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# Measuring the Flexibility of Labour Relations Laws in Canada and the United States

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## Executive summary

*Measuring the Flexibility of Labour Relations Laws in Canada and the United States* evaluates the extent to which the rules established by labour relations legislation bring flexibility to the labour market while balancing the needs of both employers and employees. Balanced labour laws are crucial in providing an environment that encourages productive economic activity. Labour relations laws that favour one group over another or that are overly prescriptive, inhibit the proper functioning of a labour market and thus reduce its performance. Empirical evidence from around the world indicates that jurisdictions with flexible labour markets enjoy higher rates of job creation, greater benefits from technological change, and higher rates of economic growth.

This paper evaluates labour relations laws in the private sector for the 10 Canadian provinces and 50 US states. The 10 components examined in the study are grouped into four areas: (1) Certification and Decertification, (2) Union Security, (3) Mandatory Clauses, and (4) Labour Disputes. In addition, a composite measure of labour relations flexibility is also calculated to provide an overall assessment of a jurisdiction's approach to relations between workers and employers. There is also an overview of public-sector labour relations laws in Canada and the United States.

## Index of Flexibility in Labour Relations Law

The Index of Flexibility in Labour Relations Law gives the score for each Canadian province and US state. The overall index is based on the scores obtained on each of the four areas of labour relations laws. It represents a measure of each jurisdiction's overall labour relations policy. The Index is measured on a scale from 0 to 10; jurisdictions with more flexible labour relations laws receive higher scores while jurisdictions with less flexible labour relations laws receive lower scores. **[Summary table]** Note that a score of 10 is not indicative of ideal labour relations legislation but rather is a relative measure of flexibility in labour relation laws across the 10 Canadian provinces and the 50 US states.

Jurisdictional authority for the regulation of relations between employers and employees in Canada differs markedly from that in the United States. In Canada, regulation and enforcement of labour relations is largely decentralized and left to the control of the provinces. Each province has its own set of labour relations laws for both the private and public sectors that are independent of any other province as well as of federal law. In the United States, on the other hand, private-sector labour relations laws are centralized, regulated through federal law, and enforced under federal authority by the National Labor Relations Board (NLRB).

Since US labour relations laws are largely federal, the only difference found across US states was whether or not a state had enacted Right-to-Work (RTW) legislation—more

***Summary table: Index of Flexibility in Labour Relations Law***

| | Score (out of 10) | Rank (out of 60) |
|---|---|---|
| **Right-to-Work States** | 9.2 | tied for first place |
| **Non-Right-to-Work States** | 7.9 | tied for 23rd place |
| **Alberta** | 6.7 | 51 |
| **Ontario** | 4.6 | 52 |
| **Prince Edward Island** | 3.8 | 53 |
| **Newfoundland** | 3.3 | 54 |
| **Manitoba** | 3.0 | 55 |
| **Nova Scotia** | 3.0 | 55 |
| **British Columbia** | 2.9 | 57 |
| **New Brunswick** | 2.5 | 58 |
| **Saskatchewan** | 2.5 | 58 |
| **Quebec** | 1.6 | 60 |

accurately described as worker choice laws. The 22 states with such laws have the most flexible labour relations policy amongst the 10 Canadian provinces and 50 US states, each receiving a score of 9.2 out of 10. The remaining 28 US states were tied for the 23rd position with an overall score of 7.9.

The Canadian provinces occupied the last 10 positions (51st to 60th). The only province with a passing score (higher than 5) was Alberta with an overall score of 6.7 (out of 10). Quebec had the most rigid set of labour relations laws in all of Canada and the United States (score of 1.6), followed closely by Saskatchewan (2.5) and New Brunswick (2.5).

A brief description and overview of the results for each of the areas covered by the Index of Flexibility in Labour Relations Law are presented below.

### *1 Certification and decertification*

Certification and decertification refer to the processes through which a union acquires and loses its power to be the exclusive bargaining agent for a group of employees. A number of aspects of certification and decertification were examined in order to ascertain how well a jurisdiction balanced the needs of workers, employers, and unions, including the use of mandatory secret ballot elections, balanced voting thresholds, and remedial certification.

Alberta and Ontario topped the rankings on this indictor, both with scores of 10. Most jurisdictions performed reasonably well on this measure of labour relations flexibility; only Manitoba failed to receive a passing score (3.7 out of 10), indicating relatively inflexible and biased rules for certification and decertification.

There were some interesting findings within the various components of the certification and decertification indicator. For example, five of the 60 jurisdictions (Saskatchewan, Manitoba, Quebec, New Brunswick and Prince Edward Island) do not require a vote by secret ballot for employees to become unionized. Four jurisdictions (Saskatchewan, Manitoba, Quebec, and Nova Scotia) have certification thresholds lower than the decertification thresholds, making it easier for a union to gain bargaining power than to lose it through decertification.

### *2 Union security*

Provisions for union security determine whether or not an employer and a union may include a clause in their collective agreement that requires membership in a union or mandatory payments of dues as a condition of employment. Union security provisions vary from restrictive, where all workers must be union members and pay full dues as a condition of employment, to flexible, where employees have the choice of becoming a union member and do not have to pay union dues.

The results for this measure of the flexibility of labour relations law indicate that there are three distinct groups of jurisdictions. The first group, that achieving the highest score (10 out of 10), are American Right-to-Work states, in which workers are permitted to choose whether or not to join a union and pay union dues. The second group of jurisdictions, which scored 5 out of 10 and tied for 23rd position, are the American states without worker choice laws (RTW legislation). Workers in these states are permitted to choose whether or not to join a union but must remit a portion of union dues to cover costs associated with negotiating and maintaining the collective agreement. The final group, the one that scores poorly on this measure (0 out of 10), are the Canadian provinces. All 10 Canadian provinces, in one way or another, permit clauses in collective agreements requiring union membership and mandatory payment of dues.

### *3 Mandatory clauses*

*Successor rights*

Successor employer provisions determine whether, and how, collective bargaining agreements survive the sale, transfer, consolidation, or other disposal of a business. If a business, or portion of a business, is rendered uneconomical as the result of changes in the market, reductions in competitiveness, or other reasons, stringent successor laws will impede the reorganization of the business or the efficient reallocation of its capital.

The legislation in each Canadian province makes an existing collective agreement binding upon the new employer, when a business, in whole or in part, is sold, transferred, leased, merged, or otherwise disposed of. Conversely, it is rare in the United States for a purchaser to be responsible for the incumbent collective bargaining agreement.

*Technological change*

Technological change provisions in labour relations laws require a notice of technological investment and change by the employer to the union. These provisions are a barrier to technological change and could have serious and adverse effects on productivity. Only five jurisdictions, again all Canadian (British Columbia, Saskatchewan, Manitoba, Quebec, and New Brunswick) require a notice be sent in advance when technological change is to be introduced that may affect either the collective bargaining agreement or employment. The remaining Canadian provinces and all US states have no such requirement.

*Arbitration of disputes*

An important component of labour relations flexibility is how disputes about the collective bargaining agreement, its meaning, application, or alleged violations are resolved when both parties cannot, or no longer wish to, negotiate a solution. Laws that force parties into immediate binding arbitration without allowing voluntary efforts such as mediation, may not only increased costs for both parties (e.g., arbitrator fees) but may also create hostility between management and the union.

Only six jurisdictions, all Canadian (British Columbia, Saskatchewan, Ontario, Quebec, New Brunswick, and Prince Edward Island), force immediate and binding arbitration. The remaining four Canadian provinces and all US states permit other voluntary mechanisms such as mediation prior to the use of binding arbitration.

### *4 Labour disputes*

*Replacement workers*

In the event of a legal strike or lockout, an employer may wish to hire replacement workers. Employers can then continue partial business operations, maintaining market share and securing investor confidence while addressing reasons for the strike. Only four jurisdictions (British Columbia, Quebec, Nova Scotia, and Newfoundland) preclude the use of temporary workers. The remaining six Canadian provinces and all US states either have specific legislation allowing replacement workers or have legal precedents that indicates their use is permitted. Employers in US states can, in some circumstances, hire permanent replacement workers.

*Third-party picketing*

Third-party (or second-site) picketing refers to the ability of striking workers and their union to picket and, therefore, disrupt the operations of enterprises not covered by the collective agreement. Two Canadian provinces, British Columbia and Alberta, specifically prohibit third-party picketing while the overall direction of the National Labor Relations Board in the US is to prohibit third-party involvement as much as possible. The remaining eight Canadian provinces all permit third-party pickets.

## Conclusion

Canadian provinces generally lag their US counterparts in the level of flexibility accorded their citizens by labour relations laws. Such flexibility has proven to be of great benefit to citizens both in the United States and around the world. Canadian provinces would be well advised to pursue greater flexibility in their labour laws in order to promote better performance in the labour market.

## Introduction

Labour relations laws provide for the regulation and enforcement of the interactions among unionized employees, unions, and employers as well as the process through which unions gain and lose the right to represent workers in collective bargaining. In 2003, these laws regulated over four million workers in Canada—32.4% of the total workforce—and 17 million workers in the United States—14.3% of the workforce (Statistics Canada, 2003; Hirsch and Macpherson, 2003). One of the over-arching objectives of government in designing labour relations laws should be to establish an environment within which productive economic activities can not only occur but flourish. Labour laws that favour one group at the expense of another or laws that are overly prescriptive and prevent innovation and flexibility will inhibit the proper and efficient functioning of the labour market. [1] Empirical evidence from around the world indicates that jurisdictions with more flexible labour markets have better records in job creation, enjoy greater benefits from technological change, and experience faster growing economies (OECD, 1994).

Flexibility allows the labour market to adjust to market changes and permits employees and employers to reallocate labour resources to maximize productivity. For employees, flexibility allows them to shift their efforts to endeavours that provide the greatest return or benefit. Similarly, flexibility allows employers to change the mix of capital and labour to respond to market changes. This paper measures the flexibility of labour relations laws across the Canadian provinces and American states. It evaluates whether or not the rules established by labour relations legislation and case law to govern relations between employers and employees bring flexibility to the labour market while balancing the needs of both.

This paper evaluates labour relations laws in the private sector for the 10 Canadian provinces and 50 US states. The 10 components examined in the study are grouped into four areas: (1) Certification and Decertification, (2) Union Security, (3) Mandatory Clauses, and (4) Labour Disputes. In addition, a composite measure of labour relations flexibility is also calculated to provide an overall assessment of a jurisdiction's approach to relations between workers and employers. There is also an overview of public-sector labour relations laws in Canada and the United States.

### *Jurisdictional differences*

Jurisdictional authority for the regulation of relations between employers and employees in Canada differs markedly from that in the United States. In Canada, regulation and enforcement of labour relations is largely decentralized and left to the control of the provinces. [2] Each province has its own set of labour relations laws for both the private and public sectors that are independent of any other province as well as of federal law. On the other hand, in the United States private-sector labour relations laws are central-

ized, regulated through federal law, and enforced under federal authority by the National Labor Relations Board (NLRB). [3] While the NLRB does pre-empt any lower statutory law, each state has the power to clarify, expand upon, or introduce new laws in addition to, but not contravening, the federal law. US states, like Canadian provinces, have full jurisdiction over public-sector labour relations laws.

### *Methodology*

For the method by which the scores for the Index of Flexibility in Labour Relation Law were computed, see **Appendix A**, page 38.

# Labour relations laws in the private sector

## 1 Certification and decertification

***Certification***

Certification refers to the process through which a union acquires the power to be the exclusive bargaining agent for a group of employees. There are a number of important aspects of certification, including the use of mandatory secret-ballot elections, remedial certification, and differences between the thresholds for certification and decertification. **[Table 1 & Table 2]**

*Application for certification*

For a union to submit an application for certification to the Labour Relations Board, they must have written support from a prescribed percentage of workers. Eight of the 10 Canadian provinces require workers to complete union membership cards while the remaining two require either written petitions, individual letters, or membership cards. In US states, either written petitions, individual letters, or membership cards can be used as the support for an application.

The threshold for indications of support, through either membership cards, petitions, or individual letters ranges from a low of 25% of workers in a bargaining unit in Saskatchewan to 50%+1 in Prince Edward Island. For all US states, the threshold is 30%. **[Table 1]**

*Secret ballot vote versus automatic certification*

Another important aspect is the means by which certification is completed. Once a union has achieved the required level of support to trigger a certification vote, the Labour Relations Board will either conduct a secret ballot vote or, in some jurisdictions, automatically certify the union based on a prescribed level of support. This is of particular concern for labour market flexibility since workers may be subjected to undue pressure from co-workers and union representatives to sign a union card or petition without recourse to an autonomous decision made in private by secret ballot. Currently, all 50 US states and five Canadian provinces (British Columbia, Alberta, Ontario, Nova Scotia, and Newfoundland) require a mandatory secret ballot vote to certify a union. The remaining five provinces (Saskatchewan, Manitoba, Quebec, New Brunswick, and Prince Edward Island) allow automatic certification if the indication of support exceeds a specified threshold. The threshold for automatic certification varies from 50%+1 in Quebec, Saskatchewan, and Prince Edward Island to 65% in Manitoba.

It is also important to note that the impact of certification and decertification elections on Canadian workers is more profound than on US workers. In Canada, because

### *Table 1: Certification*

| | Is union membership required for application? | Threshold required for application | Is vote by secret ballot required for certification? | Threshold required for certification vote | Threshold for automatic certification [a] | Is remedial certification allowed? |
|---|---|---|---|---|---|---|
| **British Columbia** | Yes | 45% | Yes | 50%+1 | n/a | Yes |
| **Alberta** | No | 40% | Yes | 50%+1 | n/a | No |
| **Saskatchewan** | No | 25% | No | 50%+1 **[e]** | 50%+1 | No |
| **Manitoba** | Yes | 40% | No | 50% +1 **[e]** | 65% **[f]** | Yes |
| **Ontario** | Yes | 40% | Yes | 50%+1 | n/a | No |
| **Quebec** | Yes | 35% | No | 50%+1 **[e]** | 50%+1 **[g]** | No |
| **New Brunswick** | Yes | 40% | No | 50% +1 **[e]** | 60% **[h]** | Yes |
| **Nova Scotia** | Yes | 40% **[c]** | Yes | 50%+1 | n/a | Yes |
| **Prince Edward Is.** | Yes | 50%+1 | No | 50%+1 **[e]** | 50%+1 **[i]** | No **[j]** |
| **Newfoundland** | Yes | 40% **[d]** | Yes | 50%+1 | n/a | Yes **[k]** |
| **All US states [b]** | No | 30% | Yes | 50%+1 | n/a | Yes |

Sources: *Provincial Labour Codes*; National Labour Relations Board; for details, see Labour Relations Laws on p. 46.
**[a]** Threshold for automatic certification is the threshold required to certify a union without a representative vote.
**[b]** In the United States, private-sector labour relations are under federal, not state, jurisdiction and thus the laws are uniform across all states.
**[c]** In Nova Scotia, the threshold required to apply for certification for the construction industry is 35%.
**[d]** In Newfoundland, a union has to have at least 50%+1 of the bargaining unit sign union cards in order to apply to the Labour Relations Board but, if the Board after investigation determines that the union has the support of only 40% of the bargaining unit, it will still conduct a vote.
**[e]** If the vote is conducted.
**[f]** In Manitoba, if a union has membership cards for more than 65% of the unit, the workplace will be unionized and there will not be a vote. If a union has membership cards for between 40% and 65% of the unit, there will be a vote by secret ballot.
**[g]** In Quebec, if a union has membership cards for more than 50% of the unit, the workplace will be unionized and there will not be a vote. If a union has membership cards for between 35% and 50% of the unit, there will be a vote by secret ballot.
**[h]** In New Brunswick, if a union has membership cards for more than 60% of the unit, the workplace will be unionized and there will be no vote. If a union has membership cards for between 50% and 60% of the unit, the workplace may be unionized without a vote. If a union has membership cards for between 40% and 50% of the unit, there will be a vote by secret ballot.
**[i]** Prince Edward Island's legislation states that, if the majority of employees in a unit sign union cards, the Labour Relations Board may certify the union without a representation vote. The interpretation of "majority" is left to the Labour Relations Board but it is always more than 50%.
**[j]** There are no provisions in the Labour Act of Prince Edward Island that either prohibits or allows the Labour Relations Board to certify a union without conducting a representation vote. This was interpreted to mean that the Labour Relations Board does not have the power to certify a union without conducting a representation vote. However, there is a recent case where the PEI Labour Relations Board certified the union without conducting a vote (see *Polar Foods v. Labour Relations Board et al.* 2002 PESCTD 78). The Labour Relations Board's decision is currently under judicial review.
**[k]** Based on case law. There is nothing in Newfoundland's Labour Relations Act about remedial certification.

unions have monopoly bargaining status, a union that succeeds in gaining the support of enough workers for an application triggers a vote that affects every employee in the bargaining unit. In the United States, a union that succeeds in gaining enough support among workers for an application triggers a vote that may not affect all of the employees, since workers in the United States may remove themselves from union membership and, in some states, remove themselves from the obligation to pay full union dues (see "Union Security" below for further details).

*Remedial certification*

In the case of an employer deemed to have illegally interfered with a union's campaign for certification (often referred to as a "union drive"), or otherwise influenced or threatened employees not to vote in favour of certification (classified as an "unfair labour practice" in legislation), the Labour Relations Board may have remedial certification power, whereby they can automatically certify a union that claims to represent the aggrieved employees. In most cases, the Labour Relations Board automatically certifies a union only if, in their opinion, a fair and representative election is not possible. The Labour Relations Boards in five Canadian provinces (British Columbia, Manitoba, New Brunswick, Nova Scotia, and Newfoundland) have the power to certify a union automatically in the event of an employer committing an unfair labour practice. The appointment of officials to the Labour Relations Boards in these jurisdictions is, therefore, much more critical given their discretionary power. The remaining five Canadian provinces (Alberta, Saskatchewan, Ontario, Quebec, and Prince Edward Island) do not permit remedial certification.

In the United States, the National Labor Relations Board has remedial certification authority but it is rarely used. It is the US Supreme Court's position that the National Labor Relations Board has remedial authority only where the unfair labour practices of the employer are so outrageous and pervasive "that there is no reasonable possibility that a free and un-coerced election could be held" (395 U.S. 575). For the overwhelming majority of cases, the National Labor Relations Board would issue an investigation and proceed to normal certification procedures. [4]

***Decertification***

Decertification is the converse of certification. It is the process by which a union ceases to be a bargaining agent for a group of workers. Similar to the certification process, workers must gather a prescribed percentage of support among their fellows in order for the Labour Relations Board to issue a decertification vote. [Table 2] The threshold required to issue a vote varies from a low in US states of 30% of workers in a bargaining unit to a high of 50%+1 in four Canadian provinces (Saskatchewan, Quebec, Nova Scotia, and Prince Edward Island).

***Table 2: Decertification***

| | Threshold required for application | Is vote by secret ballot required for decertification? | Threshold required for decertification vote | Certification/ decertification differential, percentage points |
|---|---|---|---|---|
| **British Columbia** | 45% | Yes | 45% | 0 |
| **Alberta** | 40% | Yes | 50%+1 | 0 |
| **Saskatchewan** | 50%+1 | Yes | 50%+1 | 25 |
| **Manitoba** | 50% | Yes | 50%+1 | 10 |
| **Ontario** | 40% | Yes | 50%+1 | 0 |
| **Quebec** | 50%+1 | Yes | 50%+1 | 15 |
| **New Brunswick** | 40% | Yes | 50%+1 | 0 |
| **Nova Scotia** | 50%+1 **[a]** | Yes | 50%+1 | 10 |
| **Prince Edward Is.** | 50%+1 | No **[b]** | 50%+1 **[c]** | 0 |
| **Newfoundland** | 40% | Yes | 50%+1 | 0 |
| **All US States** | 30% | Yes | 50%+1 | 0 |

Sources: *Provincial Labour Codes*; National Labour Relations Board; for details, see Labour Relations Laws on p. 46.
**[a]** In Nova Scotia, a show of support is not needed in order for the union to apply for decertification. The application to the Labour Relations Board has to claim that there is majority of support (50%+1) but no petition or individual letters are needed.
**[b]** In Prince Edward Island, if the Labour Relations Board is satisfied that a majority of employees in the unit support the application for decertification, it may decertify the union without a vote. The interpretation of "majority" is left to the Labour Relations Board but it is always more than 50%.
**[c]** If the vote is conducted.

*Secret ballot vote versus automatic decertification*

Every Canadian province except Prince Edward Island and every American state requires a mandatory secret ballot vote in order to decertify a union. If the Labour Relations Board in Prince Edward Island is satisfied after reviewing the application for decertification that a majority of the employees in the unit support decertification, the Labour Relations Board may decertify the union without a representative vote. The percentage of ballots cast in favour of decertification has to be at least 50%+1 in every Canadian province except British Columbia (45%) and all US states in order for the Labour Relations Board to decertify a union.

***Differences between thresholds for certification and decertification***

An important indicator of the degree to which labour relations laws favour one side at the expense of the other is the presence or absence of a difference in certification and decertification requirements. For example, a jurisdiction that maintained a decertification threshold higher than its certification threshold would make it easier for a union

to gain bargaining power than it would for the same union to lose such representative power. Four Canadian provinces (Saskatchewan, Manitoba, Quebec, and Nova Scotia) maintain a lower threshold for certification application than for decertification application (see table 2). The remaining Canadian provinces and all US states maintain the same thresholds and requirements for certification and decertification, indicating a more balanced approach to the certification and decertification process.

The scores for certification and decertification [Table 3] indicate that most jurisdictions in Canada and, to an even greater extent, the United States attempt to promote labour flexibility and choice while balancing the needs of both employers and employees. The scores range from a low of 3.7 in Manitoba to a high of 10.0 in Alberta and Ontario. Only four jurisdictions (Manitoba, Saskatchewan, New Brunswick, and Nova Scotia) stand out as having certification and decertification processes that heavily favour one party, namely unions.

### *Other important aspects of certification and decertification*

There are two additional aspects of certification and decertification that deserve some attention but are not included in the discussion above due to the lack of sufficient evidence for the impact of these two indicators on the flexibility of labour relations laws.

#### *How the threshold for certification and decertification vote is calculated*

The threshold for certification or decertification is calculated as the number of votes in favour or against a union either as a percentage of total ballots cast or as a percentage of

***Table 3: Summary of certification and decertification***

| | Certifiction and decertification score | Certifiction and decertification rank (out of 60) |
|---|---|---|
| **Alberta** | 10.0 | 1 |
| **Ontario** | 10.0 | 1 |
| **British Columbia** | 6.7 | 3 |
| **Newfoundland** | 6.7 | 3 |
| **Prince Edward Island** | 6.7 | 3 |
| **All US States** | 6.7 | 3 |
| **Quebec** | 6.3 | 56 |
| **Nova Scotia** | 5.3 | 57 |
| **New Brunswick** | 5.0 | 58 |
| **Saskatchewan** | 5.0 | 58 |
| **Manitoba** | 3.7 | 60 |

Note that the score is based on mandatory vote requirement for certification and decertification, remedial certifictaion, and certification/decertification differential (for further details, see Appendix A).

all eligible employees in a given unit. All US states and all Canadian provinces except Quebec calculate the threshold as a percentage of total ballots cast. [5] It obviously takes fewer employees to certify or decertify a union if the threshold is calculated as a percentage of total ballots cast rather than as a percentage of all eligible employees in a given unit.

*Time between approval of the application for certification or decertification and the vote*

The period of time between the submission of an application for certification and decertification and the vote may have an impact on the outcome of the vote. For example, if the time period is too short, employees may not have time to acquire enough information to make the correct decision. On the other hand, if the time period is too long, it may allow the employer or the union to coerce workers. Currently, there is no substantive research that indicates an optimal waiting time between the submission of an application for either certification or decertification and the actual vote. [6]

## 2 Union security

Provisions for union security determine whether or not an employer and a union may include a clause in the collective agreement that requires membership in a union or mandatory payment of dues as a condition of employment. These provisions vary from restrictive, where all workers must be members of a union and pay full dues as a condition of employment, to flexible, where employees have the choice of becoming a union member and do not have to pay full union dues. [Table 4] Allowing workers choice through flexible provisions for union security increases the flexibility of the labour market in two ways: (1) it makes unions more responsive to employees' demands since members and dues are no longer guaranteed and; (2) it ensures competition for the right to represent workers during contract negotiations.

The difference in how Canadian and American labour relations law address union security is one of the fundamental reasons for the divergence of unionization rates between Canadian provinces and US states (Taras and Ponak, 2001). In Canada, unions have monopoly bargaining power, whereby a certified union represents all employees in the bargaining unit even if some employees desire to avoid union membership or the payment of dues. All provinces, in one form or another, have specific legislation allowing employers and unions to make both union membership and mandatory payment of dues a condition of employment.

In the United States, the National Labor Relations Act and complementary legislation makes two conditions explicit: (1) a union-security provision in a collective agreement cannot require that applicants for employment be members of the union in order to be hired; and (2) such an agreement cannot require employees to join or maintain membership in the union in order to retain their jobs. The most that can be required of

***Table 4: Union security***

| | Mandatory union membership allowed | Mandatory union dues allowed | Score | Rank (out of 60) |
|---|---|---|---|---|
| **Right-to-Work States [a]** | No | No | 10 | 1 **[c]** |
| **Non-Right-to-Work States** | No | Yes **[b]** | 5 | 23 **[d]** |
| **Alberta** | Yes | Yes | 0 | 51 |
| **British Columbia** | Yes | Yes | 0 | 51 |
| **Manitoba** | Yes | Yes | 0 | 51 |
| **New Brunswick** | Yes | Yes | 0 | 51 |
| **Newfoundland** | Yes | Yes | 0 | 51 |
| **Nova Scotia** | Yes | Yes | 0 | 51 |
| **Ontario** | Yes | Yes | 0 | 51 |
| **Prince Edward Island** | Yes | Yes | 0 | 51 |
| **Quebec** | Yes | Yes | 0 | 51 |
| **Saskatchewan** | Yes | Yes | 0 | 51 |

Sources: *Provincial Labour Codes*; National Labour Relations Board; for details, see Labour Relations Laws on p. 46.
**[a]** Right-to-Work States include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming (National Institute for Labor Relations Research, 2004).
**[b]** In non-Right-to-Work States, partial union dues are allowed at the request of employees. Partial union dues cover union's costs from representing employees during collective bargaining, contract administration, and grievance adjustment.
**[c]** 22 states tied for first place.
**[d]** 28 states tied for 23rd place.

non-union members who inform the union that they object to the use of their payments for non-representational purposes (and being subject to collective bargaining provisions) is that they pay their share of the union's costs relating to representational activities (NLRB, 1997). [7]

Currently, 22 US states have extended workers' choice by clarifying and expanding the applicable federal law by introducing Right-to-Work (RTW) legislation—more accurately described as worker choice laws. (For a list of Right-to-Work states, see note **[a]** in table 4). In practice, all 22 Right-to-Work states outlaw forced membership and forced dues payment of any kind as a condition of employment. [8]

The results for this measure of the flexibility of labour relations laws indicate that there are three distinct groups of jurisdictions. The first group, that achieving the highest score (10 out of 10), are American Right-to-Work states, in which workers are permitted to choose whether or not to join a union and pay union dues. The second group of jurisdictions, which scored 5 out of 10 and tied for 23rd position, are the American states without worker choice laws (RTW legislation). Workers in these states are permitted to

choose whether or not to join a union but must remit at least a portion of union dues to cover costs associated with negotiating and maintaining the collective agreement. The final group, the one that scores poorly on this measure are the Canadian provinces. All 10 Canadian provinces, in one way or another, permit clauses in collective agreements requiring union membership and mandatory payment of full dues.

## 3 Mandatory clauses

### *Successor rights*

Successor employer provisions determine whether, and how, collective bargaining agreements survive the sale, transfer, consolidation, or other disposal of a business. Those considering the purchase of a business would be concerned to what extent they are responsible to adhere to the existing collective bargaining agreement (labour contract). This is an important aspect of labour relations laws and, to a larger extent, the process of reallocating capital. If a business or portion of a business is rendered uneconomical as the result of changes in the market, reductions in competitiveness, or other reasons, stringent successor laws will impede the reorganization of the business or the efficient reallocation of its capital.

The legislation in each Canadian province makes an existing collective agreement binding upon the new employer, when a business, in whole or in part, is sold, transferred, leased, merged, or otherwise disposed of. In other words, a purchasing employer is bound by a contract (the existing collective agreement) that it had no part in negotiating. There is little variance regarding successor rights across Canadian provinces. [Table 5] Some provinces provide the Labour Relations Boards with discretion in certain circumstances but the general direction of the laws in all provinces is to protect the collective bargaining agreement before and after a change in ownership.

Conversely, it is rare in the United States for a purchaser to be responsible for the incumbent collective bargaining agreement. The National Labor Relations Board decides whether the purchaser is a successor employer by taking into account a number of factors, including the number of employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations, and the character of the bargaining relationship between the union and the original employer. While successor employers may be bound to recognize and bargain with the incumbent union, the general direction of the Labor Relations Board in the United States is not to force successor employers to be bound by the substantive provisions of a collective bargaining agreement negotiated by their predecessors. [Table 5]

### *Table 5: Mandatory clauses*

| | Successor rights: Is the existing collective agreement binding? | Is mandatory notice required for introduction of technological change? | Advanced notice of technological change | Is immediate binding arbitration the only option? [e] | Score | Rank (out of 60) |
|---|---|---|---|---|---|---|
| **All US states** | No **[a]** | No | n/a | No | 10.0 | 1 **[f]** |
| **Alberta** | Yes | No | n/a | No | 6.7 | 51 |
| **Newfoundland** | Yes | No | n/a | No | 6.7 | 51 |
| **Nova Scotia** | Yes | No | n/a | No | 6.7 | 51 |
| **Manitoba** | Yes | Yes | 90 days | No | 3.3 | 54 |
| **Ontario** | Yes | No | n/a | Yes | 3.3 | 54 |
| **Prince Edward Is.** | Yes | No | n/a | Yes | 3.3 | 54 |
| **British Columbia** | Yes | Yes | 60 days | Yes | 0.0 | 57 |
| **New Brunswick** | Yes | Yes **[c]** | not specified | Yes | 0.0 | 57 |
| **Quebec** | Yes **[b]** | Yes **[d]** | not specified | Yes | 0.0 | 57 |
| **Saskatchewan** | Yes | Yes | 90 days | Yes | 0.0 | 57 |

Sources: *Provincial Labour Codes*; National Labour Relations Board; for details, see Labour Relations Laws on p. 46.
Note that three of the four indicators above are used to compute the score for this area. The specific time period before which required notice of technological change must be sent to the union (and in some cases the labour minister) is not included in the computation of the scores.
**[a]** In the United States, an employer who purchases or otherwise acquires the operations of another may be obligated to recognize and bargain with the union but rarely is the new employer bound by the existing collective agreement. In general, these bargaining obligations exist—and the purchaser is called a "successor employer"—where there is a substantial continuity in the employing enterprise despite the sale and transfer of business. Whether the purchaser is a successor employer is dependent on several factors, including the number of employees taken over by the purchasing employer, the similarity in operations and product of the two employers, the manner in which the purchaser integrates the purchased operations into its other operations, and the character of the bargaining relationship and agreement between the union and the original employer. There are circumstances where the employer is bound by the existing collective agreement but the mere fact that the new employer is doing the same work in the same place with the same employees as its predecessor does not mean that it is bound by the existing collective agreement. Rather, it depends if the new employer inherited other liabilities and contracts of its predecessor.
**[b]** In Quebec, a small but important change was made to the legislation wherein, if only a portion of a firm is transferred, the existing collective agreement may not be binding.
**[c]** In New Brunswick, the technological change provision in the *Industrial Relations Act* differs from that in other provinces: it does not specify how much time in advance an employer has to send the written notice to the union before technological change is implemented nor does it define "technological change." The *Act* requires that the employer give "reasonable advance notice" to the bargaining agent but it does not specify what "reasonable" is.
**[d]** The Quebec Labour Code requests that the employer send a notice to the union in cases where the technological change causes an employee to become a contractor. *An Act Respecting Labour Standards* (Government du Québec, Ministère des Relations avec les citoyens et de l'Immigration, Publications Quebec, 2003), however, has more detailed procedures with respect to technological change.
**[e]** Refers to disputes regarding collective bargaining agreement, its meaning, application, or alleged violation.
**[f]** Tied for first place.

### *Technological change*

Technological change provisions in labour relations laws require a notice of technological investment and change by the employer to the union (and, in some provinces, to the Minister of Labour). These provisions determine whether an employer must notify a union and the length of notice required. [Table 5] Some jurisdictions also allow the union to grieve or otherwise object to the technological investment.

A barrier to technological change can have serious and adverse effects on productivity and, thus, ultimately on worker wages. [9] The productivity of workers is in part dependent on the capital (machinery and equipment) available to them. Since wages are ultimately determined by the workers' productivity, anything that affects productivity will eventually affect wages. Thus, any reduction of the capital available to workers in the form of plants, machinery, equipment, and new technologies will adversely affect the future wages and benefits of workers.

Five Canadian provinces (British Columbia, Saskatchewan, Manitoba, Quebec, and New Brunswick) require a notice be sent to the union in advance when proposed technological change may affect either the collective bargaining agreement or employment. It further permits the union to lodge a complaint with the Labour Relations Board. There is no formal requirement for employers in the remaining five Canadian provinces or any of the US states to inform unions of technological change. If the union found the change to have an impact on the collective agreement, steps could be taken to resolve the dispute.

### *Arbitration of disputes*

Although most collective agreements have provisions for resolving disputes (usually called a grievance procedure or disputes about the collective agreement, its meaning, application, and alleged violations), it is important to recognize how disputes are resolved subject to labour law when both parties cannot, or no longer wish to, negotiate a solution. It is generally seen as beneficial to exhaust voluntary efforts such as mediation before relying on forced arbitration. Proceeding immediately to binding arbitration without taking prior steps may not only result in increased costs for both parties but it may also create hostility between management and the union. A stronger commitment to voluntary negotiation may increase the odds that both parties will be satisfied with the agreement.

In Canada, six provinces (British Columbia, Saskatchewan, Ontario, Quebec, New Brunswick, and Prince Edward Island) prescribe immediate, binding arbitration and do not allow the parties first to exhaust other avenues such as mediation or any other less formal dispute resolution mechanisms. [Table 5] [10] This is an important aspect of Canadian labour relations laws since it means that most disputes regarding the interpretation and application of a collective bargaining agreement will be resolved immediately using binding arbitration. The selection of arbitrators and, indeed, the members of provincial Labour Relations Boards thus have the potential to exert great influence over the resolution of industrial disputes.

In the United States, arbitration is voluntary: American legislation does not force the parties to include binding arbitration clauses in their labour agreements. [11] The National Labor Relations Board (NLRB) works in conjunction with the independent Federal Mediation and Conciliation Service and, depending on the significance of the dispute, with the American Arbitration Association and any state arbitration services to resolve disputes.

The US states, both RTW and non-RTW, received a perfect score of 10 on this measure of flexibility in labour relations law. Alberta, Nova Scotia, and Newfoundland received passing scores of 6.7, indicating strong performances but with room for improvement. The rest of the Canadian provinces fared poorly. Three Canadian provinces (Manitoba, Ontario, and Prince Edward Island) scored 3.3 while the remaining four provinces (British Columbia, Saskatchewan, Quebec, and New Brunswick) received a score of 0.0, ranking last on this measure. Like many measures in this study, the results indicate a generally poor performance for Canadian provinces when compared with the US states.

## 4 Labour disputes

### *Replacement workers*

In the event of a legal strike or lockout, an employer may wish to hire replacement workers in order to continue at least partial business operations while addressing reasons for the strike. Consequently, revenue inflow can be maintained, thus securing investor confidence and market share.

Four Canadian provinces (Alberta, Saskatchewan, Manitoba, and Prince Edward Island) have legislation allowing replacement workers during legal strikes and lockouts. These four provinces also stipulate that striking or locked-out workers have the right to reinstatement once the dispute has been resolved. Two provinces, British Columbia and Quebec, specifically prohibit the hiring of replacement workers and two provinces, Ontario and New Brunswick, generally allow replacement workers even though there is nothing in their respective legislations regarding temporary replacement workers. [Table 6] The remaining two Canadian provinces, Nova Scotia and Newfoundland, also do not have specific provisions regarding replacement workers but, unlike Ontario and New Brunswick, have generally interpreted the absence of such provision to mean employers do not have the right to hire replacement workers.

The National Labor Relations Act in the United States allows replacement workers. Employees who strike for a lawful reason fall into two classes, "economic strikers" and "unfair labour practice strikers." While both classes continue as employees (that is, they cannot be discharged), economic strikers may be permanently displaced whereas unfair labour practice strikers can be only temporarily replaced. However, upon resolution of

the dispute, the employer must place economic strikers who wish to return to work on a preferential hiring list and offer to reinstate them when any job for which they are qualified becomes available. [12]

### *Third-party picketing*

Third-party (or second-site) picketing refers to the ability of striking workers and their union to picket and, therefore, disrupt the operations of enterprises not covered by the collective agreement. For example, striking employees might engage in third-party picketing of suppliers to, or retailers for, the firm. The ability to disrupt the operations of third parties means that the union and workers have the ability to affect not only the employer covered by the collective agreement but also any other company doing business with the primary firm. This may force the employer to settle a strike because of pressure from third-parties instead of addressing the reasons for the strike.

Only two Canadian provinces, British Columbia and Alberta, specifically prohibit third-party picketing. [Table 6] The remaining eight provinces do not address third-party picketing and, therefore, regulation is achieved through court precedent. A decision in 2002 by the Supreme Court of Canada [13] acknowledged the right of employees to picket third-parties. For the majority of cases in the US states, third-party picketing is prohibited; however, some unions have found loopholes in the current case law. The overall direction, however, of the National Labor Relations Board is to prohibit third-party involvement as much as possible.

Alberta ties with the US states, both the Right-to-Work (RTW) and non-RTW states with the highest scores (10) for this fourth area of measurement, which includes the use of temporary replacement workers and third-party picketing. Six of the remaining Canadian provinces (British Columbia, Saskatchewan, Manitoba, Ontario, New Brunswick, and Prince Edward Island) perform moderately, receiving scores of 5.0 and tying for 52nd position. Unfortunately, the remaining three Canadian provinces (Quebec, Nova Scotia, and Newfoundland) receive scores of 0 and tie for last position in the rankings. Except for Alberta, the performances of the Canadian provinces are generally weak.

### *Table 6: Labour disputes*

| | Are temporary replacement workers allowed? | Is third-party picketing allowed? | Score | Rank (out of 60) |
|---|---|---|---|---|
| **Alberta** | Yes | No | 10 | 1 **[e]** |
| **All US states** | Yes | No **[b]** | 10 | 1 **[e]** |
| **British Columbia** | No | No **[c]** | 5 | 52 |
| **Manitoba** | Yes | Yes **[d]** | 5 | 52 |
| **New Brunswick** | Yes **[a]** | Yes **[d]** | 5 | 52 |
| **Ontario** | Yes **[a]** | Yes **[d]** | 5 | 52 |
| **Prince Edward Is.** | Yes | Yes **[d]** | 5 | 52 |
| **Saskatchewan** | Yes | Yes **[d]** | 5 | 52 |
| **Newfoundland** | No **[a]** | Yes **[d]** | 0 | 58 |
| **Nova Scotia** | No **[a]** | Yes **[d]** | 0 | 58 |
| **Quebec** | No | Yes **[d]** | 0 | 58 |

Sources: *Provincial Labour Codes*; National Labour Relations Board (for details, see Labour Relations Laws on p. 46.
**[a]** Ontario, New Brunswick, Nova Scotia, and Newfoundland have nothing in their legislation that either prohibits or allows the hiring of replacement workers during a legal strike or lockout. In Ontario and New Brunswick, this was interpreted to mean that replacement workers are allowed since they are not prohibited in the legislation. In Newfoundland and Nova Scotia, on the other hand, it was interpreted to mean that replacement workers are prohibited.
**[b]** In general, secondary picketing is prohibited in all US states. The exceptions are as follows: (1) workers may picket a secondary "ally' employer where it is performing the work that would have been done by the striking employees; (2) consumer picketing, where picketers dissuade the public from patronizing retail establishments rather than to dissuade employees from working, provided that the union's case is closely confined to the primary dispute and that the secondary employer can easily substitute another employer's goods or services; (3) secondary boycotts allowed in construction and textile industry; (4) Informational picketing allowed if the sole object of the picketing is to inform the public even if such picketing interferes with deliveries or pickups.
**[c]** In British Columbia, second-site picketing of an "ally" business is allowed. An "ally" business is a business that is found to be assisting the employer by doing work done by the employees on strike or locked out.
**[d]** Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland have nothing in their legislation that either prohibits or allows third-party picketing. Since third-party picketing is not addressed in the labour legislation, third-party picketing falls under the jurisdiction of courts rather than of the Labour Relations Boards. The Supreme Court of Canada's 2002 decision acknowledged the right of employees to picket third parties, provided it does not constitute criminal or tortious (accidental or unintentional harm) activity; see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] 1 S.C.R. 156, 8 S.C.C.
**[e]** Tied for the first place.

## Index of Flexibility in Labour Relations Law

The Index of Flexibility in Labour Relations Law [14] is a composite measure of the four areas of labour relations laws: Certification and Decertification; Union Security; Mandatory Clauses; and Labour Disputes. It represents a measure of each jurisdiction's overall labour relations policy. The Index is measured on a scale for 0 to 10; jurisdictions with more flexible labour relations laws receive higher scores while jurisdictions with less flexible labour relations laws receive lower scores. [Table 7; Figure 1] Note that a score of 10 is not indicative of ideal labour relations legislation but rather is a relative measure of flexibility in labour relation laws across the 10 Canadian provinces and the 50 US states.

The 22 Right-to-Work states have the most flexible labour relations laws amongst the 10 Canadian provinces and 50 US states, each receiving a score of 9.2 out of 10.0. The remaining 28 US states were tied for the 23rd position with an overall score of 7.9. The scores of the US states do not vary because labour relations laws governing the private sector are regulated and enforced at the federal level.

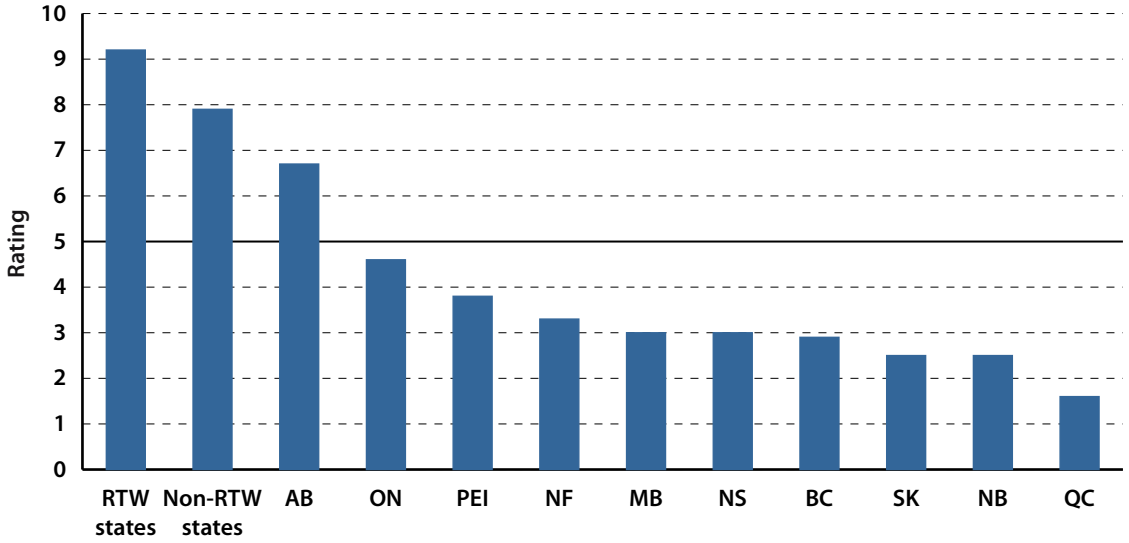
The Canadian provinces occupied the 51st to 60th positions. The only province with a passing score (higher than 5.0) was Alberta with an overall score of 6.7. Second was Ontario with a score of 4.6. Quebec, Saskatchewan, and New Brunswick have the most rigid labour relations policies in Canada and the United States. Quebec had the lowest score of 1.6 and ranked last. Saskatchewan and New Brunswick followed with a score 2.5 and were tied for 58th place.

***Table 7: Index of Flexibility in Labour Relations Law***

| | Overall Index (out of 10) | Rank (out of 60) |
|---|---|---|
| **Right-to-World states** | 9.2 | 1 **[a]** |
| **Non-Right-to-Work states** | 7.9 | 23 **[b]** |
| **Alberta** | 6.7 | 51 |
| **Ontario** | 4.6 | 52 |
| **Prince Edward Island** | 3.8 | 53 |
| **Newfoundland** | 3.3 | 54 |
| **Manitoba** | 3.0 | 55 |
| **Nova Scotia** | 3.0 | 55 |
| **British Columbia** | 2.9 | 57 |
| **New Brunswick** | 2.5 | 58 |
| **Saskatchewan** | 2.5 | 58 |
| **Quebec** | 1.6 | 60 |

Note that the overal Index is an average of four areas: Certification and Decertification, Union Security, Mandatory Clauses, and Labour Disputes (for further details, see Appendix A).
**[a]** Tied for first place. **[b]** Tied for 23rd place.

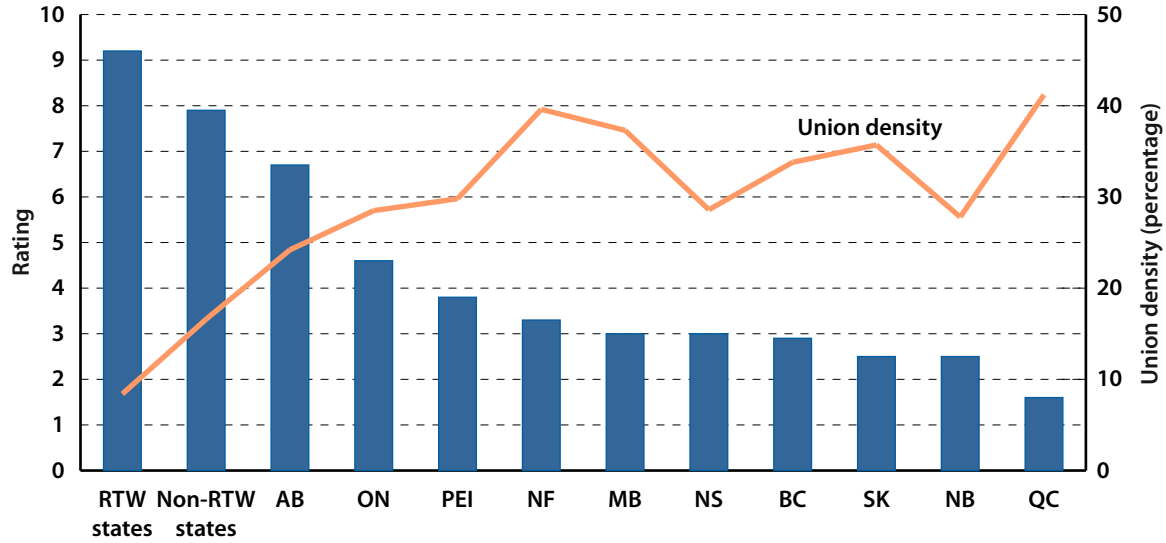
***Figure 1: Index of Flexibility in Labour Relations Law***




## The Index and unionization

Figure 2 shows the scores from the Index of Flexibility in Labour Relations Law and unionization in the 10 Canadian provinces and 50 US states, which have been combined into two groups, Right-to-Work states and non-Right-to-Work states. In general, as the flexibility of labour relations laws increases, unionization rates decrease. [15] The correlation coefficient between the Index of Flexibility in Labour Relations Law and overall union density (private and public) is negative 0.89; and the correlation coefficient between the Index and union density in the private sector is negative 0.77.

***Figure 2: Index of Flexibility in Labour Relations Law versus union density, 2003***



## Labour relations laws in the public sector

Although the laws governing public-sector labour relations are not included in the Index of Flexibility in Labour Relations Law, they are an important component of a jurisdiction's labour market. Over the last five years (1998 to 2002), average employment in the public sector (by federal, provincial/state and local governments, and government business enterprises) represented 18.3% of total employment in Canada and 14.2% in the United States. The public sector tends to be highly unionized: in Canada over the last five years (1999 to 2003), average unionization in the public sector was 75.0% versus 19.9% in the private sector. For the same time period, the United States had an average public-sector unionization rate of 41.8% versus 9.6% in the private sector.

The assessment of public-sector labour relations laws, however, is difficult because regulation of labour in the public sector, especially in the United States, is much more complex than it is in the private sector. The following section on public-sector labour relations laws in Canada and the United States are presented for informational purposes and to provide a more comprehensive review of the labour relations laws across the 60 jurisdictions.

## Canada

Canada's approach to the regulation and enforcement of public-sector labour relations is decentralized, like its approach to private-sector labour relations. That is, except for those persons employed in the federal sector, the provinces have jurisdiction over their public-sector labour relations laws. In general, each province groups workers into one of eight categories: private-sector, civil servants, government enterprise (crown corporation), municipal, fire fighters, police officers, hospital, and teachers. Some jurisdictions, such as Ontario, have separate legislation for each category but most group at least some categories together under one comprehensive statute. [16]

Public-sector collective bargaining laws differ from private-sector laws in two main areas: the scope of bargaining and dispute resolution (Swimmer and Bartkiw, 2003: 580). The scope of bargaining in the public sector is usually limited to wages and working conditions as most statutes prohibit the negotiation of provisions for hiring, classification, and promotion. For instance, each province, with the exception of Saskatchewan, prohibits the negotiation of pension-plan provisions in collective bargaining agreements (Fryer, 1995: 345).

Resolution of disputes (in particular strike and arbitration provisions) constitute the major difference between private- and public-sector labour relations in Canada. Employees in the public-sector are faced with a range of strike options: right to strike, limited or "controlled" right to strike, and, as in the case of most essential public employ-

ees, prohibited from striking. For example, municipal employees except police officers and fire fighters are allowed to strike since they are covered by private-sector labour relations laws. Newfoundland, New Brunswick, Ontario, Quebec, Saskatchewan, and British Columbia allow their civil servants to strike. In the remaining four provinces, where there is no right to strike, disputes are settled by compulsory arbitration. [Table 8] Limited strikes are prominently used for hospital workers, civil servants, and for most teachers (Swimmer and Bartkiw, 2003: 582). Provisions for limited or "controlled" strikes prohibit essential employees from participating in strike activity.

Aside from a few provincial and municipal exceptions, police officers and fire fighters do not have the right to strike. Newfoundland, for example, allows rural fire fighters to strike but not those in urban centres such as St. Johns. Only Saskatchewan and Nova Scotia allow police officers and fire fighters the right to strike. The default remedy for the resolution of disputes about the renewal of an existing collective agreement in all other public occupations and provinces is compulsory arbitration. [Table 8]

## United States

One of the underlying differences between the system of private-sector labour relations and public-sector labour relations in US states is jurisdictional control. While Congress has made attempts in the past to pass a national public-sector labour relations act (much like the National Labor Relations Act for the private sector), state and local employee relations continue to be under the auspices of state control. The main incentive for Congress to introduce federal legislation is the desire to simplify the complex web of statutes, ordinances, court decisions, executive orders, opinions by attorneys general, and other policies that make up public-sector labour relations. State public-sector legislation alone constitutes over 110 state statutes and numerous court cases (Kearney, 2001: 58). Adding to the complexity of the legal environment is the nature of work in the public sector and the role of politics and financial incentives of public-sector employers.

Given the complexity of public-sector labour relations, an assessment similar to that of private-sector labour relations is not possible at this point. We can, however, make some observations about each state's approach to public-sector labour-relations policy. These include the incidence of state collective bargaining legislation, how states regulate labour disputes, and the incidence of public-sector unionization.

Unlike Canadian provinces, where labour relations laws cover all but a few public employees, several US states have varying combinations of legislation depending on occupation. There are eight states that have no collective bargaining for any public-sector employees, 17 states with legislation for some occupations, and 25 states that have comprehensive legislation for all public-sector employees. [Table 9] [17] Not surprisingly, seven of the eight states with no legislation and 11 of the 17 states with partial legislation are

Right-to-Work states. Only four RTW states have comprehensive legislation. If passing laws that allow collective bargaining in the public sector is an approximate indicator of a state's increasing labour-market rigidity, then clearly most of the Right-to-Work states, which do not have such legislation, can be deemed to have more flexible labour markets in the public sector than non Right-to-Work states.

Collective bargaining in some cases may not include strict obligations on both parties to negotiate contracts. Some states have what are called "meet and confer" provisions, which are unique to public-sector labour relations in US states. Under a meet and confer arrangement, employers have the final decision-making authority: they are not obligated to negotiate and sign a written agreement (Kearney, 2001: 67).

There is variability in the laws governing how states solve labour disputes regarding the renewal of an existing collective agreement. Several states allow strikes coupled with other avenues of dispute resolution such as fact-finding and mediation. Other states prohibit strikes but require either voluntary or mandatory arbitration. Yet other states prohibit strikes altogether and even have discipline measures for striking unions. Only eight states (Alabama, Arizona, Arkansas, Mississippi, North Carolina, South Carolina, Virginia, and West Virginia) do not have any collective bargaining provisions and, therefore, no provisions governing strike activity. **[Table 10]**

Another, and perhaps more revealing, indicator of a state's approach to public-sector labour relations is the incidence of public-sector unionization. In a major review of public-sector unionization, Freeman (1986) concluded that in states with laws favourable to unionism, public-sector unionism has prospered whereas, in states without such laws, it has not. This phenomenon has more recently been supported by Kearney (2001: 62), who explained that "strong private sector unionization, indicating pro-union sentiment, is associated with comprehensive public sector bargaining policy," and Fossum (2002: 505), who noted that public-sector labour laws are generally more comprehensive and were passed earlier in states with high private-sector unionization rates.

Not surprisingly, Right-to-Work states have lower unionization rates than states without worker choice laws. Over the last five years (1999 to 2003), the average public-sector unionization rate (defined as union members plus dues-paying non-members) in RTW states was 24.3% and, in non-RTW states, 49.0%, a difference of nearly 25 percentage points. This differential is not a recent phenomenon. In fact, states that have a history of flexibility in private-sector labour relations—RTW states—have consistently lower public-sector unionization rates. **[Figure 3]**

***Figure 3: Private- and public-sector union density in RTW and non-RTW states***

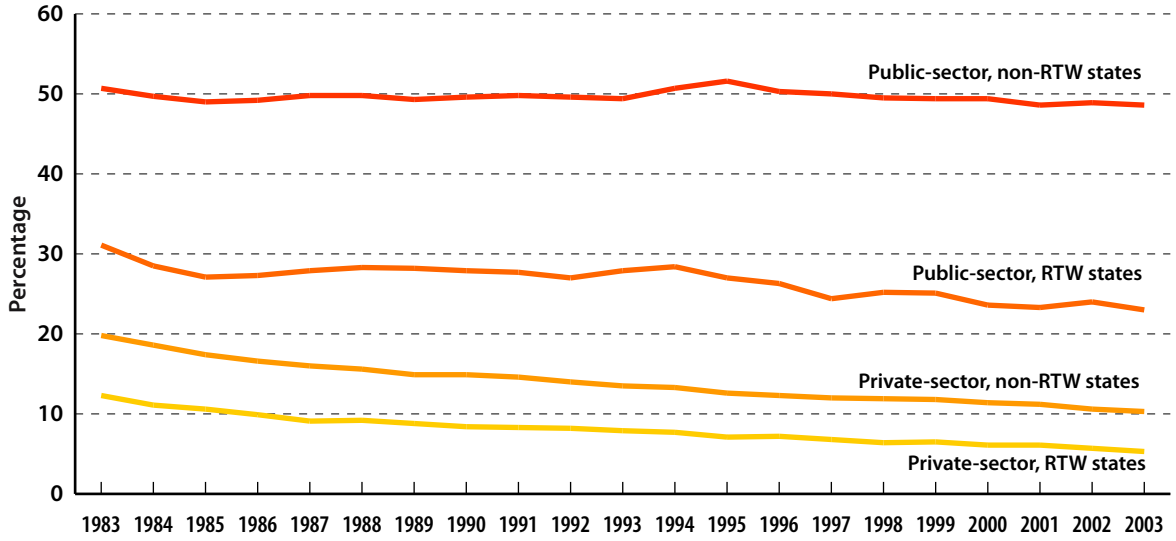


***Table 8: Procedures for resolving labour disputes in the Canadian public sector***

| Municipal | Police | Firefighters | Hospitals | Teachers | Civil Service | Gov't Enterprises |
|---|---|---|---|---|---|---|
| **Federal** | | | | | | |
| Strike—Yukon and NWT | RCMP—not covered by bargaining legislation **[a]** | Union choice of arbitration or strike **[b]** | Union choice of arbitration or strike **[b]** | Strike for some schools in NWT and schools run by band councils on Indian reserves | Union choice of arbitration or strike **[b]** | Strike for most crown corporations **[b]** |
| **British Columbia** | | | | | | |
| Strike **[b]** | At the request of either party, the Minister may order arbitration if certain conditions are met | At the request of either party, the Minister may order arbitration if certain conditions are met | Strike **[b]** | Strike **[b]** | Strike **[b]** | Strike **[b]** |
| **Alberta** | | | | | | |
| Strike | Arbitration | Arbitration | Arbitration | Strike | Arbitration | Arbitration for most crown corporations |
| **Saskatchewan** | | | | | | |
| Strike | Strike | Strike; arbitration requested by either party is binding only if the consititution of the local union prohibits strikes | Strike | Union choice of arbitration at the request of either party or strike | Strike | Strike |
| **Manitoba** | | | | | | |
| Strike | Winnipeg: arbitration at either party's request; others: strike | Arbitration at either party's request | Strike **[b]** | Arbitration at either party's request | Arbitration at either patry's request **[b]** | Strike |
| **Ontario** | | | | | | |
| Strike | Arbitration at either party's request | Arbitration at either party's request | Arbitration | Strike | Strike **[b]** | Strike **[b]** |

***Table 8: Procedures for resolving labour disputes in the Canadian public sector***

| Municipal | Police | Firefighters | Hospitals | Teachers | Civil Service | Gov't Enterprises |
|---|---|---|---|---|---|---|
| **Quebec** | | | | | | |
| Strike **[b]** | Arbitration at either party's request | Arbitration by either party's request | Limited Strike **[b, c]** | Strike **[c]** | Strike **[c]** | Strike **[e]** |
| **New Brunswick** | | | | | | |
| Strike | Arbitration at either party's request | Arbitration at either party's request | Strike **[b]** | Strike | Strike **[b]** | Strike **[b]** |
| **Nova Scotia** | | | | | | |
| Strike | Strike | Strike | Strike | Strike **[c]** | Arbitration at either party's request | Strike |
| **Prince Edward Island** | | | | | | |
| Strike | Arbitration at Minister's order | Arbitration | Arbitration | Arbitration at either party's request | Arbitration at either party's request | Arbitration at either party's request |
| **Newfoundland** | | | | | | |
| Strike | Royal Newfoundland Constabulary: arbitration at either party's request; others: strike | St. John's Fire Department: arbitration; others: strike | Limited strike **[d]** | Strike | Limited strike **[d]** | Strike |

Source: Swimmer and Thompson, 1995; Canada, HRDC, 2004.

**[a]** Royal Canadian Mounted Police officers are not covered by the Canada Labour Code or the Public Service Staff Relation Act.

**[b]** Employees are prohibited from participating in a strike when they are required to provide essential services under the applicable labour relations legislation.

**[c]** No strikes over local or regional issues.

**[d]** Union can demand arbitration if more than 50% of the unit is designated as essential and prohibited from striking. Hospital employees may not engage in a rotating strike.

**[e]** The government of Quebec may order the parties to maintain essential services in a variety of "public services." Quebec's legislation specifies that certain government agencies' policies on renumaration and conditions of employemnt must be approved by the Treasury Board.

### *Table 9: Bargaining legislation in US states*

| | State | Local | Police | Fire-fighters | Teachers (K–12) |
|---|---|---|---|---|---|
| Alabama | — | Y | — | Y | — |
| Alaska | X | X | X | X | X |
| Arizona | — | — | — | — | — |
| Arkansas | — | — | — | — | — |
| California | Y | Y 1 | Y 1 | Y 1 | X |
| Colorado | — | — | — | — | — |
| Connecticut | X | X | X | X | X |
| Delaware | X | X 1 | X | X | X |
| Florida | X | X 1 | X | X | X |
| Georgia | — | — | — | X | — |
| Hawaii | X | X | X | X | X |
| Idaho | — | — | — | X | X |
| Illinois | X | X | X | X | X |
| Indiana | X | — | — | — | X |
| Iowa | X | X | X | X | X |
| Kansas | Y | Y 1 | Y 1 | Y 1 | X |
| Kentucky | — | — | X | X | — |
| Louisiana | — | — | — | — | — |
| Maine | X | X | X | X | X |
| Maryland | X | X2 | — | — | X |
| Massachusetts | X | X | X | X | X |
| Michigan | X | X | X | X | X |
| Minnesota | X | X | X | X | X |
| Mississippi | — | — | — | — | — |
| Missouri | Y | Y | — | Y | — |
| Montana | X | X | X | X | X |
| Nebraska | X | X | X | X | Y |
| Nevada | — | X | X | X | X |
| New Hampshire | X | X | X | X | X |
| New Jersey | X | X | X | X | X |
| New Mexico | X | X | X | X | X |
| New York | X | X | X | X | X |
| North Carolina | — | — | — | — | — |
| North Dakota | Y 2 | X 2 | Y 2 | Y 2 | X |
| Ohio | X | X | X | X | X |
| Oklahoma | — | X | X | X | X |
| Oregon | X | X1 | X | X | X |
| Pennsylvania | X | X | X | X | X |
| Rhode Island | X | X | X | X | X |
| South Carolina | — | — | — | — | — |
| South Dakota | X | X | X | X | X |
| Tennessee | — | — | — | — | X |
| Texas | — | — | X1 | X1 | — |
| Utah | — | — | — | — | X |
| Vermont | X | X | X | X | X |
| Virginia | — | — | — | — | — |
| Washington | X | X | X | X | X |
| West Virginia | Y 2 | Y 2 | Y 2 | Y 2 | Y 2 |
| Wisconsin | X | X | X | X | X |
| Wyoming | — | — | — | X | — |

Source: Kearney, 2001.

Note: X = collective bargaining provisions; Y = meet and confer provisions; 1 = local option permitted; 2 = meet and confer established by attorney general's opinion; — = no provision for collective bargaining.

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Alabama** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **Alaska** | | | |
| Prohibited with fines, arbitration of economic issues | Prohibited, other impasse procedures | Prohibited, other impasse procedures | Prohibited, other impasse procedures |
| **Arizona** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **Arkansas** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **California** | | | |
| No provision | Strikes allowed, mediation | Strikes allowed, voluntary fact-finding | Strikes allowed, mediation |
| **Colorado** | | | |
| Strikes allowed, no provision | Strikes allowed, no provision | Strikes allowed, no provision | Strikes allowed, no provision |
| **Connecticut** | | | |
| Strikes allowed, fact-finding | Strikes allowed, fact-finding, arbitration | Strikes prohibited, final offer arbitration on total package | Strikes allowed, fact-finding, arbitration |
| **Delaware** | | | |
| Strikes prohibited, fact-finding | Strikes prohibited, fact-finding | Strikes prohibited, fact-finding | Strikes prohibited, fact-finding |
| **Florida** | | | |
| Strikes prohibited, union can be decertified, fact-finding, final resolution by legislative body | Strikes prohibited, union can be decertified, fact-finding, final resolution by legislative body | Strikes prohibited, union can be decertified, fact-finding, final resolution by legislative body | Strikes prohibited, union can be decertified, fact-finding, final resolution by legislative body |
| **Georgia** | | | |
| Strikes prohibited, fact-finding | Strikes prohibited, employees disciplined | No bargaining | No bargaining |

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Hawaii** | | | |
| Strikes prohibited, arbitration | Strikes allowed with proper notice, fact-finding, voluntary arbitration | Strikes allowed with proper notice, fact-finding, voluntary arbitration | Strikes allowed with proper notice, fact-finding, voluntary arbitration |
| **Idaho** | | | |
| Strikes allowed, mandatory fact-finding | No bargaining | Strikes prohibited, voluntary fact-finding | No bargaining |
| **Illinois** | | | |
| Strikes prohibited, final-offer arbitration by issue | Strikes allowed with notice, voluntary fact-finding | Strikes allowed with sufficient notice, voluntary fact-finding and/or arbitration | Strikes allowed with notice, voluntary fact-finding |
| **Indiana** | | | |
| No bargaining | Strikes prohibited, union decertified | Union loses dues check-off if illegal strike, mandatory fact-finding | No bargaining |
| **Iowa** | | | |
| Strikes prohibited, union can be decertified, fact-finding, final offer arbitration issue-by-issue | Strikes prohibited, union can be decertified, fact-finding, final offer arbitration issue-by-issue | Strikes prohibited, union can be decertified, fact-finding, final offer arbitration issue-by-issue | Strikes prohibited, union can be decertified, fact-finding, final offer arbitration issue-by-issue |
| **Kansas** | | | |
| Strikes prohibited, mandatory fact-finding, final resolution by legislative body | Strikes prohibited, mandatory fact-finding, final resolution by legislative body | Strikes prohibited, mandatory fact-finding, final resolution by legislative body | Strikes prohibited, mandatory fact-finding, final resolution by legislative body |
| **Kentucky** | | | |
| Strikes prohibited, voluntary fact-finding | No bargaining | No bargaining | No bargaining |
| **Louisiana** | | | |
| Strikes prohibited | Strikes allowed | Strikes allowed | Strikes allowed |

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Maine** | | | |
| Strikes may be ULP, voluntary fact-finding and/or advisory arbitration | Strikes may be ULP, voluntary fact-finding and/or advisory arbitration | Strikes may be ULP, voluntary fact-finding and/or advisory arbitration | Strikes may be ULP, voluntary fact-finding and/or advisory arbitration |
| **Maryland** | | | |
| No provision | No bargaining | Union decertified if strike, voluntary fact-finding | Union decertified if strike, mandatory fact-finding |
| **Massachusetts** | | | |
| Strikes prohibited, arbitration | Strikes prohibited, mandatory fact-finding, voluntary arbitration | Strikes prohibited, mandatory fact-finding, voluntary arbitration | Strikes prohibited, mandatory fact-finding, voluntary arbitration |
| **Michigan** | | | |
| Strikes prohibited, final-offer arbitration issue-by-issue | Strikes prohibited, mediation | Strikes prohibited, mediation | Strikes prohibited, mediation |
| **Minnesota** | | | |
| Strikes are possible ULP, arbitration | Strikes allowed with proper notice, arbitration | Strikes allowed with proper notice, arbitration | Strikes allowed with proper notice, arbitration |
| **Mississippi** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **Missouri** | | | |
| No bargaining | Strikes prohibited | No bargaining | Strikes prohibited |
| **Montana** | | | |
| Strikes not prohibited, arbitration | Strikes not prohibited, mandatory fact-finding, voluntary arbitration | Strikes not prohibited, mandatory fact-finding, voluntary arbitration | Strikes not prohibited, mandatory fact-finding, voluntary arbitration |
| **Nebraska** | | | |
| Strikes prohibited, mediation, voluntary fact-finding | Strikes prohibited, mediation | Strikes prohibited, mediation, voluntary fact-finding | Strikes prohibited, mediation, voluntary fact-finding |

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Nevada** | | | |
| Strikes prohibited with discipline, arbitration | No bargaining | Strikes prohibited with discipline, arbitration | Strikes prohibited with discipline, mandatory fact-finding |
| **New Hampshire** | | | |
| Strikes are possible ULP, fact-finding with legislative review | Strikes are possible ULP, fact-finding with legislative review | Strikes are possible ULP, fact-finding with legislative review | Strikes are possible ULP, fact-finding with legislative review |
| **New Jersey** | | | |
| Strikes not prohibited, arbitration or other method devised by parties | Strikes permitted, mandatory fact-finding | Strikes permitted, mandatory fact-finding | Strikes permitted, mandatory fact-finding |
| **New Mexico** | | | |
| Strikes prohibited, union decertified, mandatory fact-finding | Strikes prohibited, union decertified, fact-finding with legislative review | Strikes prohibited, union decertified, fact-finding with legislative review | Strikes prohibited, union decertified, fact-finding with legislative review |
| **New York** | | | |
| Strikes prohibited with discipline, arbitration | Strikes prohibited with discipline, fact-finding with legislative review | Strikes prohibited with discipline, fact-finding with legislative review | Strikes prohibited with discipline, fact-finding with legislative review |
| **North Carolina** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **North Dakota** | | | |
| No bargaining | No bargaining | Strikes prohibited with discipline, mandatory fact-finding | No bargaining |
| **Ohio** | | | |
| Strikes prohibited, final-offer arbitration issue-by-issue | Strikes allowed with notice, mandatory fact-finding, other procedure determined by parties | Strikes allowed with notice, mandatory fact-finding, other procedure determined by parties | Strikes allowed with notice, mandatory fact-finding, other procedure determined by parties |

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Oklahoma** | | | |
| Strikes prohibited wirh discipline, final-offer arbitration on total package | No bargaining | Strikes prohibited with discipline, mandatory fact-finding | No bargaining |
| **Oregon** | | | |
| Strikes prohibited, arbitration | Strikes allowed with notice, mandatory fact-finding, voluntary arbitration | Strikes allowed with notice, mandatory fact-finding, voluntary arbitration | Strikes allowed with notice, mandatory fact-finding, voluntary arbitration |
| **Pennsylvania** | | | |
| Strikes not prohibited, arbitration | Strikes allowed, mandatory fact-finding, voluntary arbitration | Strikes allowed, arbitration or other procedure determined by parties | Strikes allowed, mandatory fact-finding, voluntary arbitration |
| **Rhode Island** | | | |
| Strikes prohibited, arbitration | Strikes prohibited, arbitration | Strikes prohibited, arbitration | Strikes prohibited, arbitration |
| **South Carolina** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **South Dakota** | | | |
| Strikes prohibited with discipline, mediation | Strikes prohibited with discipline, mediation | Strikes prohibited with discipline, mediation, final resolution by legislative body | Strikes prohibited with discipline, mediation |
| **Tennessee** | | | |
| No bargaining | No bargaining | Strikes prohibited and may be ULP, mandatory fact-finding | No bargaining |
| **Texas** | | | |
| Strikes prohibited with discipline, arbitration | No bargaining | No bargaining | No bargaining |

***Table 10: Procedures for resolving labour disputes in the American public sector***

| Police and Fire | State Employees | School Teachers | Municipal |
|---|---|---|---|
| **Utah** | | | |
| No bargaining | No bargaining | Strikes not prohibited, mandatory fact-finding | No bargaining |
| **Vermont** | | | |
| Strikes allowed but may be ULP, mandatory fact-finding, voluntary arbitration | Strikes are possible ULP, final-offer arbitration on total package | Strikes allowed, fact-finding with review by legislative body | Strikes allowed but may be ULP, mandatory fact-finding, voluntary arbitration |
| **Virginia** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **Washington** | | | |
| Strikes prohibited with discipline, arbitration | Strikes prohibited, fact-finding with review by legislative body | Strikes not prohibited, mandatory fact-finding, voluntary arbitration | Strikes prohibited, fact-finding with review by legislative body |
| **West Virginia** | | | |
| No bargaining | No bargaining | No bargaining | No bargaining |
| **Wisconsin** | | | |
| Strikes may be allowed or may result in discipline, arbitration | Strikes prohibited with discipline and may be ULP, mandatory fact-finding | Strikes prohibited with discipline, final-offer arbitration on total package | Strikes prohibited with discipline, final-offer arbitration on total package |
| **Wyoming** | | | |
| Strikes not prohibited, arbitration | No bargaining | No bargaining | No bargaining |

Source: Fossum, John A. (2002). Labor Relations: Development, Structure, Process. Toronto, ON: McGraw-Hill Irwin ( p. 508). For further details on specific provisions, see this reference.

## Conclusion

Assessing the labour relations laws in Canada and the United States reveals large differences in jurisdictional control and the promotion of labour market flexibility. In Canada, the regulation and enforcement of private-sector labour relations laws is essentially under provincial authority while in the United States it is under federal authority.

Combining scores from all of the observed labour relations laws into an Index of Flexibility in Labour Relations Law provides an overall ranking of the 60 sub-national jurisdictions in Canada and the United States. Canadian provinces scored poorly, occupying the bottom 10 positions. Only Alberta received a passing score of 6.7 (out of 10). Alberta outpaced Canada's other large provincial economies, Ontario at 4.6, Quebec at 1.6, and British Columbia at 2.9. Saskatchewan, New Brunswick, and Quebec occupied the last three rankings, with Quebec ranking last overall with a score of 1.6.

Since US labour relations laws are largely federal, the only difference found across US states was whether or not a state had worker choice laws, that is, "Right-to-Work" laws. The 22 states with such laws have the most flexible labour relations policy amongst the 10 Canadian provinces and 50 US states, each receiving a score of 9.2 out of 10. The remaining 28 US states had an overall index score of 7.9. It was determined that US states facilitated greater labour relations flexibility by having less stringent laws governing union security, arbitration, and successor rights. US states also have a flexible approach to third-party picketing, barriers to technological change, and replacement workers.

One observed outcome of Canada's more rigid labour relations laws is higher union density rates than in the United States: Canada's overall (private and public) union density is 18 percentage points higher than in the United States (32.4% in Canada and 14.3% in the United States).

# Appendix A: Methodology—computing the scores for the Index

The Index of Flexibility in Labour Relations Law gives the score for each Canadian province and US state. The overall index is based on the scores obtained for the 10 components examined in the study. These components are grouped into four areas of labour relations law: (1) Certification and Decertification, (2) Union Security, (3) Mandatory Clauses, and (4) Labour Disputes. Each area is given equal weight, 25%, and each component within each area is given an equal score.

### *1 Certification and decertification*

*a Mandatory secret ballot vote*

Mandatory vote for certification and decertification. If the legislation requires a mandatory vote for both certification and decertification, a jurisdiction gets a score of 10. If the legislation requires a mandatory vote for either certification or decertification, a jurisdiction gets a score of 5; otherwise, it gets a score of zero.

*b Remedial certification*

If the legislation gives the Labour Relations Board the power to certify a union without the mandatory vote when an employer commits an unfair labour practice, a jurisdiction gets a score of zero; otherwise, it gets a score of 10.

*c Differences between certification and decertification thresholds*

The value for this indicator is calculated as the difference between an application for decertification threshold and an application for certification threshold. The score for this indicator is calculated as follows:

$$\frac{(V_{max} - V_i)}{(V_{max} - V_{min})} \times 10$$

The $V_i$ is the actual threshold difference, while $V_{min}$ and $V_{max}$ are set to zero and 25 respectively. The $V_{max}$ is set at 25 since the largest difference between decertification and certification threshold among the 60 jurisdictions is 25.

### *2 Union security*

*a Mandatory union membership*

If the legislation allows a union and employer to include a clause in their collective agreement that requires membership in a union as a condition of employment, a jurisdiction gets a score of zero; otherwise it gets a score of 10.

*b Mandatory union dues*

If the legislation requires or allows mandatory payment of dues by those employees who are not members of a union, a jurisdiction gets a score of zero; otherwise it gets a score of 10.

### *3 Mandatory clauses*

*a Successor rights*

If, in general, a new employer is bound by the existing collective agreement, a jurisdiction gets a score of zero; otherwise, it gets 10.

*b Technological change*

If the legislation requires an employer to inform the union (or the Minister of Labour) before technological change is to take place, a jurisdiction gets a score of zero; otherwise, it get a score of 10.

*c Arbitration*

If the legislation has an intermediate step between procedures in the collective agreement for dealing with disputes (regarding the application, interpretation, or alleged violation of the existing collective agreement) and binding arbitration, a jurisdiction gets a score of 10, otherwise, it gets zero.

### *4 Labour disputes*

*a Replacement workers.*

If the legislation allows an employer to hire replacement workers during a legal strike or lockout, a jurisdiction gets a score of 10; otherwise, it gets zero.

*b Third-party picketing.*

If the legislation allows striking employees to picket businesses other than their own employer, a jurisdiction gets a score of zero; otherwise it gets 10.

## Appendix B: Clarification of union security in the United States

The Taft-Hartley amendments to the National Labor Relations Act (NLRA) in 1947 regarding union security were intended to accomplish one purpose: stop abuses of compulsory unionism by abolishing closed-shop union security agreements. Congress, however, recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost" (*S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L.M.R.A. 412*). Consequently, "employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but "expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fees or dues" (*S. Rep. No. 105, 80th Cong., 1st Sess., p. 7, 1 Leg. Hist. L.M.R.A. 413*). In essence, Congress was driven to eliminate the free-rider problem while balancing the power of unions with worker choice.

Since Taft-Hartley, however, workers have challenged the courts, not on the requirement that worker be a union member as a condition of employment, but rather on the requirement that a union member must pay dues or follow collective bargaining provisions at all. Hence, the real question regarding the clarification of union security in the United States—and the question that the majority of union security case law pertains to—is what exactly it means to be a union member.

The first judicial test of the Taft-Hartley amendments, and thus the first opportunity of the Supreme Court to provide a definition of "union member," was in *Labor Board v. General Motors*, 373 U.S. 734 (1963). The Supreme Court explained that if an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees and membership in the union is therefore denied or terminated, the condition of "membership" is nevertheless satisfied and the employee may not be discharged for non-membership even though he is not a formal member. In other words, an employee can satisfy union membership requirements merely by paying initiation fees and dues.

Furthermore, in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), the Supreme Court specifically declared that any union bylaw or contract clause restricting the right to resign from a union in order to avoid penalties for working during a strike (or for any other reason) is invalid in all 50 states.

In *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court affirmed that section 8(a)(3) of the NLRA permits an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members. The Beck case also solidified the Supreme Court's position on dues, "Section 8(a)(3) does not permit a union, over the objections of dues-paying non-member employees, to expend funds collected from them on activities unrelated to collective

bargaining activities" (p. 744–62). In other words, the use of dues from nonmembers is strictly limited to paying for collective bargaining.

These decisions by the Supreme Court have been further buttressed in *Marquez v. Screen Actors Guild, Inc.*, No. 97-1056 (1998) and *Bloom v. NLRB*, No. 97-1582, 8th Circ., (2000). In *Marquez*, the Supreme Court explained that despite *General Motors*, a union can still tell a prospective employee that he or she has to join a union (even though it can only require dues payment), as long as the union informs the employee in some forum (such as a union newsletter) within a reasonable time just what "join" actually means. In the *Bloom* case, the 8th Circuit Court ensured that *General Motors*, *Beck*, and *Marquez* rights were upheld and that any violation of those rights by a union constitutes an unfair labour practice.

To recap, in all 50 states, workers have the right to quit the union (or not join in the first place) in order to avoid fines or other penalties such as working during a strike. The definition of "union member," therefore, is a very fine one. Essentially, the courts have defined a "union shop" as a bargaining unit where all workers pay dues for collective bargaining purposes. As a practical matter, the union shop as defined by the National Labor Relations Act and subsequent case law imposes exactly the same restrictions on the rights of a worker who does not wish to join a union as an agency shop agreement would.

## Notes

[1] Whether or not jurisdictions legislate flexible labour relations laws can have significant impacts on the labour market. For example, Besley and Burgess (2004), studying labour market regulation in India from 1958 to 1992, found that jurisdictions that legislated labour relations in a direction favouring one group over another experienced lower output, employment, investment, and productivity, and increased urban poverty.

[2] Approximately 9% of the workforce who are federal employees or work in federally regulated industries such as banking are regulated by federal legislations.

[3] In addition, those workers and employers in the United States involved in surface transportation (i.e. trains) and the airline industry are covered by the *Railway Labor Act*.

[4] *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969) is the primary precedent-setting case.

[5] British Columbia and Saskatchewan also allow for a subsequent vote if the total number of all ballots cast is less than the majority of all eligible employees in a unit (55% in British Columbia and 50%+1 in Saskatchewan). Note that New Brunswick and Prince Edward Island in their respective legislation state that the threshold for certification and decertification is calculated as a percentage of eligible employees in the unit. However, they further clarify that employees who do not cast their ballots are not counted as eligible employees.

[6] Weiler (1983) argues for shorter time periods between the submission of the application and the vote on certification or decertification.

[7] While section 7 and 8(a)(3) of the NLRA states that "union membership" may be required for employment, subsequent case law such as the *Beck* line of cases has clarified what exactly a union "member" is. For further explanation, see **Appendix B**.

[8] It is important to note that, while in general union density has declined in the United States, the 22 Right-to-Work (RTW) states that have outlawed the remittance of dues and union membership as a condition of employment have experienced a more significant decline in union membership than states without worker choice laws. Over the last 15 years (1989 to 2003), union density in RTW states decreased from 12.5% to 8.4%, a drop of 32.6%. In states without worker choice laws, union density fell from 20.8% to 16.6% over the same time period, a drop of 20.1%. The higher rate of decline in RTW states may indicate that, where workers are given a choice between joining a union or not, they are increasingly choosing not to join (data from Hirsch and Macpherson, 2003).

[9] Empirical analyses based on cross-country comparisons tend to confirm that the employment record has been better in those countries where the pace of structural change, technological specialization, investment rates, and productivity gains have been high (OECD, 1994).

[10] First-contract provisions (union and workers' first collective bargaining agreement) may also be important in that they may impose a contract on the two parties. In two provinces only, British Columbia and Ontario, the Board may impose a first contract on the two parties in special circumstances (Taras, 1997).

[11] However, over 99% of collective bargaining agreements in the United States provide for arbitration as the final step in the grievance procedure (Sloane and Witney, 2004: 227).

[12] For a detailed discussion of replacement workers in United States and Canada, see Singh and Jain, 2001 and Crampton, Gunderson, and Tracy, 1999.

[13] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] 1 S.C.R. 156, 8 S.C.C.

[14] See Appendix A for methodology.

[15] The relationship between flexibility in a jurisdiction's labour relations laws in general, and their laws about union security and certification and decertification in particular, and their rates of unionization is an area requiring further research.

[16] For example, in British Columbia, Alberta, Saskatchewan, Manitoba, and Nova Scotia, private-sector labour relations laws cover the employees of government enterprises (Swimmer and Thompson, 1995; Human Resources Development Canada, 2004).

[17] Two states, North Carolina and Virginia, prohibit collective bargaining by statute.

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