

# Legal framework for collective bargaining of a renewal agreement in New Brunswick<sup>1</sup>

Labour relations between employers and unionised employees are governed by the *Industrial Relations Act (IRA)*. Collective agreements must also comply with other legislation, including the Employment Standards Act, the *Occupational Health and Safety Act* and the *New Brunswick Human Rights Act*.

The most important provisions of the *IRA* governing collective bargaining include:

## 1. Establishment of Bargaining Rights by Certification

A certified trade union is the bargaining agent for the bargaining unit that the Labour and Employment Board determined was appropriate for collective bargaining. The unit's scope should be included in the recognition clause of your collective agreement.

A collective agreement applies to everyone in the bargaining unit even if some members of the bargaining unit are not members of the union.

## 2. Notice to Bargain

Either party may give written notice of its desire to bargain a renewal agreement **within a period of 30 to 90 days before expiry of a collective agreement** [s. 33(1)]. The parties can negotiate a longer notice period within the collective agreement [s. 33(2)]. The parties must meet within 20 days of notice unless they agree to meeting at a later date [s. 34(2)].

## 3. Obligation to bargain in good faith

Under the *IRA*, collective bargaining means negotiating in good faith with a view to conclude, renew, or revise a collective agreement [s. 34(2)]. The parties are required to engage in good faith bargaining according to the procedures prescribed by the act.

## 4. Duty of Fair Representation

In representing its members, the Union cannot act in a manner that is arbitrary, discriminatory, or in bad faith. This principle applies in bargaining as well as grievances. In New Brunswick, the union's Duty of Fair Representation is based on common law. It is not codified in the *IRA*.

## 5. Freeze on working conditions

After notice has been given, neither the employer nor the union can make any unilateral changes to wages or terms and conditions of work until 7 days after the minister has turned down a request to appoint a conciliator or 14 days after the minister has released the report of the conciliation

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<sup>1</sup> Current as of Sept. 2023.

board or a no-board report [s. 35(2)]. Note that the freeze period of 14 days is longer than the 7-day cooling-off period before a strike or lockout can be declared.

## 6. Conciliation

In New Brunswick, the Minister may appoint a conciliator on written request from either party or may appoint one on his/her own initiative [s. 36(1)]. The act requires the Minister to respond to a request within 7 days [s. 36(3)].

If the Minister appoints a conciliator, the conciliator must report to the minister within 14 days of appointment unless the Minister extends the deadline [s. 61(1)]. Once the Minister receives the conciliator's report, she or he has 15 days to decide whether to appoint a conciliation board. While conciliation boards are rare, they have been appointed in past rounds in New Brunswick. Consult with your CAUT Senior Labour Relations Officer for strategies to avoid the appointment of a Conciliation Board.

## 7. Provisions governing strikes and lockouts

In order for a union to go on a legal strike (including "work to rule") or for an employer to lock out employees, the following conditions must be met:

- a. The collective agreement must have expired.
- b. A **7 day** cooling off period must have passed since one of the following occurred:
  - i. One of the parties has requested the appointment of a conciliator and the Minister has given notice that he/she will not appoint a conciliator;
  - ii. The parties have met with a conciliator and Minister has issued a notice that he/she will not appoint a conciliation board (the "no board" report); or
  - iii. A conciliation board has been appointed and the Minister has released the board's report to the parties [s. 91(2)].
- c. In the case of a strike, the union must have held a strike vote.
  - i. In New Brunswick, that strike vote cannot be taken until after the 7-day cooling off period [s. 98(2)].
  - ii. The vote must be by secret ballot and must give all employees of the bargaining unit ample opportunity to vote [s. 94(2)].
  - iii. The majority of employees must have voted in favour of the strike [s. 94(1)]. There are two ways of determining the voting constituency for the purpose of identifying a majority vote:
    - i. Employees as defined in section 94(3)<sup>2</sup> must vote in the majority [s. 94(1)(a)]. Section 94(3) defines an employee as someone who has been employed "within three calendar months preceding" the strike vote "and, where the vote is taken on a

<sup>2</sup> 94(3) For the purposes of paragraph (1)(a), no employee in the unit shall be counted as an employee unless he has been employed by the employer within the period of the three calendar months preceding the taking of such vote and, where the vote is taken on a working day otherwise than by mail, an employee who is absent from work on the day of the vote and who does not cast his ballot shall not be counted as an employee in determining the number of employees for the purposes of the paragraph.

working day otherwise than by mail, an employee who is absent from work **and** who does not cast his ballot shall not be counted as an employee in determining the number of employees for the purposes of" paragraph 94(1)(a).

- ii. A majority of the "members affected" must vote in favour of a strike "and such majority in favour includes a majority of the employees in the bargaining unit" [s. 94(1)(b)].

In the first instance, in order to determine a majority the union must get an accurate count of absentees who fail to vote **and** those who are not absent from work who fail to vote. Otherwise, Employers could contest the vote. In the second instance, determining a majority vote is easier. However, if a member fails to vote for any reason, that vote will count as a "no" vote. Contact your Senior Labour Relations Officer at CAUT to discuss how to determine your voting constituency.

- d. The party declaring the strike or lockout must give the other party 24 hours written notice of the date and time the strike or lockout will commence [s. 97(1)].

If the Union and the Employer agree to reopen specific provisions of the collective agreement before expiry, the provisions governing strikes and lockouts apply [s. 91(1), 91(3)]. Put more simply, Unions can strike and employers can lockout on reopeners in New Brunswick. Should your Employer propose a reopener, consult with your CAUT Senior Labour Relations Officer.

In New Brunswick, the Employer can compel a final offer vote once during the life of a labour dispute [s. 105.1].

Section 104 of the *IRA* addresses the legality of picketing but does not specifically address its conduct. There is, however, case law guiding what conduct can and cannot be restricted. Consult with your CAUT Senior Labour Relations Officer immediately if your employer threatens legal action against pickets.

There is no legal right in New Brunswick to refuse to cross the picket line of another union (except to refuse unsafe work).

There is no prohibition against the use of replacement workers ("scabs") in New Brunswick.

The employer is not legally obligated to continue to make payments to pension and benefits plans or to pay sickness, pregnancy and parental, sabbatical, vacation, and similar entitlements. Strike protocols often include agreements about these provisions. As part of a strike protocol, unions should negotiate provisions to continue contributions to benefit plans. The union will be expected to pay the full contributions during any strike.

Employees cannot be disciplined or fired just for participating in a legal strike or exercising other rights under the *IRA*. However, they can be disciplined or fired for just cause after a strike for some kinds of strike-related conduct (picket line violence, etc.).

## 8. Interest Arbitration

**CAUT does not recommend that you agree to interest arbitration; your CAUT Senior Labour Relations Officer can provide information about this recommendation.**

## 9. Ratification

In New Brunswick, ratification is not required [s. 37(1)]. Nevertheless, if the parties determine that agreement is conditional upon ratification, eligibility for ratification voting is determined by the union constitution. All tentative agreements reached through collective bargaining should be ratified by a vote in which majority of those voting vote in favour of ratification. The vote should be by secret ballot and the union should provide ample opportunity for all members of the bargaining unit to vote.