PRB 08-46E

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COLLECTIVE BARGAINING UNDER THE *CANADA LABOUR CODE* – REMEDIES WHEN PARTIES FAIL TO RESOLVE LABOUR DISPUTES

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26 January 2009

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INTRODUCTION

The *Canada Labour Code*, like most labour relations statutes in Canada, provides various remedies that parties to collective bargaining can access when they reach an impasse in negotiations to conclude a collective agreement and resolve labour disputes. The Code also confers certain powers on elected officials to intervene where there may be a compelling public interest in doing so. Interest in these remedies becomes acute in periods of prolonged strikes or lockouts, particularly where a work stoppage has the potential to interfere with public safety, public health or the general economic health of the nation.

The various mechanisms in the Code that are potentially available to compel the parties to collective bargaining to resolve a dispute, especially where there is a strike, lockout or other work stoppage, are discussed in this paper.

DUTY OF GOOD FAITH BARGAINING AND DUTY OF REASONABLE EFFORT TO ENTER INTO COLLECTIVE AGREEMENT – SECTION 50(*a*)

Section 50(*a*) of the Code imposes two separate duties on parties to collective bargaining to conclude a collective agreement: a duty to bargain in good faith; and a duty to make every reasonable effort to enter into a collective agreement. A party to collective bargaining may bring a complaint to the Canada Industrial Relations Board on the basis that the other party has failed in either or both of those duties.

Section 50(*a*) of the Code states:

> 50. Where notice to bargain collectively has been given under this Part,
>
> > (*a*) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
> >
> > > (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
> > >
> > > (ii) make every reasonable effort to enter into a collective agreement…

A recent leading case from the Canada Industrial Relations Board on section 50(*a*), *Nav Canada*, discusses the distinction between the two duties.(1) The Board's decision holds that whether "every reasonable effort to enter into a collective agreement" has been made is to be measured by an objective standard by considering "comparable standards and practices within the particular industry," while the test for determining whether a party has bargained in good faith is a subjective one.(2) The Board makes an important distinction between "hard" bargaining and bad faith bargaining. In assessing whether bargaining is being conducted in bad faith or it is legitimate hard bargaining, the Board considers the overall bargaining context and the relationship between the parties.(3) The Canada Industrial Relations Board may order a broad range of remedies for a breach of section 50(*a*), including the imposition of an agreement on the parties or ordering a ratification vote on terms that the Board may impose.

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(1) *Nav Canada*, [1999] CIRB no. 13.

(2) Ibid., para. 147.

(3) *Maritime Employers Association*, [1999] CIRB no. 26; and 2000 CLLC 220–014; also commentary in R. M. Snyder, ed., *The 2009 Annotated Canada Labour Code*, Carswell, Toronto, 2008, p. 430.

BINDING ARBITRATION

A. Binding Arbitration by Consent of the Parties – Section 79

Binding arbitration, or interest arbitration, whereby outstanding bargaining issues will be settled by arbitration, is a voluntary process, to be initiated only if agreed to by the parties.(4) The parties may agree to submit any collective bargaining issue to binding arbitration under section 79. Upon an agreement to submit a dispute to binding arbitration, all strike or lockout activity is to cease (section 79(2)).

B. Binding Arbitration as a Remedy for an Unfair Labour Practice – Sections 94–99

In the absence of consent to binding arbitration under section 79, compelling the parties to enter into binding arbitration by order of a court or tribunal is generally considered an extraordinary measure. This has been the consistent position of courts and labour relations boards. The reluctance of labour relations boards and courts to order binding arbitration was commented upon by the Canada Industrial Relations Board in a recent decision involving a protracted and complex dispute between a major telephone company and a union of telecommunications workers.

In *TWU* v. *Telus*, the union brought a complaint under the unfair labour practices provisions in the Code. In particular it complained that the employer violated section 94(1)(*a*), which prohibits an employer from interfering in the administration of a trade union.(5) It sought and obtained an order from the Board referring a collective bargaining dispute to binding arbitration as a remedy for the unfair labour practice. In a reconsideration decision, the Board overturned the decision to order binding arbitration as a remedy for breach of section 94(1)(*a*), while upholding the finding that the employer had breached that section.(6) The Board's reconsideration decision states:

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(4) George W. Adams, *Canadian Labour Law*, 2nd ed., Looseleaf, Canada Law Book, Aurora, Ont., 1993, para. 11.870.

(5) The union alleged that the employer issued a series of communications to bargaining unit members during negotiations for a collective agreement, thus interfering with the union's ability to represent the bargaining unit.

(6) *TWU* v. *Telus*, [2005] C.I.R.B.D. no. 12 (QL) or CIRB Decision no. 317 (hereinafter, *TWU* v. *Telus*).

> It is true that TELUS and the TWU have been involved in a lengthy dispute and that negotiations have been very difficult. The complexity of the issues that the parties are dealing with cannot be underestimated. Some attempts have been made to assist the parties in resolving their dispute. *These, however, do not constitute exceptional or compelling circumstances that would justify the imposition of such an invasive remedial order that effectively put an end to "free collective bargaining" between the parties.* It is not unusual, in the federal jurisdiction, given the size of the employers and the unions, the competitive and complex nature of the industries within which they operate, and the difficult collective bargaining issues that arise at the negotiating table, for parties to be engaged in lengthy disputes that involve a myriad of very complicated issues.(7) [emphasis added]

The Board's decision to overturn the binding arbitration order was upheld by the Federal Court of Appeal in July 2005.(8) The Court, after reviewing the leading judgments on this issue, highlighted the fundamental nature of the principle of free collective bargaining, and held that the circumstances of this case did not warrant an infringement of that principle.

C. Binding Arbitration and Settlement of First Agreements – Section 80

Binding arbitration may be imposed on parties that are required to enter into a first contract but have failed to do so. Section 80 of the Code grants the Minister of Labour the power to refer any dispute concerning negotiations for a first collective agreement to the Canada Industrial Relations Board for a determination. The Board, if it considers it appropriate, may settle the terms of a collective agreement, effectively imposing a first collective agreement on the parties. Where the Board does so, the agreement is effective for a two-year period. The parties may subsequently amend the terms of the agreement in writing during the two-year period.

The Board exercises the power to impose terms of settlement on the parties sparingly. It has held that imposing a collective agreement is done only in exceptional circumstances.(9) It has imposed agreements in situations where the negotiation process has broken down irreconcilably or where there is evidence of significant bad faith on the part of one or both of the parties such that continued negotiations would be pointless.(10)

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(7) Ibid., para. 220.

(8) *Telus Communications Inc.* v. *Telecommunications Workers Union*, 2005 FCA 262, paras. 74–83.

(9) *Meszaros (Les) et al.*, [2002] CIRB no. 188; and 95 CLRBR (2d), para. 43.

(10) Snyder (2008), pp. 530–31.

CONTINUATION OF ESSENTIAL SERVICES – SECTIONS 87.4, 87.5

Section 87.4(1) requires the parties to a dispute to "continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public." Either party to a dispute or the Minister may refer any question arising from the operation of section 87.4(1) to the Canada Industrial Relations Board for a determination. Only the Board can make a determination as to whether the parties have complied with the section and make any orders to comply.

The provision requires the parties to compile a list detailing the services, operations or production of goods that must be continued during a strike or lockout, as well as the approximate number of employees that would be required for that purpose (subsection 87.4(2)). If the employer and the union are in agreement as to which services, operations or production of goods are to continue to be provided, such agreement may be filed with the Board, where it will have the effect of a Board order. Where the parties cannot agree on what services or operations are to be continued, the Board may, on application by either party, determine the question.

Section 87.4(5) additionally grants the Minister the power to refer any matter arising from the operation of the essential services provision to the Board for a determination, after notice of a dispute has been given.

The Board may make a range of orders, including an order to designate the services or operations that must be continued, the manner in which they are to be continued, and any other measure it considers appropriate. The Board may also, on application by either the employer or the union (but not by the Minister), order the parties to resolve any disputes by a binding dispute resolution process (effectively binding arbitration) if it is of the view that a strike or lockout would be rendered ineffective by the parties' compliance with the essential services provisions of the Code (section 87.4(8)).

The term "immediate … danger" has been interpreted expansively. It need not mean imminent or right away or even "very shortly," but the danger must be expected to occur soon or within a short period of time.[(11)] The phrase "safety or health of the public" has similarly been interpreted broadly.[(12)]

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(11) *Atomic Energy of Canada Ltd.*, [2001] CIRB no. 122, affirmed (2002), 298 N.R. 285 (F.C.A.); *Chalk River Technicians and Technologists* (2002), 298 N.R. 285 (F.C.A.); see also the discussion in Snyder (2008), p. 540.

(12) *Marine Atlantic Inc.*, [2004] CIRB no. 275, where the Board ordered the continuation of ferry services between Newfoundland and Nova Scotia.

During the period when the Board is considering an application by one of the parties or the Minister for a determination on what services or activities of an employer are essential, the employer may not alter wage rates or conditions of employment and may not interfere with the bargaining agent's rights of representation. (See section 87.5.) This prohibition continues in force until the later of the date on which Board makes its determination and the date that the parties are in a legal strike or lockout situation, as detailed in paragraphs 89(1)(*a*) to (*d*).

MEDIATION AND CONCILIATION

A. Mediation – Section 105

The Minister may also exercise a power under section 105 of the Code and appoint a mediator at any time in the course of a labour dispute. The Minister may appoint any individual who may assist the parties in resolving their differences. When exercising this power, the Minister would likely appoint a mediator who has experience in the industry and who is likely to be agreeable to both parties. The mediator need not come from the Federal Mediation and Conciliation Service (see below).

It would appear that any party may request the appointment of a mediator pursuant to section 105. There is nothing in the language of that section to prevent any interested individual from requesting that the Minister order mediation. The Minister, of course, would consider the appropriateness of doing so given the nature of the dispute and the public interest in seeing labour disputes mediated and come to an end.

B. Conciliation – Sections 70.1, 71–78 and 89(1)

The mediation process in section 105 is distinct from the process set out in sections 71–78, which deal with conciliation. The conciliation process is a necessary step for parties to acquire the legal right to strike or impose a lockout. Section 89(1) sets out the conditions that must be met before the parties may be in a legal strike or lockout position. These conditions are:

- Notice to bargain collectively has been given by either the employer or the union;
- The parties have failed to bargain collectively within the period specified in section 50(*a*) (20 days after notice to bargain has been given), or, where the parties have engaged in collective bargaining, have failed to enter into a collective agreement; and

- 21 days have elapsed since the date when the Minister advised the parties that a conciliation process will not be established, or that a conciliation officer has reported, or (where a conciliation process has been established) since the date when the parties received a conciliation report.

Under section 72(1) of the Code, the Minister may appoint a conciliation officer, a conciliation commissioner or a conciliation board where the parties have given notice to the Minister that they have failed to enter into, renew or revise a collective agreement (i.e., negotiations have failed). The Minister may also appoint one of the officers described in section 72(1) on his or her own initiative if he or she does not receive a notice that negotiations have failed. The Minister may also decide not to appoint one of those officers and inform the parties of this.

Individuals who may be appointed as conciliation officers, commissioners or boards must come from the Federal Mediation and Conciliation Service (FMCS) established pursuant to section 70.1. FMCS officials are employees of the Department of Human Resources and Skills Development. In addition to its role in attempting to resolve labour disputes, the FMCS advises the Minister of Labour on labour relations matters.

ADDITIONAL POWERS OF MINISTER – SECTION 107

Section 107 of the *Canada Labour Code* is a broadly worded discretionary provision that grants the Minister of Labour power to do what he or she deems expedient to maintain or secure industrial peace and "promote conditions favourable to the settlement of industrial disputes." The Minister may, to further those ends, refer any question to the Canada Industrial Relations Board or direct the Board to do what the Minister deems necessary.

The scope of this provision has only minimally been considered in the academic literature and the case law from either the courts or the Canada Industrial Relations Board. As a result, it is difficult to ascertain where, within the scheme of the Code, the provision fits, how it might be used, and to what end. However, as a general rule, the courts impose limits on how Ministers of Labour may exercise the broad discretionary powers conferred by statute. Generally, discretion must be exercised to promote the objects of the legislation and be consistent with the overall scheme of the legislation.[13]

(13) *C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

VOTE ON EMPLOYER'S LAST OFFER – SECTION 108.1

Section 108.1(1) gives the Minister the authority to order that an employer's latest offer be put to the members of the bargaining unit for a vote if, in the Minister's opinion, this would be in the public interest. The Minister may also direct the Board or another person or body to be in charge of conducting the vote. Upon the employees' acceptance of the offer, all strike or lockout activity shall cease. The Minister may do this at his or her own discretion; no referral from a party to the dispute is needed.

INDUSTRIAL INQUIRY COMMISSION – SECTION 108

Section 108 of the Code authorizes the Minister to establish an Industrial Inquiry Commission to which the Minister may refer any matter arising out of an industrial dispute for investigation.(14) The Commission would then issue a report to the Minister.

AD HOC LEGISLATION

The Minister may also introduce ad hoc legislation to order a cessation of strike or lockout activity, continuation of collective agreements for specified periods of time, and referral of matters in dispute to binding arbitration.(15) Some recent examples of such legislation at the federal level include the *Postal Services Continuation Act, 1987*, S.C. 1987, c. 40, and the *Maintenance of Railway Operations Act, 1995*, S.C. 1995, c. 6. Such legislation has typically been introduced where labour disputes are determined to threaten or cause "loss of services," including "economic harm disproportionate to the interests of the immediate parties to the dispute, as well as loss of services posing immediate threats to public order, safety or health."(16)

Back-to-work legislation has been challenged unsuccessfully on constitutional grounds. In *International Longshoremen's and Warehousemen's Union – Canada Area Local 500* v. *Canada*, [1994] 1 S.C.R. 150, the union challenged the *Maintenance of Ports Operations Act*,

(14) One notable example was the Royal Oak Mines Industrial Inquiry Commission, appointed by the Minister on 22 December 1992. The Commission's final report was issued on 13 September 1993.

(15) Adams (1993), para. 11.930.

(16) Ibid.

1986, which ordered striking British Columbia port workers back to work, as an infringement of the right to freedom of association guaranteed by section 2(*d*) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada upheld the validity of the legislation and held that the right in section 2(*d*) of the Charter does not encompass a right to strike. It also held that the penalty attached to the refusal to return to work in the legislation did not violate section 7 (the right to life, liberty and security of the person) of the Charter. This judgment is consistent with a line of cases from the Supreme Court of Canada, notably *Reference Re Public Service Employee Relations Act*, that consistently refused to recognize collective bargaining and the right to strike as rights encompassed by section 2(*d*) of the Charter.(17) While the rights to form a trade union and participate in its activities have long been recognized as coming within the scope of section 2(*d*), the Supreme Court held that the right to engage in collective bargaining with an employer was not essential to enable the exercise of freedom of association, and that freedom of association was adequately protected without the additional right to collective bargaining and the right to strike.

In a landmark judgment in 2007, however, the Supreme Court of Canada reconsidered its earlier position on whether the right to collective bargaining is necessary in order for union members to exercise their right to freedom of association.(18) The provincial legislation at issue in the appeal invalidated important provisions in collective agreements already in force, voided collective agreements (both current and future) inconsistent with the legislation, and effectively did away with meaningful collective bargaining on a number of important issues. The Court, in a majority judgment, dramatically reversed its long-standing position excluding collective bargaining from the scope of section 2(*d*) of the Charter, on the basis that the position could "not withstand principled scrutiny." The Court held that collective bargaining has been a fundamental aspect of Canadian society since well before the current regime of labour relations legislation across Canada was put in place, and that the right to freedom of association must be assessed within this context.(19)

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(17) See *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where the validity of legislation barring strikes in the public service and imposing binding arbitration in the event of a collective bargaining impasse was challenged on the basis of section 2(*d*) of the Charter. (Hereinafter, *Reference Re Public Service Employee Relations Act*.)

(18) *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 (hereinafter, *Health Services Bargaining Association*).

(19) Ibid., paras. 22, 41 and 64–68.

The Court outlined four essential factors that weighed in favour of including collective bargaining within the ambit of section 2(*d*) of the Charter, as follows:

> 20 Our conclusion that s. 2(*d*) of the *Charter* protects a process of collective bargaining rests on four propositions. First, a review of the s. 2(*d*) jurisprudence of this Court reveals that the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of s. 2(*d*) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of *Charter* guarantees. Finally, interpreting s. 2(*d*) as including a right to collective bargaining is consistent with, and indeed, promotes, other *Charter* rights, freedoms and values.(20)

Having established the right to collective bargaining as coming within the scope of freedom of expression, the Court found the legislation to infringe section 2(*d*) of the Charter and it was held to be unjustifiable under section 1 of the Charter. A range of less impairing options were found to be available for the provincial government's consideration.

The judgment in this case (*Health Services Bargaining Association*) is silent on the question of whether the right to strike constitutes an essential part of freedom of association and whether denial of that right would interfere with the right to bargain collectively. A related question is: if the right to strike is seen to form part of the right to collective bargaining, and thus freedom of association, to what extent could restrictions on that right be seen as justifiable under section 1 of the Charter in appropriate cases? It has been suggested in some news media that the judgment would make back-to-work legislation more difficult to justify, since taking away the right to strike would interfere with the right to bargain collectively, which is now protected by the Charter.(21) Whether the right to strike now forms part of section 2(*d*) of the Charter will likely need to be articulated more clearly by the courts, since the Supreme Court of Canada made no comment on this matter. The Court simply stated in paragraph 19 that "the present case does

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(20) Ibid., para. 20.

(21) R. Benzie, K. Rushowy and P. Loriggio, "Why McGuinty lets York U. strike drag on – Province is worried Supreme Court ruling bars back-to-work bill," *Toronto Star*, 22 January 2009, p. A01. See also Maria Babbage and Allison Jones, "Mediator Appointed in last-ditch effort to end 11-week York University Strike," *Canadian Press*, 21 January 2009.

not concern the right to strike, which was considered in earlier litigation on the scope of the guarantee of freedom of association," referring to *Reference Re Public Service Employee Relations Act*. Without a more definitive statement, it would have to be presumed that the Court's position on the right to strike as articulated in its earlier judgments is unchanged.

These questions have important implications for many aspects of labour relations statutes that attempt to deal with collective bargaining impasses by imposing such limits as essential services designations or binding arbitration.