

FREEZE PERIODS

INTRODUCTION

Every Canadian labour relations statute has provisions prohibiting changes employment conditions at certain times in a bargaining relationship. We commonly call these provisions “statutory freeze” provisions. The periods during which employment conditions may not be changed are called “freeze periods.” This policy describes:

- the different freeze periods;
- the purpose of a statutory freeze;
- elements of the statutory freeze; and
- exceptions to the freeze.

THE FREEZE PERIODS

There are three statutory freezes. Section 147(1) sets out the first freeze period. It lasts from the filing of a certification application to its dismissal or to 30 days after the certificate is issued.

147(1) If a trade union has applied for certification, no employer affected by the application shall, except in accordance with an established custom or practice of the employer or with the consent of the trade union or in accordance with a collective agreement in effect with respect to the employees in the unit affected by the application, alter the rates of pay, any term or condition of employment or any right or privilege of any of those employees during the time between the date of the application and

- (a) the date of its refusal, or
- (b) 30 days after the date of certification.

Section 147(2) imposes the second freeze. If notice to bargain is served within 30 days of a certification, a further 60-day freeze occurs while negotiations for a first agreement are under way.

147(2) If a notice to commence collective bargaining has been served pursuant to section 59(1) within 30 days after the date of certification of the bargaining agent, no employer affected by the notice shall, except

- (a) in accordance with an established custom or practice of the employer,
- (b) with the consent of the bargaining agent, or
- (c) in accordance with a collective agreement in effect with respect to the bargaining agent, alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until 60 days after the date on which the notice is served.

By serving notice to bargain within 30 days of certification, a trade union can extend its Section 147(1) freeze with a contiguous Section 147(2) freeze.

The last freeze, in Section 147(3), starts with a notice to commence bargaining to renew a collective agreement. It ends only on the conclusion of a renewal agreement, a decertification, or the start of a lawful work stoppage.

147(3) If a notice to commence collective bargaining has been served pursuant to section 59(2), no employer affected by the notice shall, except

(a) in accordance with an established custom or practice of the employer,

(b) with the consent of the bargaining agent, or

(c) in accordance with a collective agreement in effect with respect to the bargaining agent, alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until the right of the bargaining agent to represent the employees is terminated, or a strike or lockout commences under Division 13.

PURPOSE OF THE STATUTORY FREEZE

Employers must participate in the certification process and bargain with any certified bargaining agent. During the certification and bargaining processes, however, they continue to hold their management rights to manage and direct the business. They can use these rights to alter employees' employment conditions and destabilize employee support for the bargaining agent. A unilateral cut in wages or benefits or the withholding of an experience increment can strongly suggest to employees that their union is unable to achieve better terms of employment or even protect them from rollbacks. A well timed raise can lead employees to believe that a trade union is unnecessary to achieve better employment terms.

The statutory freeze is intended to prevent employers from so subverting the bargaining agent when it is most vulnerable to a loss of confidence among members of the bargaining unit. These times are: pending a certification, during first agreement bargaining, and during renewal bargaining.

ELEMENTS OF THE STATUTORY FREEZE

There are four elements to the statutory freezes set out in Section 147(3):

- The employer's action must involve an **alteration**;
- to a **rate of pay term, condition, right or privilege** of employment;
- within the applicable **time** periods; and
- none of the **exceptions** to the freeze must apply.

Timeliness

A change to employees' terms of employment will not offend the statutory freeze if it occurred before the freeze went into effect. If, for example, a layoff and reclassification is underway or even announced before a notice to bargain is served, the freeze in Section 147(3) will not prevent the change from proceeding. See: [*CHCG v. Crowsnest Pass General and Auxiliary Hospital and Nursing Home District No. 40* [1993] Alta. L.R.B.R.].

Terms, Conditions, Rights or Privileges

The purpose of the statutory freeze is to prevent unanticipated changes to employee working conditions that may undermine the bargaining agent. What conditions of employment are frozen? An employer may undermine a bargaining agent's support by altering the formal terms of an individual employment contract or collective agreement. It may also do this by altering the informal rules or employment practices that exist outside the formal employment contract. The [Code's](#) references to "rates of pay," "terms" or "conditions" of employment freeze the former. The reference to employee "rights" or "privileges" extends the freeze to all benefits and workplace practices that employees enjoy *in fact*, whether or not they are formally recognized. Examples of an employee "right" or "privilege" protected by the statutory freeze might include a periodic wage review, a Christmas bonus, or the right to be a member of the workforce entitled to do the work in question. The freezing of the latter privilege can protect employees from extraordinary layoffs or contracting out of work. See: [*Crowsnest Pass, above; Canadian Paperworkers Union 1118 v. McMillan Bathurst Inc.* [1991] Alta. L.R.B.R. 126].

Each of the freezes imposed by Section 147 applies to rights and privileges of the bargaining agent as well as those of employees. This is the case because an alteration of practices (like time off for union officials to conduct union business, or union use of employer bulletin boards or mail systems), can undermine the union's presence in the workplace. Indirectly this may undermine employee confidence in their bargaining agent.

Alteration of Terms

Though the term "freeze" suggests an absolute ban on changes to any aspect of employees' employment, labour relations boards do not go so far. Early in the development of the statutory freeze, labour boards recognized that its rationale did not require an absolute freeze to existing employment terms. In most employment relationships, employees anticipate some measure of change to their employment terms. Employees often have sufficient expectations that their employment conditions will change that the actual change has none of the subversive effect on their bargaining agent that the freeze addresses. Good examples include an annual salary increment, a scheduled plant closure or a seasonal layoff. Indeed, where the expected change involves a benefit to employees, like an annual salary increment, an absolute freeze to existing salaries and suspension of the increment is likely to be exactly the type of unexpected departure from the normal that the freeze is aimed at.

For this reason, the Board will not only examine whether there was a change to the terms employees enjoyed just before the freeze period, but also the employer's past practice and whether the alteration in question was part of an established pattern of managing the enterprise.

What if the alteration is not part of an established pattern of management, but is a first-time event? Some boards have concluded that a first-time alteration of employment terms is not necessarily a breach of the statutory freeze. The change may be so reasonable or foreseeable in the circumstances that one cannot conclude that the employer's action impairs the bargaining agent's status among employees. This has given rise to the "reasonable expectations" test. A change will not be a breach of the statutory freeze, even without past practice, if it was within the reasonable expectations of employees in the unit.

Note that the statutory freeze provisions of Section 147 create "strict liability" prohibitions. Unlike many other unfair labour practices, a breach of the statutory freeze does not require an anti-union motive. What the freeze prohibits is the destabilizing *effect* of an unexpected change to terms of employment, however well-intentioned the change may have been.

No Exceptions to the Freeze Applicable

Unlike most Canadian statutes, Section 147 expressly sets out the exceptions to the statutory freeze. Under each of subsections 147(1) to (3), an alteration of employment terms is not prohibited if:

- there is an "established custom or practice" of changes to those conditions;
- an existing collective agreement permits the alteration; and
- the bargaining agent consents to the alteration.

These exceptions are probably unnecessary, for they reflect the most important exceptions to the freeze recognized by other labour boards without express statutory language. Nonetheless, because the [Code](#) expressly mentions these exceptions to the statutory freeze, this Board analyzes statutory freeze complaints in a structured fashion. It decides first whether the employer has in fact altered terms within the prohibited period. It then addresses each exception to determine whether the [Code](#) prohibits the alteration. If the Board fails to address the complaint in this structured way, a reviewing Court may infer that the Board failed to take account of a defence to the complaint. See: [*McMillan Bathurst Inc. v. Canadian Paperworkers Union 1118* [1991] Alta.L.R.B.R. 727 (Q.B.)].

The “established custom or practice” exception is an express formulation of the “business as usual” test. See: [*Crowsnest Pass, above*]. The “trade union consent” exception recognizes that the prohibition is for the benefit of the bargaining agent and so the bargaining agent can waive it. In most cases the bargaining agent will consent to an alteration that stands to benefit employees.

Finally, a change to working conditions contemplated by a collective agreement in force at the time will not breach the freeze. A permissive collective agreement provision, in a sense, is evidence of an existing custom or practice, evidence of employees’ reasonable expectations, and a prior consent from the trade union, all at the same time. The collective agreement exception applies primarily to the renewal bargaining freeze in Section 147(3). Only where a raiding trade union makes a certification application will it apply to a freeze under Section 147(1) or (2).

Section 130 bridges an expired collective agreement to the beginning of a strike or lockout. The freeze therefore overlaps the effect of the statutory bridging clause. The freeze continues, however, to protect employee rights and privileges outside the collective agreement. The overlap between statutory freeze and bridged agreement allows a trade union to ask the Board rather than an arbitrator to remedy a change of employment terms.