

BAD FAITH BARGAINING

INTRODUCTION

The [Labour Relations Code](#) requires unions and employers with bargaining relationships to meet with each other and bargain in good faith. They must make every reasonable effort to enter into a collective agreement. Section 60 states that one party serving notice on the other to commence collective bargaining triggers the duty to meet and bargain in good faith. If one party feels the other is failing to meet or failing to bargain in good faith, that party may file a complaint with the Board alleging a breach of the duty to bargain in good faith. This policy describes:

- statutory provisions;
- bad faith bargaining issues;
- processing complaints; and
- remedies.

Unfair labour practice complaints such as interfering with the representation of employees by a trade union are often filed in conjunction with bad faith bargaining complaints. This policy is only about bad faith bargaining. For information on unfairs, see: [[Unfair Labour Practices by Employers, Chapter 27\(b\)](#); [Unfair Labour Practices by Trade Unions, Chapter 27\(c\)](#)].

STATUTORY PROVISIONS

Section 60 of the [Code](#) provides:

60(1) When a notice to commence collective bargaining has been served under this Division, the bargaining agent and the employer or employers' organization, not more than 30 days after notice is served, shall

(a) meet and commence, or cause authorized representatives to meet and commence, to bargain collectively in good faith, and

(b) make every reasonable effort to enter into a collective agreement.

(2) The bargaining agent and the employer or employers' organization shall exchange bargaining proposals within 15 days of the first time they meet for the purpose of collective bargaining or within any longer time agreed on by the parties.

(3) No employer, employers' organization or bargaining agent and no authorized representative acting on behalf of any of them, after having served or having been served with a notice to commence collective bargaining pursuant to this Division, shall refuse or fail to comply with subsections (1) and (2).

Section 1 defines collective bargaining, bargaining agent and collective agreement.

1 In this Act,

(a) "bargain collectively" or "collective bargaining" means to negotiate or negotiation with a view to the conclusion of a collective agreement or the revision or renewal of a collective agreement;

(b) "bargaining agent" means a trade union that acts on behalf of employees in collective bargaining or as a party to a collective agreement with an employer or employers' organization, whether or not the bargaining agent is a certified bargaining agent;...

(f) "collective agreement" means an agreement in writing between an employer or an employers' organization and a bargaining agent containing terms or conditions of employment, and may include one or more documents containing one or more agreements;

BAD FAITH BARGAINING ISSUES

Good faith bargaining requires the employer to recognize the union as bargaining agent. There is also a further requirement on both parties to engage in a full and rational discussion of their bargaining differences. In *United Electrical, Radio and Machine Workers of America v. DeVilbiss Canada Ltd.* [1976] 2 CLRBR 101, the Ontario Labour Relations Board summed up the statutory requirement to bargain in good faith this way:

The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective—that of entering into a collective agreement and s.14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter into a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

The Board determines exactly what constitutes bad faith bargaining on a case-by-case basis. There are, however, some general issues that often form the basis of these complaints.

Failure to Meet

Failure to meet may involve:

- **Refusing to meet once notice to bargain is served:** The [Code](#) allows a trade union or an employer to require the other party to a bargaining relationship to meet and engage in collective bargaining. Notice to commence collective bargaining can be served by or upon a certified bargaining agent (Section 59(1)) or a voluntarily recognized trade union (Section 42). The responsibility to bargain is the same in both instances.
- **Missing procedural steps:** Section 61 of the [Code](#) stipulates that the notice to commence

bargaining must contain certain information such as the names of residents of Alberta who are authorized to bargain collectively, conclude an agreement and sign an agreement. Information on ratification procedures must also be exchanged, if asked for.

- **Refusing to attend further meetings:** Attending negotiating meetings is part of an ongoing obligation to bargain in good faith. The obligation to remain available to bargain continues during a strike or lockout. A party is not obliged to attend to bargain where meeting would obviously be futile. A party must do more than show up.
- **Attending meetings unprepared to bargain:** Both parties must prepare themselves to bargain and engage in real discussions aimed at reaching an agreement.

Undermining the Union

Undermining the union may involve refusing to recognize the union as bargaining agent or negotiating directly with employees instead of through their bargaining agent. Section 40(1) of the [Code](#) outlines the effect of certification.

40(1) When a trade union becomes a certified bargaining agent, it

- (a) has exclusive authority to bargain collectively on behalf of the employees in the unit for which it is certified and to bind them by a collective agreement, and
- (b) immediately replaces any other bargaining agent for employees in the unit for which it is certified.

Reading this with Section 60(1) of the [Code](#), employers must recognize a union's statutory role as bargaining agent for its employees and negotiate with the union, not directly with the employees. This must be balanced with an employer's right to communicate with employees.

Sections 130 and 147(3) freezes terms and conditions of employment during bargaining until a strike or lockout occurs. Once a strike or lockout occurs, an employer may impose working terms outside its prior bargaining position. See: [*Section 147(3)*]. Interim terms that clearly exclude the union from the workplace and are intended to undermine the union's role, may be a breach of the [Code](#).

Surface Bargaining

Surface bargaining is bargaining conduct which appears to be collective bargaining but in fact is inconsistent with the intent to enter into a collective agreement as required by Section 60(1)(a). These complaints can involve:

the circumstances which arise when one party reneges on a proposal;

- reactivating signed-off proposals.;
- adding new proposals late in the dispute (this is sometimes referred to as “receding horizon bargaining”); or
- stalling by one party during ongoing but unproductive negotiations (“surface bargaining”).

Illegal Bargaining Proposals

Illegal bargaining proposals may involve:

- **Proposals in conflict with the *Labour Relations Code* or other statutes:** Some complaints deal with bargaining proposals alleged to be in direct conflict with collective bargaining legislation or other statutes, such as employment standards or human rights legislation. For example, Section 59(2) of the [Code](#) outlines the timing of serving notice to commence collective bargaining. It states that the timing can be lengthened if provided for in a collective agreement. A proposal shortening this period would be in conflict with the [Code](#). Proposals to close off “open” or “window” periods established by the [Code](#) would also be prohibited. See: [*AUPE 99 v. Rivercrest Lodge Nursing Home* [1992] Alta. L.R.B.R. 486; [Window Periods, Chapter 24\(h\)](#)]. Proposals dealing with issues covered by the [Employment Standards Code](#), if less than the minimum standards provided in that legislation, would also conflict. See: [[Employment Standards Code, Chapter 15\(b\)](#)].
- **Proposals in conflict with terms already agreed to by the parties:** Some complaints contend that a proposal conflicts with terms of the collective agreement already agreed to by the parties. The Board will deal with these matters only if the offending party pushes the issue to impasse. Impasse is reached when one party remains insistent on its position without a realistic possibility of change. See: [*Brewery Workers 287 v. Molson Breweries Ltd.* [1991] Alta. L.R.B.R. 587; *UFCW 1118 v. Airtex Manufacturing Partnership* [1991] Alta. L.R.B.R. 783].

PROCESSING COMPLAINTS

A party making a complaint about a breach of Section 60 can do so by using the optional Board form or by letter. See: [[Information Bulletin #2](#)]. The applicant must include:

- names, addresses, phone numbers and contact persons for all parties;
- the section(s) of the [Code](#) allegedly violated;
- details which explain how the section of the [Code](#) was violated; and
- remedy desired.

The Director of Settlement reviews the complaint for completeness, see: [[Particulars, 19\(b\)](#) and [Accepting and Processing Complaints, Section 27\(a\)](#)]. Once satisfied, stamp the complaint received by the Board. Enter the matter on the database and create a process file. The Director then decides

on a resolution strategy, see: [[Dispute Resolution Initiatives, Chapter 19\(c\)](#)]. The Director may revise the strategy as developments occur. The Board deals with bad faith bargaining complaints as quickly as possible because often these disputes are holding up collective bargaining or prolonging a work stoppage. See: [[Hearings and Scheduling, Chapter 34\(a\)](#)].

REMEDIES

Section 17(1)(c) grants the Board specific powers to remedy situations where bad faith bargaining occurs.

17(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made and, without restricting the generality of the foregoing,...

(c) in respect of a failure to comply with section 60,

(i) may issue a directive directing the employer, employers' organization, bargaining agent or authorized representative concerned to bargain in good faith and to make every reasonable effort to enter into a collective agreement, and

(ii) may prescribe the conditions under which collective bargaining is to take place;

The Board's powers to remedy bad faith bargaining situations are not limited to those outlined in Section 17(1)(c). For more information on remedies, see: [[Remedies, Chapter 19\(d\)](#)]. If the Board finds a party has bargained in bad faith it can order:

- establishment of bargaining dates;
- the presentation of a complete set of bargaining proposals within a set period of time;
- specific bargaining conditions;
- the production of records relevant to bargaining;
- a party to remove a particular proposal from the table;
- removal of an illegal clause whether agreed to or not;
- cease and desist in making unlawful or inflammatory proposals;
- that certain items are agreed to by the parties while they must bargain over others;
- further bargaining under prescribed conditions; or
- the imposition or extension of a bargaining period freeze.