CAUT Bargaining Advisory

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Recognizing & Responding to Bad Faith Bargaining

In every Canadian jurisdiction, giving notice to bargain imposes a duty to bargain on both the employer and the union. Unlike the United States, there is no "ongoing duty to bargain" about issues of significance during the course of a collective agreement. With the exception of limited statutory provisions in some jurisdictions which require negotiation about technological change, or mid-contract negotiations with the agreement of the employer, there is no meaningful opportunity to renegotiate or revisit terms in a collective agreement during its term. What happens in bargaining, then, is very important and will determine conditions of employment for the duration of the collective agreement.

While the precise contents of the duty to bargain vary from jurisdiction to jurisdiction, broadly speaking, the duty generally contains two separate and coexistent elements: a duty to bargain in good faith, and a duty to make reasonable efforts to reach a collective agreement. In interpreting and defining the scope of the duty to bargain, labour boards have made it clear that the duty to bargain is not designed to redress an imbalance of bargaining power. Hard bargaining, even aggressive bargaining is not by itself a breach of the duty to bargain.

When faced with a bad faith bargaining complaint, a labour board will be very reluctant to evaluate the reasonableness of either party's proposals or to impose judgments on the content of bargaining. The requirements of "good faith" and "reasonable efforts" are designed to ensure no more than that (1) the employer recognize the union as exclusive bargaining agent, and (2) the parties engage in a full, free, honest and rational discussion of their differences. Within these requirements the parties remain free to bargain hard, to steadfastly disagree and to use their economic power to strike or lock out, in accordance with the terms of the governing labour statute.

Generally, labour boards are less likely to intervene in the bargaining process in "mature bargaining relationships." Labour Boards in first contract bargaining relationships are more likely to provide remedies. Although direct evidence of union-breaking is rare, labour boards will consider the context of employer reaction to recent unionization.

The scope of remedies a board will grant is typically very narrow. It may include a declaration that a party has violated the Act and could impose a requirement that a party withdraw a

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provision which, in the circumstances, is illegal. It would be highly unusual for a Labour Board to impose a collective agreement as a remedy for a duty to bargain complaint. That is what interest arbitration laws are for.

Symptoms and Patterns

The following are some patterns and symptoms which have led labour boards to find a breach of the duty to bargain. It should be noted that a labour board is unlikely to consider any event in isolation. Rather, it will weigh the totality of the circumstances surrounding the negotiations. Of particular relevance is the existence (or non-existence) of other unfair labour practices.

1. "Surface Bargaining"

This term is used to describe a pattern of simply going through the motions of bargaining without the intent of concluding a collective agreement. Historically, this has been of particular concern in first contract negotiations. Evidence of surface bargaining may include the following:

a) making patently unreasonable proposals with no business justification, particularly where such proposals are predictably inflammatory;

b) the adoption of inflexible positions on issues central to the negotiations without apparent business justification;

c) presenting change(s) in position which are (is) by their nature tailor-made for rejection;

d) efforts to scuttle a memorandum of agreement by urging its rejection by the group to which it is put for ratification.

Some of the conduct described above might also support a complaint that a party is failing to make reasonable efforts to conclude a collective agreement.

2. Direct Dealing with Employees

Once a union is certified, an employer may not bargain directly with bargaining unit employees. An employer is generally free to attempt to "set the record straight" by explaining to employees its bargaining position. However, it may not

a) make new proposals to its employees before the union can respond;

b) invite employees to respond directly to its proposals;

c) attempt to obtain information about employee sentiments concerning its proposals, either by speaking to them directly or by infiltrating union meetings.

3. Attacking the Credibility of the Union

Examples of patterns of conduct found to violate the duty to bargain include the following:

a) negotiating with a view to protecting employees which the employer believes oppose the union, or with a view to fostering dissension in the bargaining unit, without valid business justification;

b) conveying the message that employees will suffer economically as long as they are represented by a trade union;

c) implementing new terms and conditions of employment before negotiations with the union have reached an impasse.

4. Attempting to Dictate or Negotiate the Composition of the Union's Negotiating Committee

This includes refusals to bargain with an authorized representative of a union on the grounds that he or she is an employee, not an employee, a member of another bargaining unit, or an employee of a competitor.

5. Bargaining Illegal or Improper Demands to Impasse

It is unusual for a bargaining demand to be "per se" illegal, although a demand that the union conduct a ratification vote where it was not required to do so by law was found to be illegal on its face. But beyond a patently illegal demand, almost any issue can be the subject of a bargaining proposal. Some proposals are likely to be found to be illegal if they are bargained to impasse, including the following:

a) demands to alter the scope of the bargaining unit;

b) demands that a union accept a union security, arbitration, or other clause providing less protection than that provided by a statutory minimum clause;

c) demands that a successor or related employer be excluded from the coverage of a collective agreement;

d) demands that a union admit as members employees excluded from the coverage of the applicable labour relations statute.

6. Failure to Disclose Relevant Information or Failure to Respond Truthfully to Inquiries

a) where a union specifically requests information relevant to the negotiations an employer generally must comply with that request;

b) where a union asks a question about the employer's future plans, the employer must respond truthfully;

c) in addition, in some jurisdictions an employer has an obligation to reveal decisions that it has already made (or which are sufficiently firm) which will have a major impact on the bargaining unit, such as a plant or facility closure.

7. Abusive and Insulting Conduct

Conflict and tactlessness in negotiations do not in themselves violate the duty, and boards will generally only intervene where abuse and insults are so obvious as to reveal a contempt which is tantamount to a refusal to recognize the status of the opposite party at the bargaining table.

8. Refusals to Discuss

The parties are required to engage in full, rational and honest discussion. A party fails to do so when it

a) fails to provide a full justification of a bargaining position when asked to do so; or

b) refuses to hear or consider the other party's objections to a bargaining position; or

c) insists upon discussing one point to the exclusion of all others; or

d) refuses to discuss other matters until particular matter is completely settled.

9. Reneging or Changing Position

Reneging or changing position is not typically contrary to the duty to bargain, but it may amount to a breach of the duty to bargain in serious cases, such as where the change of position has the predictable effect of destroying the framework for decision making at the bargaining table, or, as noted above, where it forms part of a pattern of surface bargaining. Examples may include the following:

a) adding several new demands after all matters appeared to be settled (sometimes referred to as "moving the goalposts");

b) reneging upon agreements with respect to important clauses in clear contravention of ground rules agreed between the parties.

10. Failure to Meet

Parties must be reasonably available for negotiations. Evidence of bad faith or a failure to make reasonable efforts can be found in conduct such as the following:

a) repeated cancellation or abbreviation of meetings;

b) arbitrarily breaking off a meeting;

c) persistent unavailability;

d) refusal to respond to new settlement proposals which offer the possibility of compromise;

e) refusal to attend conciliation.

11. Insisting upon a bargaining process which is time-consuming, repetitive, and serves no useful purpose

12. Sending a negotiator to the table without real authority to negotiate

In addition to unnecessarily slowing down the process, such practices have been criticized for denying employees a channel through which to express their ambitions to the relevant decision makers.

The union is entitled to expect an employer negotiator who has full knowledge of any employer plans to alter its operations (e.g. to discontinue or significantly alter a programme, or part or all of the institution). It is no defence for the employer negotiator to answer honestly where the negotiator is not fully appraised of the plans.

Responses and Remedies

Bargaining team note takers should record detailed descriptions of conduct which may form part of a pattern breaching the duty to bargain. In addition, these notes could be relevant to the interpretation of the collective agreement, as representations made during bargaining

could found an estoppel and/or could inform the interpretation of ambiguous language. These notes should of course be dated and kept as originals.

Bear in mind that accusations of bad faith bargaining are highly charged and can throw sand in the gears of negotiations. As noted above, the remedy awarded may only provide limited relief and will not likely result in a collective agreement. Accordingly, bargaining complaints should be used sparingly and out of necessity. However, where you believe upon reflection that the employer is negotiating in bad faith, probing the reasons for its conduct may expose an absence of bona fide justifications, and stating your objections to such conduct may have a salutary effect. Even if your statement of objection to their conduct does not resolve the issue at the bargaining table, it will be useful evidence before the labour board.

Where informal measures have failed, recourse may be had to the labour board. Keep in mind that such cases tend to take many days to hear and can therefore be quite expensive.

If a complaint is successful, the kinds of remedies that may be imposed are the following:

a) a declaration that the employer has violated the relevant act;

b) a direction that the employer cease and desist from violating the act. This can entail, for example, that inflammatory proposals be withdrawn from the bargaining table;

c) a direction that the employer prepare and present a complete collective agreement proposal which it is prepared to sign;

d) a direction that the employer explain that proposal to the union, possibly at a meeting convened by a mediator;

e) a direction that the parties continue to meet as directed by a mediator to negotiate a collective agreement;

f) a direction that the employer provide the union with reasonable access to employee notice boards;

g) a direction that the employer post a notice in a form prepared by the board stating that the employer has violated the act;

h) a direction that the employer pay all monetary losses of the union and of bargaining unit employees which may reasonably be proved as arising from the employer's breach of the act, including losses resulting from the loss of opportunity to negotiate a collective agreement, together with interest on such damages;

i) where there has in fact been agreement on all terms of significance, a direction that the employer execute a collective agreement.

It should be noted that the availability of such remedies may vary from jurisdiction to jurisdiction. Awards of damages have been made in British Columbia and Ontario. In Ontario the Board approaches the awarding of damages with caution, and as a response to cases of more flagrant violation.■


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