



Legal Issues That Can Arise During Bargaining

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Roadmap

- i. Statutory Freeze
- ii. Strikes & Lockouts
- iii. Picketing (and Secondary Picketing)



Statutory Freeze

- There are four different “freeze periods”
 - Certification Freeze
 - filing of a certification application to its dismissal or 30 days after certificate is issued
 - First Agreement Freeze
 - if notice to bargain is served within 30 days of certification, a further 120 day freeze occurs while negotiations for a first agreement are underway
 - Renewal Agreement Freeze
 - begins with notice to commence bargaining to renew a collective agreement and ends only with conclusion of renewal agreement, decertification or beginning of strike/lockout
 - Essential Services Freeze
 - where there is an essential services agreement in effect during a strike or lockout, statutory freeze continues to apply to essential service workers

What is “Frozen”?

- Rates of Pay;
- Any term or condition of employment; or
- Any right or privilege of any of those employees



Exceptions to the Freeze

- i. In accordance with the established custom or practice of the employer (business as usual, business as before, or reasonable expectations of employees if it's a first-time change)
- ii. Consent of the bargaining agent (the Union)
- iii. In accordance with a collective agreement in effect

Elements of the Statutory Freeze

- i. Employer's action must involve an alteration to employment terms or employee right or privilege
- ii. Within the applicable time period(s) in the Labour Relations Code
- iii. None of the exceptions apply

Examples of Statutory Freeze Violations

- New or amended policy (i.e., can't wear jewelry at work, must provide a doctor's note if calling out sick, etc.)
- Changes to how vacation is scheduled
- Changes to scheduling hours of work

Strikes & Lockouts

- i. Requirements for a legal Strike and Lockout
- ii. What is a “Strike”?
- iii. What is a “Lockout”?



Requirements for a Legal Strike or Lockout

- i. No collective agreement in force (unless the collective agreement is “bridged” under the Labour Relations Code)
- ii. Strike/Lockout vote must be held, and the results must be current
- iii. Strike/Lockout notice must be given
- iv. Strike/Lockout must commence in accordance with the notice given
- v. If there is a Disputes Inquiry Board, it must have expired.

When can a Strike Vote take place?

Not until...

- There is no collective agreement in force (subject to s. 130 of the *Labour Relations Code*)
- A mediator has been appointed
- The 14-day “cooling off period” under the Labour Relations Code has expired
- But less than two years has passed since the expiry of the “cooling off period”.

When can a Strike Vote take place?

- Union must apply for strike votes at least 7 calendar days before planned voting date; single employers, polled as soon as possible after application, 14 days for employer's organizations.
- Can apply for a vote during cooling off period, but proposed date must fall after expiry of 14 day cooling off period

Who is eligible to vote in a strike vote?

Results of a strike/lockout vote are determined on the basis of the majority of those who actually vote

Those employed in the bargaining unit affected by the dispute employed at any time during the 60 days preceding the date fixed for the strike vote.

The Strike Must Commence in Accordance with the Strike Notice

If a strike or lockout does not occur on the date, at the time and at the location specified in notice (or amended notice) the notice becomes ineffective.

Another notice must be served before strike can happen.

What is a “strike”?

Defined in s. 1(v) of the Labour Relations Code.

- (i) a cessation of work
- (ii) a refusal to work, or
- (iii) a refusal to continue to work,

by 2 or more employees acting in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer or an employers' organization to agree to terms or conditions of employment or to aid other employees to compel their employer or an employers' organization to accept terms or conditions of employment;

What is a “strike”?

Three Elements

- i. Refused work – (cessation of work, refusal to work, refusal to continue to work)
- ii. Concerted action – 2 or more employees acting in concert or in accordance with common understanding
- iii. Purposive/subjective – actions must be for purpose of compelling employer to agree to certain terms or conditions of employment (or to aid other employees in doing so)

Striking – Other Considerations

What is “work”?

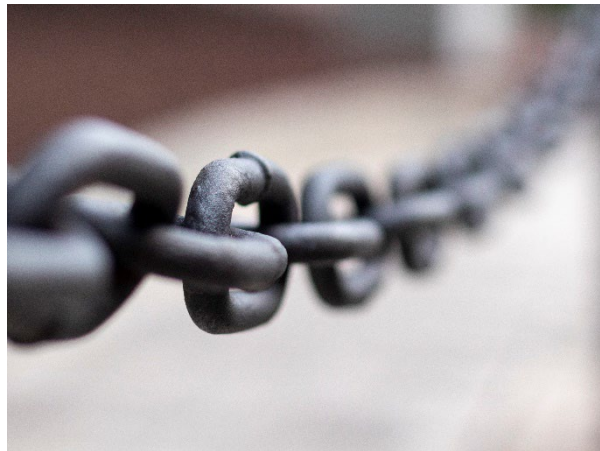
“work that the employee would ordinarily be expected to do”

Refusing to do unsafe work is not an illegal strike.

Refusal by a group of employees to cross a lawful picket line does give rise to the inference of concerted action

What is a “lockout?”

- Defined in s. 1(p) of the Labour Relations Code
 - Closing of place of employment by an employer;
 - Suspension of work by an employer;
 - Refusal by an employer to continue to employ employees;
- For purpose of compelling employees to agree to terms/conditions of employment



Employment Status of Strikers

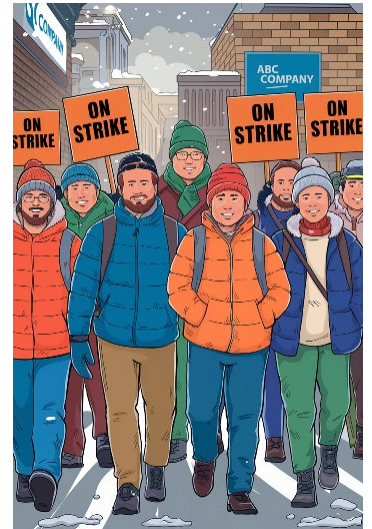
- No employee ceases to be an employee because they ceased to work as a result of a lawful strike or lockout
- While the collective agreement may end, the employment relationship does not.

Picketing (and Secondary Picketing)

- What is picketing?
- Regulations around picketing
- Primary versus Secondary Picketing
- Leafleting

What is “Picketing”?

- Picketing is not a term that is defined in most labour legislation (except BC). Courts and labor boards alike have grappled with its meaning
- Definition comes from common law (judge-made law) or labour board decisions



What is the Purpose of Picketing?

- Twofold
 - To convey information about a labour dispute in order to gain support for its cause from other workers, or clients of the employer or the general public
 - To put social and economic pressure on the employer, and by extension its suppliers and clients

Regulation of Picketing

- Five criteria in s.84(1) of the Labour Relations Code
 - i. Must be a legal strike/lockout in effect
 - ii. Picketing must occur at place of employment*
 - iii. Picketing must be in connection with a labour dispute
 - iv. Picketing must be peaceful and without wrongful acts
 - v. Picketing must be for the purposes set out in Labour Relations Code

Secondary Picketing

Labour Code: “Place of Employment” includes premises:

- a) Where work that is normally done by striking or locked-out employees is being performed during strike/lockout
- b) The employer uses to further a lockout or resist a strike, or
- c) At which a third party assists the employer in furthering a lockout or resisting a strike by performing services for the employer it does not normally provide.

“Primary” versus “Secondary” Picketing

- Primary picketing is picketing at the employee’s place of employment
- Section 84 of *Code* specifically allows picketing at place of employment
- Secondary picketing is picketing elsewhere
- New 84.1 – need to get permission from the Board for secondary picketing

Secondary Picketing

84.1(1) A person or trade union shall not picket at the premises referred to in section 84(2) unless permitted to do so pursuant to an order of the Board made under subsection (2) and subject to any determinations or declarations made by the Board in the order.

(2) On the application of a person or trade union wishing to picket at any premises referred to in section 84(2), the Board may

(a) permit picketing at the premises,

(b) determine the location or locations on the premises at which the picketing may be conducted, and

(c) make any other declarations with respect to picketing at the premises that the Board considers advisable.

Regulation of Picketing

- Picketing must be conducted without wrongful acts (s. 84(3))
- Obstructing or impeding someone who wishes to cross a picket line is a wrongful act (s. 84(3.1))
- Attempts to persuade are not wrongful acts? (s.84(4))

Picketing

Picketing is not strictly defined by the Courts

Picketing represents a “continuum of expressive activity”

Canadian Charter of Rights and Freedoms

- Charter protection means that picketing should be legal, subject to limitations to protect third parties

- “Wrongful Action model”

- Innocent 3rd parties should be shielded from “undue harm”; or conduct that is criminal or tortious

Picketing – Examples of Possible Wrongful Acts

Criminal:

- Mischief
- Intimidation, watching and besetting
- Assault
- Theft

Tortious:

- Trespass
- Intimidation
- Nuisance
- Inducing breach of contract/economic torts
- Defamation
- Misrepresentation
- Conspiracy

Options Around Picketing

Popular Option: Picketing Protocol

- Do's and Don't's of picketing
- E.G.:
 - DO attempt to persuade people approaching entrances not to attend work and provide information about the strike issues
 - DO NOT block the exit entrance

Leafleting

- Distinction between conventional picketing and leafleting:
 - Conventional picket lines act as a signal not to cross a barrier; not based on rational discourse
 - Leafleting seeks to persuade the public through informed and rational discourse
 - Although both may result in a loss of business for the employer, picketing does by coercion and leafleting by rational persuasion

Leafleting

- these are the **rules for the conduct to be leafleting** not picketing:
 - the message conveyed by the leaflets must be accurate, not defamatory or otherwise unlawful and must not entice people to commit unlawful or tortious acts
 - the leaflet must make clear who the dispute is with
 - the manner in which the leafleting is conducted must not be coercive, intimidating, or otherwise unlawful or tortious
 - the activity must not involve a large number of people so as to create an atmosphere of intimidation
 - the activity must not unduly impede access to or egress from the premises
 - the activity must not prevent employees of the neutral site from working and must not interfere with other contractual relations of suppliers of the neutral sites – customers only



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Thank You!