[55] Section 167(3) reads:

(3) Division XIV does not apply to or in respect of employees who are managers.	(3) La section XIV ne s'applique pas aux employés qui occupent le poste de directeur.

Not surprisingly, disputes in the decided cases often arise over whether the "dismissal" was a "layoff"[57] or not.

Section 241(1) of the *Code* allows the employee, or an inspector, to request that the employer set out in writing the reasons for the dismissal ("congédiement" in French):

241. (1) Where an employer dismisses a person described in subsection 240(1), **the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal**, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made. (emphasis added)	241. (1) **La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander par écrit à l'employeur de lui faire connaître les motifs du congédiement;** le cas échéant, l'employeur est tenu de lui fournir une déclaration écrite à cet effet dans les quinze jours qui suivent la demande. (caractères gras ajoutés)

The *Code* sets out adjudicators' remedial powers, which include the right to reinstate the employee in his/her employment and to award compensation:

242. (4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the	242. (4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :

[56] Section 242(3.1) reads:

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where (*a*) **that person has been laid off** because of lack of work or because of the discontinuance of a function; or (*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.	(3.1) L'arbitre ne peut procéder à l'instruction de la plainte dans l'un ou l'autre des cas suivants : *a*) **le plaignant a été licencié** en raison du manque travail ou de la suppression d'un poste; *b*) la présente loi ou une autre loi fédérale prévoit un autre recours.

[57] See for example, *Tsoi* v. *Royal Bank of Canada*, 2013 CanLII 41572

employer who dismissed the person to (*a*) **pay the person compensation** not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person; (*b*) **reinstate the person in his employ;** and (*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal. (emphasis added)	*a*) **de payer au plaignant une indemnité** équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié; *b*) **de réintégrer le plaignant dans son emploi**; *c*) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier. (caractères gras ajoutés)

The FCA in *Atomic Energy* found that two opposing schools of thought had arisen regarding whether the Unjust Dismissal regime limited a federal private employer's right to terminate certain employees on a without cause basis. The FCA described the central legal issue:

> [44] The central legal issue before the adjudicator, the Federal Court and this Court concerns a statutory interpretation question. That question is whether Part III of the *Canada Labour Code* permits dismissals on a without cause basis.

The FCA noted that the lack of a single tribunal applying the Unjust Dismissal provisions had prevented any uniform interpretation of Division XIV from developing over time:

> [53] **In the case of some tribunals that sit in panels, one panel may legitimately disagree with another on an issue of statutory interpretation. Over time, it may be expected that differing panels will sort out the disagreement** through the development of tribunal jurisprudence or through the type of institutional discussions approved in *IWA* v. *Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524. It may be that at least in the initial stages of discord, without other considerations bearing upon the matter, the rule of law concerns do not predominate and so reviewing courts should lay off and give the tribunal the opportunity to work out its jurisprudence, as Parliament has authorized it to do.
>
> [54] **However, here, we are not dealing with initial discord on a point of statutory interpretation at the administrative level. Instead, we are dealing with persistent discord that has existed for many years. Further, because no one adjudicator binds another and because adjudicators operate**

> **independently and not within an institutional umbrella such as a tribunal, there is no prospect that the discord will be eliminated.** There is every expectation that adjudicators, acting individually, will continue to disagree on this point, perhaps forever.
>
> (emphasis added)

The FCA decided the standard of review in *Atomic Energy* was one of correctness and that it had to act as "tie-breaker", given the two competing lines of reasoning:

> [55] As a result, at a conceptual level, the rule of law concern predominates in this case and warrants this Court intervening to end the discord and determine the legal point once and for all. **We have to act as a tie-breaker.**
>
> [56] *Dunsmuir* envisaged just such a situation and formulated a presumptive rule to be applied in circumstances such as these. **Where a question of law is of "central importance to the legal system…and outside the…specialized area of expertise" of the administrative decision-maker, correctness is presumed to be the standard of review (at paragraph 55).** Questions of central importance to the legal system are those whose "impact on the administration of justice as a whole" is such that they "require uniform and consistent answers" (at paragraph 60). **In other words, for certain questions and for some questions in unusual circumstances, rule of law concerns predominate. In these, the court must decide the matter by giving its view of the correct answer.**
>
> (emphasis added)

The FCA also concluded that, even under a reasonableness analysis, a decision finding that the *Code's* Unjust Dismissal provisions prevented dismissals on a without cause basis would similarly require the court to intervene. In the FCA's view, the statutory interpretation point involved "relatively little specialized labour insight":

> [58] **Even if the standard of review were reasonableness, as we shall see, the statutory interpretation point before us involves relatively little specialized labour insight beyond the regular means the courts have at hand when interpreting a statutory provision.** Accordingly, if we were to conduct reasonableness review in this case, we would afford the adjudicator only a narrow margin of appreciation: see, *e.g., Canada (Public Safety and Emergency Preparedness)* v. *Huang*, 2014 FCA 228, 245 A.C.W.S. (3d) 846, and *Canada (Attorney General)* v. *Abraham*, 2012 FCA 266, 440 N.R. 201. **In the end, whether we conduct reasonableness review or correctness review, the outcome of this appeal would be the same.**
>
> **D. The merits of the statutory interpretation question**
>
> [59] Conducting reasonableness review and apparently affording the adjudicator only a very limited margin of appreciation, the Federal Court found that the adjudicator misinterpreted the Federal

> Court authority of Redlon, supra. Examining Redlon and other authorities, and examining the regime for dismissals under the *Code*, referring specifically to sections 230, 235, 240 and 242 of the *Code*, the Federal Court found that the *Code* does permit dismissals without cause.
>
> …
>
> [62] **Like the Federal Court and the adjudicators' decisions in paragraph 48 above, I conclude that a dismissal without cause is not automatically "unjust" under Part III of the *Code*. An adjudicator must examine the circumstances of the particular case to see whether the dismissal is "unjust."**
>
> (emphasis added)

The FCA concluded on several grounds that the Unjust Dismissal provisions in Part III did not prevent an employer from terminating an employee on notice. As a result, an adjudicator's remedial powers only become pertinent if he or she first concluded that the dismissal was "unjust":

> [100] The Federal Court also said that the broad remedial powers under subsection 242(2) kick in when "the adjudicator … concludes on any basis that the dismissal was unjust" (my emphasis, at paragraph 36). On this, it bears noting that an adjudicator under the *Code* does not have free rein to find a dismissal "unjust" on "any basis." As I have suggested above, "unjust" is a term that sits alongside and gathers much, if not all, of its meaning from well-established common law and arbitral cases concerning dismissal. It is also a term whose meaning must be discerned using accepted principles of statutory interpretation: see paragraph 75, above. I shall not comment further on the meaning of "unjust." It is for Parliament's chosen decision-makers in this specialized field – the adjudicators – to develop the jurisprudence concerning the meaning of "unjust" on an acceptable and defensible basis, not "any basis." It is for us to review the adjudicators' interpretations for acceptability and defensibility when they are brought before us.
>
> E. Conclusion
>
> [101] For the reasons offered by the Federal Court and for the foregoing additional reasons, I reject the appellant's submission that the *Code* does not permit dismissals on a without cause basis.

b. Just cause provisions in other provinces' employment standards legislation

The Unjust Dismissal regime in Division XIV was added to the *Code* in the 1970s. Two other provinces in the 1970s also added their own statutory regimes governing employee dismissals.

i. Nova Scotia

The FCA in *Atomic Energy* concluded that the Unjust Dismissal provisions in Part III of the *Code* did not clearly oust the Common Law, unlike a contemporary provision Nova Scotia added to its legislation in the 1970s:

> [71] **If Parliament intended to limit the right of an employer to terminate an employment relationship to cases where just cause existed, it could have said so quite explicitly. After all, before Parliament passed the provisions in issue before us, the Nova Scotia Legislature did just that.** It amended its labour legislation to provide that an "employer shall not discharge … [an] employee without just cause": *Labour Standards Act*, S.N.S. 1975, c. 50, section 4. Further, we have evidence that Parliament knew of Nova Scotia's legislative initiative when considering whether to pass the relevant provisions before us: *Minutes of Proceedings and Evidence of the Standing Committee on Labour, Manpower and Immigration respecting Bill C-8, An Act to Amend the Canada Labour Code* (House of Commons, February 9, 1978 at page 18). Yet, Parliament refrained from adopting the "irresistible clearness" of the language used by the Nova Scotia Legislature.
>
> (emphasis added)

In Nova Scotia's current *Labour Standards Code*[58], section 71 sets out that only employees with 10 or more years of service are eligible for the just cause protection to which the FCA in *Atomic Energy* made reference:

> Dismissal or suspension without just cause
>
> 71 (1) **Where the period of employment of an employee with an employer is ten years or more, the employer shall not discharge or suspend that employee without just cause** unless that employee is a person within the meaning of person as used in clause (d), (e), (f), (g), (h) or (i) of subsection (3) of Section 72.
>
> (2) An employee who is discharged or suspended without just cause may make a complaint to the Director in accordance with Section 21.
>
> (3) An employee who has made a complaint under subsection (2) and who is not satisfied with the result may make a complaint to the Board in accordance with Section 23 and such complaint shall be and shall be deemed to be a complaint within the meaning of subsection (1) of Section 23.
>
> (emphasis added)

[58] Chapter 246, R.S. 1989

Nova Scotia's *Labour Standards Code* also contains the usual provisions found in this type of legislation, such as those regarding notice of termination[59]. Nova Scotia's *Code* excludes certain types of employees from the just cause protection found at section 71, including:

i. persons laid off for reasons beyond the control of the employer[60];
ii. persons exempted by Regulation such as the members of various named professions[61]; and
iii. persons subject to a collective agreement[62].

ii. Quebec

Quebec's employment standards legislation, the Loi sur les normes du travail[63] (LNT), contains many of the usual clauses. For example, the LNT sets out the minimum notice to be provided to terminate employees[64].

Under section 124 of the LNT, employees may not to be "dismissed", except for "good and sufficient cause". The original French expression used is "congédié sans une cause juste et suffisante":

DIVISION III RECOURSE AGAINST DISMISSALS NOT MADE FOR GOOD AND SUFFICIENT CAUSE	SECTION III RECOURS À L'ENCONTRE D'UN CONGÉDIEMENT FAIT SANS UNE CAUSE JUSTE ET SUFFISANTE
124. An employee credited with two years of uninterrupted service in the same enterprise who believes that he has **not been dismissed for a good and sufficient cause** may present his	124. Le salarié qui justifie de deux ans de service continu dans une même entreprise et qui croit avoir été **congédié sans une cause juste et suffisante** peut soumettre sa plainte par écrit à la

[59] Section 72
[60] Section 72(3)
[61] General Labour Standards Code Regulations (Regulation), Sections 2(2); 2(2a); 2(4);
[62] Regulation, section 2(5)
[63] RLRQ c N-1.1
[64] Section 82

complaint in writing to the Commission des normes du travail or mail it to the address of the Commission des normes du travail within 45 days of his dismissal, **except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this Act, in another Act or in an agreement.** If the complaint is filed with the Commission des relations du travail within this period, failure to have presented it to the Commission des normes du travail cannot be set up against the complainant. (emphasis added)	Commission des normes du travail ou la mettre à la poste à l'adresse de la Commission des normes du travail dans les 45 jours de son congédiement, **sauf si une procédure de réparation, autre que le recours en dommages-intérêts, est prévue ailleurs dans la présente loi, dans une autre loi ou dans une convention.** Si la plainte est soumise dans ce délai à la Commission des relations du travail, le défaut de l'avoir soumise à la Commission des normes du travail ne peut être opposé au plaignant. (caractères gras ajoutés)

Section 124 of the LNT establishes certain conditions for employees who want to file a complaint:

i. employees must have two years of uninterrupted service[65];
ii. complaints must be filed within 45 days[66];
iii. the section does not apply to employees covered by a comparable provision in a collective agreement[67]; and
iv. "senior managerial personnel" (un cadre supérieur) cannot file a complaint[68].

Section 125 of the LNT allows the Commission des normes du travail (CNT) to demand that the employer set out in writing the reasons for the employee's dismissal ("congédiement"). The employee may request a copy of these reasons from the CNT:

125. Upon receiving the complaint, the Commission des normes du travail may, with the agreement of the parties,	125. Sur réception de la plainte, la Commission des normes du travail peut, avec l'accord des parties, nommer une

[65] LNT, Section 124
[66] LNT, Section 124
[67] LNT, Section 124
[68] LNT, Section 3(6)

appoint a person who shall endeavour to settle the complaint to the satisfaction of the interested parties. The second and third paragraphs of section 123.3 apply for the purposes of this section. **The Commission des normes du travail may require from the employer a writing containing the reasons for dismissing the employee. It must provide a copy of this writing to the employee, on demand.** (emphasis added)	personne qui tente de régler la plainte à la satisfaction des intéressés. Les deuxième et troisième alinéas de l'article 123.3 s'appliquent aux fins du présent article. **La Commission des normes du travail peut exiger de l'employeur un écrit contenant les motifs du congédiement du salarié. Elle doit, sur demande, fournir une copie de cet écrit au salarié.** (caractères gras ajoutés)

The Commission des relations du travail (CRT) is the equivalent of a provincial labour board like the Ontario Labour Relations Board. The CNT, on the other hand, processes employee complaints. The CNT regularly represents non-unionized employee complainants before the CRT:

126.1 **The Commission des normes du travail may, in a proceeding under this division, represent an employee who does not belong to a group of employees to which certification has been granted under the Labour Code** (chapter C-27). (emphasis added)	126.1. **La Commission des normes du travail peut, dans une instance relative à la présente section, représenter un salarié qui ne fait pas partie d'un groupe de salariés visé par une accréditation accordée en vertu du Code du travail** (chapitre C-27). (caractères gras ajoutés)

The CRT adjudicates the complaints and has the remedial authority to order an employee's reinstatement and award an indemnity for lost wages:

128. Where the Commission des relations du travail considers that the employee has been dismissed without good and sufficient cause, the Commission may (1) **order the employer to reinstate the**	128. Si la Commission des relations du travail juge que le salarié a été congédié sans cause juste et suffisante, elle peut: 1**° ordonner à l'employeur de réintégrer le salarié;**

employee; (2) **order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;** (3) render any other decision the Commission believes fair and reasonable, taking into account all the circumstances of the matter. However, in the case of a domestic or a person whose exclusive duty is to take care of or provide care to a child or to a sick, handicapped or aged person, the Commission des relations du travail may only order the payment to the employee of an indemnity corresponding to the wage and other benefits of which he was deprived due to dismissal. (emphasis added)	2° **ordonner à l'employeur de payer au salarié une indemnité jusqu'à un maximum équivalant au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;** 3° rendre toute autre décision qui lui paraît juste et raisonnable, compte tenu de toutes les circonstances de l'affaire. Cependant dans le cas d'un domestique ou d'une personne dont la fonction exclusive est d'assumer la garde ou de prendre soin d'un enfant, d'un malade, d'une personne handicapée ou d'une personne âgée, la Commission des relations du travail ne peut qu'ordonner le paiement au salarié d'une indemnité correspondant au salaire et aux autres avantages dont l'a privé le congédiement. (caractères gras ajoutés)

The CNT on its website interprets the term "dismissal", or "congédiement"[69] in French, as one which involves some element of employee fault:

Dismissal A dismissal is the permanent severing of the employment relationship at the employer's initiative **for reasons related to the competence or behaviour of the employee.** Barring exceptions, an employer who dismisses an employee must give him, within the time periods stipulated in the Act, a notice of termination of	Congédiement Le congédiement est la rupture définitive du lien d'emploi à l'initiative de l'employeur **pour des motifs liés aux compétences ou aux comportements du salarié.** Sauf exceptions, l'employeur qui congédie un salarié doit lui remettre, dans les délais prévus par la loi, un avis de cessation d'emploi. Au moment du congédiement,

[69] http://www.cnt.gouv.qc.ca/fin-demploi/mise-a-pied-licenciement-congediement-et-demission/index.html

employment. At the time of the dismissal, the employer must make sure that the employee receives all of the sums owing to him: wages, overtime, vacation indemnity (4% or 6%), etc. (emphasis added)	l'employeur doit s'assurer de remettre au salarié toutes les sommes qui lui sont dues : salaire, heures supplémentaires, indemnité de vacances (4 % ou 6 %), etc. (caractères gras ajoutés)

The CNT describes a dismissal which does not involve the fault of the employee as a "permanent layoff", or "licenciement"[70] in French:

Permanent layoff **A permanent layoff is the permanent severing of the employment relationship by the employer for:** • **economic reasons. Example: financial difficulties, a decline in revenues** • **organizational reasons. Example: a reorganization resulting in the abolition or the merging of positions** • **technical reasons. Example: technological innovations.** An employer lays off his employee permanently when the employer no longer requires the employee's services. The employer's choice is based on objective criteria, such as: • performance • skills • versatility • seniority.	**Licenciement** **Le licenciement est la rupture définitive du lien d'emploi par l'employeur pour des motifs :** • **économiques, comme des difficultés financières ou une baisse de revenus** • **organisationnels, comme une réorganisation entraînant l'abolition ou la fusion de postes** • **techniques, comme des innovations technologiques.** L'employeur licencie son employé quand il n'a plus besoin de ses services. Le choix de l'employeur est basé sur des critères objectifs, tels que : • le rendement • les compétences • la polyvalence • l'ancienneté. L'employeur doit remettre à l'employé, dans les délais prévus par la loi, un avis de

[70] http://www.cnt.gouv.qc.ca/fin-demploi/mise-a-pied-licenciement-congediement-et-demission/index.html

The employer must give the employee, within the time periods stipulated in the Act, a notice of termination of employment. At the time of the permanent layoff, the employer must make sure that the employee receives all of the sums owing to him: wages, overtime, vacation indemnity (4% or 6%), etc. (emphasis added)	cessation d'emploi. Au moment du licenciement, l'employeur doit s'assurer de remettre au salarié toutes les sommes qui lui sont dues : salaire, heures supplémentaires, indemnité de vacances (4 % ou 6 %), etc. (caractères gras ajoutés)

Not surprisingly, debates often arise in Quebec cases about whether an announced lay off (licenciement) was in reality a dismissal (congédiement)[71]. The employer has the burden of proof to demonstrate that a *bona fide* lay off took place.

The Unjust Dismissal provisions in Part III of the *Code* similarly differentiate the concept of a dismissal (congédiement) from that of a layoff (licenciement).

IV. Summary

When Bill C-525 officially comes into force on June 16, 2015, it will mark the end, for now at least, of a recent period of significant legislative amendments impacting the *Code*. The CIRB has already amended its *Regulations* twice in recent years in order to reflect various changes, including the advent of the ATSSC.

The introduction of new federal legislation always raises the spectre of having to compare the new provisions in both official languages. That is the only way to apply the shared meaning rule of bilingual interpretation, if ambiguities arise concerning Parliament's intention.

The CIRB has been focusing its recent efforts on its new obligations to conduct mandatory representation votes in certification and revocation applications. Further amendments to the Board's *Regulations* are in progress[72].

[71] See, for example, *Torunski* c. *Métal Leetwo inc.*, 2015 QCCRT 0013

Parties are starting to come to the Board with various arguments about the impact of the changes to Part II of the *Code*, including those arising from the addition of a new definition of "danger" and the obligation to produce written reports when a work refusal takes place.

Labour lawyers will no doubt have an academic interest in following the recent *Atomic Energy* case, now that an application for leave to appeal to the SCC has been filed. The case raises several interesting issues, including those concerning the standard of review and the statutory interpretation of bilingual legislation.

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Prior to being appointed a CIRB Vice-Chair in 2007, Graham J. Clarke practised labour and employment law in both Ontario and Quebec. He has been a member of both Bars since 1987. This paper, along with those he authored for previous Six-Minute Labour Lawyer conferences, can be found under the "New Developments" tab in his book "Clarke's Canada Industrial Relations Board".

[72] The Board's website provides updates about this process.