Introduction

Collective bargaining has evolved over the years. At its core it involves two apparently contradictory premises:

- “economic warfare” which may lead to “positional bargaining”. On the duty to bargain in good faith, in 1974: “The theory of the [Labour Relations] Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interests, to stick firmly to its bargaining positions and then to rely on its economic strength in a strike [or lockout] to force the other side to make the concessions…” Noranda Metal Industries Limited BCLRB 151/74
Introduction

• “Getting to Yes – Negotiating Agreement Without Giving In” – grounded in “principled” or “interest based” bargaining, published 1981.

Key principles:
- Separate the people from the problem.
- Focus on interests, not positions.
- Generate a variety of possibilities before deciding what to do.
- Insist the result be based on some objective standard.

Introduction

• Remembering history:
  - 1992 – Violence on picket lines at Giant Gold Mine Strike.
  - 1992 – NDP was elected and promptly made 40+ changes to Labour Code, including s 68 Prohibition of Replacement Workers in strikes.
Introduction

• Today we have fewer strikes and lockouts than in the early days of the Code.
• Government and Unions boast how well the system is working.
• Maybe a function of many factors: much reduced union presence in private sector; No. American decline in union density and power; economic crisis in 2008; switch to principled/interest-based bargaining.

Presenting a challenge to you:

Consider whether the reduction in work stoppages means that unions and employers have found a better way to “get to yes”. OR, are the collective agreements we negotiate more often based on “soft” positional bargaining by employers? That can lead to less efficient and more costly collective agreements, and that can significantly impair your competitive edge.
Does your collective agreement reflect these principles pledged in the Code?

Section 2 Duties under this Code [of Board and others exercising powers + performing duties under Code to do so in a manner that]...
(b) fosters the employment of workers in economically viable businesses, ...and
(d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity, ...

Two goals today:

1. Helping you “Get to Yes”, without a work stoppage, achieving a CA that your organization can effectively operate under in this very competitive market. Helping you and your negotiating team to “raise the bar” and achieve excellence in your collective bargaining process an outcome.
Two goals today:

2. Opening or expanding communications with your fellow unionized employers, so that networking will enhance your opportunities of successfully negotiating your next collective agreement.

About us....all of us.

• Introducing Michael Weiler Employment + Labour Law
• Introducing you. Any recent bargaining experiences? Tell us a bit about you. Why are you here? What do you hope to gain from this session?
• Questions welcome throughout.
Head’s up!

In our short time together today, I will be approaching legal issues, statutory constraints in the Code and practical advice at the 20,000’ level. My comments should not be taken as legal advice on your particular situation.

Our goal today is to highlight these issues and share some experiences and enhance your skills in negotiating the best collective agreement you can.

Head’s up!

• There are key differences between bargaining a first collective agreement versus renewals.
• Let’s start with a few quick unique features of first collective agreements (and then after that we will focus on renewals).
• S. 6(3)(f)—Rand formula clause
• S. 48—4 month freeze before and after
• Division 3, s. 55 First Collective Agreement
• Closer scrutiny by LRB of negotiating tactics
• Avoid ‘preservation of benefits’ clause
• Fresh sheet of ice
• Decertification in 10 months
Focusing on these topics:

1. Preparing for collective bargaining
2. How to conduct bargaining to your advantage; and some legal issues that may arise
3. How to successfully operate behind a picket line or otherwise withstand a strike

1. Preparing for collective bargaining

When should you start?
- NB: s. 68* is triggered by giving Notice to Bargain, or bargaining commences.
  
  * Prohibition against the use of Replacement Workers

What should you do?
- Review the pluses and minuses of the last round of bargaining—have things changed?
- Continue to update your plan and strategies including gathering information.
Preparing – cont. What should you do?

- Ask each manager and excluded supervisor to give you 5 things they would like to see changed in the collective agreement.
- Gather information on your competitors—eg recent settlements through the BCBC or other sources.
- Consider forming a BCSLA unionized group to share experiences, speakers, bulletins etc.

Preparing – cont. What should you do?

- Review any grievances and arbitrations at **your operation** and how you might need to take action—eg must you bring “estoppel” to an end?
- Consider any arbitration or LRB decisions affecting **your unionized competitors** that may impact on your operation.
Preparing – cont. What should you do?

- Understand **changes to the law and policy** that may impact your bargaining. E.G. the Bullying and Harassment Policies of WorkSafeBC – Nov 1 / 13.
- Decide on the make-up of your team—all information on a need to know basis. Consider confidentiality and disclosure issues.

Preparing – cont. What should you do?

- Prepare your proposals—make sure no **“illegal” demands** or **demands that cannot be taken to impasse**.
  
  *E.G.* Consider the impact on your Final Offer Vote Application.
  
  *E.G.* LRB has ruled that this **form of non-reprisal clause** could not be taken to impasse:
  
  “4. The Union shall not expel, suspend, impose any penalty, or exercise any reprisal against any employee because he or she worked during the strike, or otherwise did not participate in the work stoppage.”

  But ... consider other means which may net the same result.
Preparing – cont. What should you do?

- There are some things you cannot contract out of e.g. Employment Standards Act section 3; sections 50 and 54 of the Labour Relations Code; Human Rights Code, including the duty to accommodate. For one example of clear direction on what you cannot contract out of re: the duty to accommodate, following is part of the headnote of the judgment of the Supreme Court of Canada in *McGill University Health Centre* 2007 SCC 4.

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**Preparing – cont. What should you do?**

**Cannot contract out of re: the duty to accommodate**

“The parties to a collective agreement have a right to negotiate, in good faith, clauses to ensure the attendance of employees and to ensure that they do their work. A clause of an agreement that provides for termination of the employment relationship should an employee be absent longer than a specified period of time is clearly aimed at ill or disabled employees and, considered from the perspective of the duty to accommodate, is among the measures implemented in the enterprise to accommodate them. However, although the period negotiated by the parties is a factor to consider when assessing the duty to accommodate, it does not definitively determine the specific accommodation measure to which an employee is entitled,
Preparing – cont. What should you do?

**Cannot contract out of re: the duty to accommodate**
since each case must be evaluated on the basis of its particular circumstances. The right to equality is a fundamental right, and the parties to a collective agreement cannot agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation. In light of the individualized nature of the accommodation process, the parties cannot definitively establish the length of the period in advance. Finally, undue hardship resulting from the employee’s absence must be assessed globally starting from the beginning of the absence, not from the expiry of the period provided for in the collective agreement.”

Ex. headnote, McGill University Health Centre 2007 SCC 4

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Preparing – cont. What should you do?

- Get **innovative** in preparing your demands—think outside the box.
- **Set the A, B, and C’s of proposals** (and in bargaining, do the same thing to Union proposals).
- Review your proposals with senior management and the Board before you go into bargaining. Make sure **your mandate is clear**. You need to get all the managers on side if you plan to operate during a work stoppage so engage them early. BUT be sure all involved keep matters **strictly** confidential.
Preparing – cont. What should you do?

- Have **accurate costing** of proposals (and be sure to accurately cost the union proposals as well)—e.g. costing on the diagonal. And when costing your proposals and the Union’s, remember to look beyond the immediate effect.
- Remember that what may be very expensive to you may not be all that important to the Union, and vice versa.

Preparing – cont. What should you do?

- Examine the **makeup of your unionized workforce**—what are their priorities versus the Union’s? What are their interests and what will their family situations be if there is a work stoppage? How important is it to them to have a happy work environment?
- If you have **more than one operation**, union or non-union, or a large non-union group at the union location, consider how collective bargaining might impact your relationships there.
Preparing – cont. What should you do?

- Prepare **communication strategy** both internally and publically. Ensure your clients are getting their news from you not the Union either directly or through the press. There are constraints under the Code on what you can say during bargaining, and of course it is always subject to what you and your union have agreed to in your Protocol Agreement.

- It is imperative to carefully monitor what the Union is saying to its members and be able to respond at the right time with the right message. See s. 8 and APS BCLRB B233/98.

Preparing – cont. What should you do?

- Do final check of what other labour disputes the Union has on-going and what the issues and/or resolution might be. E.G. When you are bargaining with the BCGEU for your organization, you want to know it, if they were/are coming off 3 years of no wage increase with the Liquor Distribution Branch.

- Re-read “Getting to Yes”!!!
2. How to conduct bargaining to your advantage

Boss, I need more money! How about a raise?
That’s a coincidence, Wimble.

I was just about to ask you to take a cut in salary, due to poor business conditions!...Tell you what....I’ll compromise!...You take a cut in salary and I’ll give you your raise!...Fair enough?

I’m beginning to see why he’s up there, an’ I’m down here.

How to conduct bargaining to your advantage

“REMEMBER WHO THE ENEMY IS”

• Put that sign up in your caucus room and then above it, a picture of your union business agent.

• But remember at the same time she is doing her job and you likely need to go through her to get a deal so tread softly.

• And there IS “life after negotiations” so you do not want to fracture the relationship UNLESS you hope to get a change of the guard on the Union side.
How to conduct bargaining to your advantage

The relationship with the Union bargaining committee is important.

- I recommend doing whatever you can to establish the trust that is often necessary to get over the tough issues.
- Getting to Yes suggests that it really isn’t a case of trusting each other and you should proceed “independent of trust”. I disagree—your counterpart does not have to like you (and likely will not) but they do need to trust you and you need to trust them OR at least know you cannot trust them.

Protocol Agreement should cover:

- Cannot take protocol agreement to impasse.
- Confirm authority of your team and your bargaining counterpart.
- Will there be a ratification vote?
- Confirm who will be part of the team.
How to conduct bargaining to your advantage

Cont. Protocol Agreement

• Will union employees be granted time off and are you required to pay them? If not, how will the Union will reimburse you for their wages and benefits.
• Will the parties restrict communications?
• Define the protocol for tabling items.

How to conduct bargaining to your advantage

• The value and risks of taking notes—use of negotiation history as part of evidence in arbitration.
• See: MTM Enterprise Ltd BCLRB B183/2013
• Be respectful but firm.
• History says there will be a wedge driven at some point of the negotiations—I recommend you drive a wedge between the employees and the Union.
How to conduct bargaining to your advantage

• Take control of the paper and document preparation early on in the process.
• Can you get the Union to provide both monetary and non-monetary at the same time? Does that help you?
• Can you then negotiate non-monetary first—the pro’s and con’s.

How to conduct bargaining to your advantage

• Package bargaining.
• Solve the problems of the employees on the Union bargaining committee if you can within reason.
Some legal issues that may arise during bargaining

- **Section 11:**

  11 (1) A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.

  (2) If a trade union and the employer have concluded a collective agreement outside British Columbia, it is invalid in British Columbia until a majority of the employees in British Columbia covered by the agreement ratify it.

Some legal issues that may arise during bargaining - s 11

- Includes obligation to disclose information because “…Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of collective bargaining agreement than negotiation based on ignorance and deception.”

- The first requirement is the obligation to make “unsolicited disclosure”. This is an extension of the duty to avoid misrepresentation and relates to the positive duty to disclose information such as closures, contracting out or major layoffs. *(Nanaimo Daily News BCLRB B64/2013)*
Some legal issues that may arise during bargaining - s 11

- Secondly, an employer is under a duty to provide necessary information where the Union makes a specific request for it. A Union can claim entitlement to information necessary to reach an informed decision in bargaining.

- The scope of the disclosure-discussion aspect of the duty is summarized by Adams, *Canadian Labour Law* (Canada Law Book, 1985), p. 582 in the following terms: “... labour boards have required that certain bargaining data be disclosed; that misrepresentations not be employed; that the true decision-makers participate in negotiations; that certain key decisions affecting a significant number of bargaining unit employees be disclosed; and that parties be prepared to justify particular stances which they may take. One aspect of the duty is the obligation to disclose pertinent information requested by a trade union.

The duty to bargain entails a requirement to meet and make every reasonable effort to enter into a collective agreement. The parties must meet on a timely basis, prepare for bargaining and
Some legal issues that may arise during bargaining s.11

and schedule regular meetings between bargaining teams who have full authority to enter into a collective agreement. As part of those meetings, the parties must engage in full and rational discussion with respect to all of the issues on the table. They must be ready and willing to explain the proposals and explore the proposals of the other side (see David J. Corry, Collective Bargaining and Agreement, Canada Law Book Inc., 1997 at p. 8-7 and 8-15).”

Some legal issues that may arise during bargaining s. 11

• Generally LRB takes hands off approach.
• What if the Union asks for **information on your employees**? Violation of section 6(1) to deny email addresses: *Viking Air* BCLR B87/2012 (appeal denied of BCLR B18/2012);

• The LRB may order you to provide to the Union information the LRB deems “necessary to foster rational and informed discussion”: e.g. *ICBC* B138/99—wage information; *Hudson Bay* B226/2004—duty to disclose names, home addresses, home phone numbers of each employee in the bargaining unit as well as salary information;
Some legal issues that may arise during bargaining s.11

- Should you introduce your **ability to pay** as reasons for your various positions? A party has a duty to disclose information related to the claims made in bargaining in order to foster rational, informed discussion thus minimizing the potential for unnecessary industrial conflict and that may well include a requirement to disclose financial information if the employer makes its ability to pay an issue: *Royal Diamond Casinos* BCLRB B18/2002; *Westfair Foods Ltd* BCLRB B20/2010

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Some legal issues that may arise during bargaining s.11

- BUT see also where disclosure of financial information NOT ordered by LRB e.g. *Modern Auto Plating Limited* BCLRB B48/2003; *Best Facilities* BCLRB B143/2010; (NOTE this was very particular to the facts of this dispute) and *Simpe Q Care Inc* BCLRB B207/2010

- What is the duty to make **unsolicited disclosure of major decisions** you have already made that may affect the bargaining unit? *Starbucks* BCLRB B183/97; *Nanaimo News* BCLRB B64/2013
Some legal issues that may arise during bargaining

When and how to use a Final Offer Vote – s. 78

quoted in part:

(1) Before the commencement of a strike or lockout, the employer of the employees in the affected bargaining unit may request that a vote of those employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, and if the employer requests that a vote be taken, the associate chair must direct that a vote of those employees to accept or reject the offer be held in a manner the associate chair directs....

(3) If a vote under this section favours the acceptance of a final offer, an agreement is thereby constituted between the parties.

Some legal issues that may arise during bargaining  s.78

(4) The holding of a vote or a request for the taking of a vote under subsection (1) or (2) does not extend any time limits or periods referred to in section 60 or 61.

(5) Only one vote in respect of the same dispute may be held under subsection (1) and only one vote in respect of the same dispute may be held under subsection (2).

(6) If, during a strike or lockout, the minister considers that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the minister may direct that a vote of the employees in the bargaining unit to accept or reject the offer be held forthwith in a manner the minister directs.
Some legal issues that may arise during bargaining

- Letter to “Mr. and Mrs.”
- Mediation options

3. How to successfully operate behind a picket line and withstand a strike

- Consider **continuation of benefits** and obligations under section 62.
- See *ICBC BCLR 397/2003* and the following clause in the collective agreement. The Union based their section 11 complaint (i.e. that the employer was negotiating directly with the employees) on the clause. The LRB dismissed the complaint.
How to successfully operate behind a picket line

Cont. **continuation of benefits** and obligations under section 62:

**Section 18.05 Coverage During Labour Dispute**

Employees who are absent because of a labour dispute, including a strike or lockout, will have their coverage under this Article continued but the employees are required to reimburse the Corporation for the full cost of premiums for the period. Should such dispute last in excess of fourteen (14) calendar days, the parties affected will meet and agree on a procedure acceptable to the Corporation for reimbursing the Corporation for such premiums.

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How to successfully operate behind a picket line – s.60

**Prerequisites to lawful strike or lockout - s. 60**

60 (1) A person must not declare or authorize a strike and an employee must not strike until a vote as to whether to strike has been taken in accordance with the regulations by the employees in the unit affected, and the majority of those employees who vote have voted for a strike.

(2) If on application by a person directly affected by a strike vote or an impending strike, or on its own behalf, the board is satisfied that a vote has not been held in accordance with subsection (1), the board may make an order declaring the vote of no force or effect and directing that if another vote is conducted, the vote must be taken on the terms the board considers necessary or advisable.
How to successfully operate behind a picket line – s.60

(3) Except as otherwise agreed in writing between the employer or employers’ organization authorized by the employer and the trade union representing the unit affected, if the vote favours a strike,

(a) a person must not declare or authorize a strike, and an employee must not strike, except during the 3 months immediately following the date of the vote, and

(b) an employee must not strike unless

(i) the employer has been served with written notice by the trade union that the employees are going on strike,

(ii) written notice has been filed with the board,

(iii) 72 hours or a longer period directed under this section has elapsed from the time written notice was

(A) filed with the board, and

(B) served on the employer, and

(iv) if a mediation officer has been appointed under section 74, 48 hours have elapsed from the time the trade union is informed by the associate chair that the mediation officer has reported to him or her, or from the time required under subparagraph (iii) of this paragraph, whichever is longer.
How to successfully operate behind a picket line—s. 60

(4) Despite subsection (3) (b) (iii), the board may direct a trade union to give more than 72 hours' notice of a strike, on application or on its own motion, for the protection of
   (a) perishable property, or
   (b) other property or persons affected by perishable property.

(5) When the board makes a direction under subsection (4), the board
   (a) must specify the length of the written notice required, and
   (b) may specify terms it considers necessary or advisable.

How to successfully operate behind a picket line—s. 60

(6) If facilities, productions or services have been designated as essential services under Part 6 and a strike that affects those facilities, productions or services does not occur on the expiry of the 72 hour period referred to in subsection (3) (b) (iii) or the longer period specified under subsection (5), the trade union must give to the employer and to the board a new strike notice of at least 72 hours before commencing a strike.
How to successfully operate behind a picket line – s. 72

Essential services orders—s. 72

• Communication with your residents

• Communication with your suppliers.

• Communication with the press—John Nixon for example.

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How to successfully operate behind a picket line – s. 65

PICKETING – S. 65

• When you go to court and when you go to the LRB

• Picketing check list
How to successfully operate behind a picket line – s. 68

Replacement workers - s. 68

68 (1) During a lockout or strike authorized by this Code an employer must not use the services of a person, whether paid or not,
   (a) who is hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins,
   (b) who ordinarily works at another of the employer's places of operations,
   (c) who is transferred to a place of operations in respect of which the strike or lockout is taking place, if he or she was transferred after the earlier of the date on which the notice to commence bargaining is given and the date on which bargaining begins, or
   (d) who is employed, engaged or supplied to the employer by another person,
   to perform
   (e) the work of an employee in the bargaining unit that is on strike or locked out, or

(2) An employer must not require any person who works at a place of operations in respect of which the strike or lockout is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the consent of the person.

(3) An employer must not
   (a) refuse to employ or continue to employ a person,
   (b) threaten to dismiss a person or otherwise threaten a person,
   (c) discriminate against a person in regard to employment or a term or condition of employment, or
   (d) intimidate or coerce or impose a pecuniary or other penalty on a person,
   because of the person's refusal to perform any or all of the work of an employee in the bargaining unit that is on strike or locked out.
How to successfully operate behind a picket line s. 68

• History
• One example to note under s. 68

_VI Care (Sunnyside Manor) _B112/93; B167/93

The daughter-in-law of Mrs. Hancock, one of these residents, served soup to six or seven of the Independent Living Unit residents in the apartment side dining room at dinner on the first day of the strike.

The LRB held: “Turning to the Union’s second allegation, bargaining unit work was done by Mrs. Hancock’s daughter-in-law. I have also found the necessary link or nexus to the Employer with respect to the performance of that work: the Employer (in the form of Drieberg) knew of the performance of that work and the work was for the benefit of the Employer in resisting the strike. In response to

How to successfully operate behind a picket line s. 68

_Cont. VI Care (Sunnyside Manor) _B112/93; B167/93

the Employer’s argument that the breach was in any event minimal, I do not find any legislative direction in the Code to apply a de minimis analysis to these circumstances. If anything, I find the legislative intent to be to the contrary. The language in the section is broader and more prohibitive than even the most restrictive recommendation from the Special Advisors. The question of the extent of the breach goes, therefore, to the issue of what is an appropriate remedy -- not to the merits with respect to whether there was a breach of the Section. As a result, the Union has established a breach of Section 68 of the Code in its second allegation.”
How to successfully operate behind a picket line s. 68

• Cannot use management hired after the strike or lockout notice.

• What if multiple locations?

• Union allowed to use secret video to prove violation. *IKEA BCLRB B144/2013*

• Employer found to have used 3 replacement workers and ordered to cease and desist. *IKEA BCLRB B179/2013*

How to successfully operate behind a picket line

End of strike or lockout

• How to settle up and bring the workforce back
Conclusion

• Preparation will allow you to get the best deal you can so start early and commit to the process.

• Careful preparation and execution will allow you to “get to yes” in a collective agreement that really works for the organization and not just one that avoids a dispute with your union.

Thank you for coming!

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