CEASE AND DESIST

INTRODUCTION

The *Labour Relations Code* prohibits:

- **strikes and lockouts** unless no collective agreement is in place and the procedural requirements of Sections 71-74 are met;
- **picketing** except at a struck place of employment and in connection with a lawful labour dispute (picketing that meets the requirements of Section 84 is legal, but may still be regulated); and
- non-striking employees from **refusing to handle goods** from a struck place of employment (also known as "hot cargo"). See: [*Information Bulletin #17, Regulation of Strikes, Lockouts and Picketing*].

The Labour Relations Board has authority to enforce these prohibitions. Section 91(a) states the Courts may grant an injunction where there is a "reasonable likelihood of danger to persons or property." Section 91(b) also states that, where resort to the Board is "impractical", the Courts may also grant an interim injunction until the Board can hear the matter.

The Board has power under Sections 17 and 88 to order a party to stop unlawful industrial action. This power is similar to the Courts' power to issue injunctions. The Board also has power under Section 82 to limit lawful picketing. It may, under Sections 86 and 87, order persons other than the guilty party to take steps to stop unlawful industrial action. We refer collectively to illegal strike or lockout complaints, unlawful picketing and hot cargo complaints, and applications to regulate lawful picketing, as "cease and desist proceedings."

The Board's role goes beyond hearing and deciding complaints of illegal industrial action. Board staff try to mediate and settle such complaints, and secure an orderly return to work.

Cease and desist proceedings are usually urgent matters. The Board has developed procedures to hear them on short notice without sacrificing due process. This policy describes those procedures and discusses some of the special procedural problems that arise in cease and desist proceedings. This policy discusses:

- how to name respondents to a cease and desist application;
- how to give parties notice of the Board's hearing;
- how to write and post notices of a hearing;
- what to consider in scheduling the hearing;
- interim directives: what they are and how the Board uses them;
- special factors in drafting picketing directives;

- consent directives;
- what a cease and desist directive contains; and
- how to give affected persons notice of a directive.

For information on how to enforce a Board directive, see: [*Enforcement of Directives, Chapter 35*].

NAMING RESPONDENTS IN CEASE AND DESIST PROCEEDINGS

A complainant seeking a cease and desist order should name as respondents all those it alleges to have violated the Code and all persons against whom it seeks a remedy. Possible respondents in a cease and desist proceeding include:

- an employer (Sections 72, 87);
- an employers' organization (Sections. 72, 87);
- an officer, official or agent of an employer or an employers' organization (Section. 87);
- employees (Sections 71, 84, 85, 86(c) and (e));
- a trade union (Sections 71, 84, 85, 86(a) and (e));
- a person acting on behalf of a trade union (Section 71);
- an officer, official or agent of a trade union (Section 86(b)); or
- any person (Sections 84, 86(d) and (e)).

A complaint should name individuals by their personal names, not their offices or positions. Illegal strike and picketing situations usually involve many employees. It is often impossible to identify and name these persons individually. In these cases, the complaint may name respondents by a class description. We allow complainants to describe the class by a combination of the employer and the trade union involved. For example,

> Employees of <employer name> represented by <union name>.

Sometimes a complainant does not know the respondents' group identity or affiliation. This problem occurs in "hit-and-run" picketing of construction sites. If there is no information upon which to draft a proper class description, the complaint may name the respondents as "unknown persons."

A bare reference to "unknown persons," however, is too vague. It might sweep in persons engaging in conduct unrelated to the dispute. The Board does not have the power to restrain all conduct that might amount to "picketing." It can only restrain picketing that relates to a labour relations dispute. If picketing by unknown persons involves a labour relations dispute, the Board can issue a directive against a class described by reference to the particular labour dispute. For example,

> All persons picketing on or around the <site name> site at <location>, Alberta, in connection with the labour dispute between <union name> and <employer name>.

Using such a description serves three purposes:

1. it ensures that the Board does not issue a directive broader than its jurisdiction can support;
2. it binds future picketers who are different individuals than the picketers involved in the original incidents; and
3. it allows both past picketers and future, would-be picketers to identify themselves as the subject of the directive.

When the Board receives a cease and desist application, the Director of Settlement reviews the application for completeness and particulars. If the complaint does not name necessary parties, the Director may require the complainant to give them notice of the application: [*Rule of Procedure 22(e)*]. The Director of Settlement must identify the proper parties to the application at the outset of the proceeding. The nature of the parties will influence the timing and form of notice of the hearing.

NOTICE OF HEARING

When the Board sets down a cease and desist matter for hearing, the Director of Settlement immediately gives notice of the hearing to:

- the complainant;
- the respondents; and
- any other parties identified as affected parties.

A respondent includes any party or person who the complainant wishes to bind to the remedy sought. Consider this example. Employees go on a wildcat strike despite the union's efforts to prevent it. The employer cannot allege that the union contravened the Code. The employer, however, asks for a Section 86 direction that the union take action to bring about a resumption of work. This proposed remedy makes the union a respondent entitled to notice of the application.

"Affected parties" is a class broader than "respondents." An affected party includes any person or organization with a tangible and direct legal interest in the outcome of the application.

The Board may give notice of a cease and desist hearing by the following methods:

- personal service of a written notice [*Rule of Procedure 11*];
- delivery of a written notice [*Rule 11*];
- fax delivery of a written notice, followed by delivering or mailing the hard copy [*Rule 11*];
- verbal notice followed by written confirmation [*Rule 13*];
- posting notices in the workplace [*Rule 14(1)*];

- directing a bargaining agent to bring the hearing to the attention of its members, its officers, or the persons it represents [*Rule 14(2)*]; or
- telegraph or telex message, followed by verbal confirmation [*Rule 12(b)*].

The Board may give notice of a hearing to an individual, where the individual is a respondent. It may give notice to a trade union, employer or employers' organization by giving notice to a person in a position of authority with the organization. Such persons are:

- an officer or business representative of a trade union [*Rule 9(b)*];
- a director or officer of an employer or employers' organization [*Rule 9(a)*];
- an "executive manager" of an employer or employers' organization [*Rule 9(a)*]; or
- a solicitor acting for a party to the proceeding [*Rule 9(e)*]. Notice to a solicitor is not valid notice to the party unless the solicitor acknowledges acting for the party.

Confirm notice was given by a memo to file. An officer gives parties notice of a cease and desist proceeding as follows.

Notice to Trade Unions

Immediately upon receiving a cease and desist application in which a union is a respondent, the officer telephones a representative of the union(s) involved. The usual practice is to try to contact a business representative at the union's office. Failing that, the officer tries to contact an officer of the union. The Board keeps the personal phone numbers of some union business representatives in case the officer is unable to contact them at work. When the officer makes telephone contact, s/he tells the contact that the Board has received a cease and desist application. The officer:

- summarizes the application;
- tells the contact the time and place of the hearing;
- asks the contact whether a solicitor will be acting, and asks that any solicitor retained immediately contact the Board;
- immediately makes a note of the conversation on the file, with the time and the name of the contact; and
- faxes a copy of the application to the union office to the attention of the person contacted. The officer writes a notice of the hearing time and place on the cover letter to the fax so there is another written record that notice was given. If the union does not have a fax machine, the officer sends the copy of the application by "Super Rush" courier.

If telephone contact is not possible, the officer can do one of the following:

- Fax the application and a written notice of the hearing to the union offices, marked to the attention of a business representative or union officer. The officer phones the union office to advise that they are sending the document. The officer directs the answerer to bring the

document to the attention of the responsible official immediately. Even if no responsible officials are present, someone in the office usually knows where to reach them. The officer documents the fax transmission and the telephone call on the file.

- Try personal service on a union representative or counsel, if the officer has information on where to find the representative or counsel. Service on counsel is only adequate notice if counsel confirms they act for the union.
- Personally deliver the notice of hearing to the union's office and leave them with a person at least 18 years old. Here, too, the officer directs the recipient immediately to bring the documents to the attention of the responsible official. The officer should deliver the application personally because the Board may require an affidavit to prove it gave a valid notice. A courier slip will not contain all the information needed to prove a valid notice.

Notice to Trade Union Officials

Employers name union officials individually when they allege the officials counselled, incited or threatened an unlawful strike. The Board officer must give named individual(s) notice of the application and hearing. The Board officer may do this by telephone, fax or personal delivery. The officer may also give notice by directing the union to advise its official of the application and hearing [*Rule 14(2)*]. The officer should always do this where it is impossible to notify the official by telephone. The Board officer makes a note on the file immediately after making such a direction.

Notice to Employers and Employers' Organizations

An officer gives notice of a cease and desist application to an employer or employers' organization in the same way as to a trade union. The proper person to notify for an employer is a director, an "executive manager" of the organization, or some other person who has authority to act for the employer in labour relations matters. An industrial relations officer or an employers' organization business representative, however titled, is usually the proper person to give notice to.

Notice to Employees

A complaint may name employee respondents individually or as a class. Either way, the standard method of giving them notice of an application is to post notices where they are likely to see them [*Rule 14(1)*]. Employees need not actually see the notice. All that is necessary is that notices appear in a place where the Board or an officer believes a reasonable number of employees are likely to see it. That may be at the workplace, near the workplace, on the picket line, at the trade union's offices, or at some other place where employees are likely to gather. The officer selects the place of posting in consultation with the Director of Settlement. In most cases the officer will post notices at more than one place. This makes it more likely that a representative group of employees will receive actual notice of the application.

The Board may give notice of an application and hearing to employees and trade union members by directing their trade union to bring the matter to their attention [*Rule 14(2)*]. An officer should always give this direction where employees are respondents. Again, the officer should immediately

make a note on file of the direction, when and to whom it was made.

Notice to Unknown Persons

Where respondents' identities are unknown, the only practical method of providing notice of an application or hearing is to post notices. The Board posts notices wherever there is reason to believe the respondents may see them. It is not important that unknown respondents are unlikely to appear in response to the notice. Procedural fairness demands that the Board make efforts to give them notice. If the Board makes no efforts, its directive may be unenforceable against anyone that later proves to have engaged in unlawful activity.

If there is reason to suspect that a union has instigated industrial action by unknown respondents, the most effective place to post a notice may be on union premises. This may be the union hall or any temporary facility maintained by a union during a particular labour dispute. Sometimes the identity of a group of picketers is unknown but the picket signs refer to a particular labour dispute ("UFCW On Strike Against XYZ Packers Ltd"). In that case it is reasonable to post notices at the site of the dispute and at the premises of the union involved. Occasionally the Board has no information suggesting an effective place for posting. As a last resort, the officer may post the notice at the site where the complaint occurred even though the allegedly unlawful activity has ceased at that location.

Officers dealing with giving notice to unnamed respondents should consult the Director of Settlement and, if necessary, legal counsel.

A Board officer posts notices of a hearing. In the vicinity of Edmonton and Calgary, Board officers do the posting. In rural areas, a Deputy Returning Officer may do the posting. The Board asks employers to post Board notices only as a last resort because it reflects poorly on the Board's independence and impartiality. If the Board must use the employer to post a Board document, the Director of Settlement or a panel of the Board issues a written direction to the employer to do so.

After posting a notice of hearing, the officer records the posting in a confirmation memo and places it on the file.

WORDING OF NOTICES

Printed notices should be written in clear, plain language. A notice should be written at a level that all persons can understand. It should state:

- The respondents that it addresses. Where the respondent is a class of persons, the notice should describe the particular work location affected. For example:

  To Certain Employees of Catalytic Maintenance Inc. employed at the Suncor site, Fort McMurray, Alberta, and represented by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 488.

- That the complainant made an application, the type of application, and when they made it.
- That the Board has decided to hold a hearing into the complaint.
- When and where the Board will hold its hearing.
- An invitation to all persons affected to attend the hearing and defend their interests.
- A warning that, if an affected person does not attend, the Board will proceed without them.

SCHEDULING THE HEARING

The Board's policy is to schedule "urgent matters" for hearing on as little as four hours of notice. A cease and desist proceeding is almost always an "urgent matter." The four-hour minimum notice period is calculated from the time the Director of Settlement expects the *last* affected party to receive notice.

The officer receiving the complaint immediately contacts the person or counsel filing the complaint to determine the urgency of the matter and when it wishes to proceed. The officer passes this information to the Director of Settlement. The Director weighs the complainant's view of the urgency of the matter against the practical problems of holding a hearing on short notice. The chief factors to consider are:

- The time necessary to give notice of the hearing. The time will be greater for complaints involving rural worksites.
- The time necessary to assemble a Board panel. This includes time to transport it to the place of hearing where the hearing takes place outside Edmonton and Calgary.
- The time necessary to transport necessary witnesses to the hearing.

The Director of Settlement sets the time and place of the hearing after considering these factors. The officer gives formal notice of the scheduled hearing to affected parties.

The Director of Settlement may amend the time of the hearing. This may happen if there are legitimate and compelling reasons why a respondent cannot prepare its case properly within the notice period. It may happen if settlement discussions show promise. If this is done, the officer provides affected parties with notice of the amended hearing time. Board administration does not amend scheduled hearing times lightly or often. If the respondent does not agree to be ready within a reasonable time, or seems merely to want to delay the hearing, the hearing proceeds as scheduled. If a party cannot present its case properly, the Board can adjourn or issue an interim directive until it hears it fully.

Before scheduling the hearing, the Director of Settlement makes certain that enough resources are on hand to conduct the hearing and issue any resulting Directive. This may require that staff work over-time, that computer equipment be available, and that the parties have after-hours access to the building and hearing room.

DIRECTIVES

Interim and Permanent Directives

The Board has the power to issue directives in cease and desist proceedings. It may issue **interim** or **permanent** (final) directives. An interim directive must limit its own duration. It may say it will expire on a given date, or on the happening of an event, or only when the Board gives a final decision. Any directive that is not self-limiting is a permanent directive. It is permanent or "final" even though the Board may later reconsider it.

The Board's authority to issue directives in cease and desist proceedings comes from Sections 12, 17, 86 and 87. Sections 86 and 87 give the Board a further specific power to make interim or final directives in picketing, unlawful strike and lockout proceedings. They give the Board authority to forbid or compel action by any person affected by the stoppage or picketing. For example, in an illegal strike the Board might order officers of the trade union to hold meetings. It might order them to publish the Board's order or communicate the Board's order individually to employees. It may do this even though the trade union was itself innocent of any wrongdoing.

A final directive is remedial in nature. The Board issues a final directive after a full inquiry into the complaint.

An interim directive may be either remedial or preservative. The Board's Section 12 power to make interim directives is preservative. It allows the Board to preserve a satisfactory state of affairs between the parties until the Board can issue a final decision. An interim directive may be useful where the Board must adjourn a hearing because critical evidence is not available. An interim preservative directive may be necessary if one party might otherwise alter the *status quo* before the Board can decide the issue.

The Board may issue an interim preservative directive under Section 12 only if "it considers [the directive] necessary." There must be some evidence before the Board leading it to believe the directive is necessary. The Board cannot issue a Section 12 interim directive in a vacuum. See: [*Boilermakers 146* v. *Labour Relations Board* (1988, Unreported Alta. C.A. No. 8703-0630 AC)]. The inquiry necessary to make an interim preservative directive does not, however, have to be a full evidentiary hearing on the merits of the case.

Interim preservative directives are useful where a party resists a cease and desist application but does not have a proper opportunity to prepare its case. For example, applications to prohibit picketing sometimes attract constitutional objections (typically that a restriction on picketing would violate picketers' freedom of expression). The Attorneys General of Canada and Alberta must receive 14 days notice of a constitutional objection. Usually in this situation the Board issues an interim directive. It then schedules continuation of the hearing to allow the parties to notify the Attorneys General and prepare argument on the constitutional point.

The Board's Section 17 power to make interim remedial orders allows it to fashion "interim remedies" after it has decided that a party has violated the Code. In *UFCW 280-P* v. *Gainers Inc.* [1986] Alta.L.R.B.R. 323, the Board explained interim remedies:

> We believe the reason for both an interim and final rectification power ... is that very frequently in labour relations the appropriate remedy for a breach of the Act may involve several stages. It may be a cease and desist order followed by damages. It may be an order to provide an employee with fair representation ... followed by compensation if the earlier absence of such representation ultimately causes damage. It may be an order to draw up bargaining proposals and subsequently to meet and bargain in a certain specified way. The labour board reports are full of such staged remedies.
>
> We believe it also serves ... to let the Board provide a stop-gap remedy for conduct which amounts to a breach, but which is either amenable to settlement or is sufficiently uncertain in scope that the fashioning of a final remedy would be premature.
>
> Section 142(5) [of the Labour Relations Act] lets the Board fashion remedies that suit the ongoing labour relations of the parties without the risk of becoming *functus officio* [exhausted of jurisdiction] after granting any initial remedial order.

An interim or permanent directive binds the person(s) to whom it is directed for the specific strike, lockout or picketing in issue. Section 88(1) states that it also binds the person for "any future strike or lockout that occurs for the same or substantially the same reason."

Picketing Directives

An application to regulate lawful picketing is very different from an application in respect of an illegal strike or lockout. See: [*Picketing, Chapter 30(b)*]. It seeks to regulate conduct rather than prohibit it. The Board keeps in mind that the union and employees have a right to engage in picketing that does not cross the line into intimidation or criminal conduct. An employer engaged in an industrial dispute has an equal right to try to continue operating during the dispute. The Board must balance these rights. It tries to restrict the lawful picketing as little as possible, while keeping the peace and allowing the employer to try to continue operating.

The Board considers many factors in regulating lawful picketing. Section 84(3) requires:

> 84(3) When the board makes a determination or order under subsection (2) it shall consider the following:
>
> (a) the directness of the interest of persons and trade unions acting under subsection (1),
> (b) violence or the likelihood of violence in connection with actions under subsection (1),
> (c) the desirability of restraining actions under subsection (1) so that the conflict, dispute or difference will not escalate, and
> (d) the right to peaceful free expression of opinion.

Section 87 gives the Board broad regulatory powers An order to regulate picketing often specifies:

- the location(s) of the picketing;
- the hours for picketing;
- the maximum number of picketers at any spot; and
- the manner in which picketers may conduct the picketing.

The order may also make any other direction the Board considers necessary to balance the competing rights involved as outlined in Section 87.

Where the Board grants an order regulating picketing, it posts the order prominently in the locations where further picketing is likely to take place.

Consent Directives

Cease and desist applications sometimes proceed unopposed. Individual employees rarely show up at a Board hearing to defend their own interests. Often the trade union is willing to consent to a directive issuing against itself and the employees it represents.

There are many reasons why a union may consent to a directive. Often an unlawful work stoppage erupts without trade union involvement. Examples are a spontaneous strike or a refusal to cross another union's picket line. The union may wish to have the support of a Board directive in convincing its members to go back to work. Where the union has helped bring about an unlawful stoppage, it may wish to avoid a finding against it. It may therefore consent to a less onerous directive than it would get from a contested hearing. It may consent to a directive that makes no finding of union responsibility for the stoppage in hopes of avoiding civil liability. It may seek to have the Board issue an interim directive rather than a final one and so maintain its freedom to raise a defence later. Employers or employers' organizations faced with a complaint of an illegal work stoppage may consent to a directive for similar reasons.

For these and other reasons parties often ask the Board to issue a directive they have negotiated between themselves. The Board considers the following matters when parties ask it to issue a consent directive:

- Have all parties received notice of the hearing? If, for example, individual respondents have not received proper notice, the Board cannot issue a consent directive agreed to only by some of the respondents. It must adjourn the hearing pending proper notice.
- How likely is it that a consent directive will resolve the alleged unlawful activity? The idea behind such a directive is that it may put an end to the action in issue and avoid the adverse labour relations consequences of a contested hearing. If union members have already ignored their trade union or wilfully defied lawful authority, however, it may not be reasonable to assume that the consent directive will defuse the situation.

Where the parties are willing to agree to a consent directive, there may be no need to hear evidence on the merits of the complaint. The Alberta Labour Relations Board's policy (like that of the

Canada Industrial Relations Board, is to be receptive to directives negotiated between the parties. If the parties present it with an otherwise acceptable form of consent directive, it will issue the directive without hearing evidence on the complaint. If it is later alleged that a party is not obeying the consent directive, it proceeds to hear the evidence on the original complaint. If the complaint is successful, it reconsiders the consent directive. It may issue a new directive as it considers proper. See: [*CNR and Brotherhood of Locomotive Engineers et al.* (Unreported C.L.R.B. Decision No. 770, December 15, 1989)].

The Board does not imply consent to a directive from a party's silence. An affected party must expressly consent to the directive. The Board ensures that the parties' consent appears on the record, either in the hearing summary or in the body of the directive itself.

Writing Directives

Although there is no formula or standard format for writing cease and desist directives, the Board has adopted a common style.

A Directive typically consists of two or three parts:

- a **text** that sets out necessary background and the Board's findings of fact;
- a **declaration** there has been a failure to comply with a provision(s) of the Code; and
- the **order** that directs certain actions by the parties.

The text of a directive and any declaration that a party has breached the Code are written in ordinary paragraph form and short, clear sentences.

The Board sets out its order or orders in brief sentences and simple language, in consecutively numbered paragraphs. The order should be precise as to what must be done and who must do it. The order should not leave persons in any doubt whether they must do something to comply and what they must do. Orders that do not meet this test may be too vague to enforce.

An order will also say:

- whether it is an interim directive, and if so, to what point it will be effective;
- when it takes effect;

- what decisions the Board makes about filing the Directive in the Court of Queen's Bench. If the Board intends to file the Directive without further hearing, it warns that a filed Directive is enforceable as a Court order; and
- by what method affected persons should receive notice of the Directive.

The Board follows this common style for consistency, and because:

- There is almost never time to prepare full written reasons in a cease and desist proceeding. Any Board Order may be judicially reviewed on short notice. The style ensures that the important findings of fact and law appear to a reviewing judge plainly and on the face of the Order.
- The format allows swift publication of any Order. Because the Order is a separate part of the Directive, administrative staff can lift it verbatim from the Directive and put into a Notice format of any size in minutes.

Notice Of Directives

When the Board issues a directive, it gives a copy to all parties represented at the hearing. Usually it simply gives a copy of the directive to the parties' counsel or representatives at the end of the hearing. It sends a copy of the directive by fax or courier to parties not represented at the hearing.

The Board gives employees notice of the directive by posting the directive or by directing the trade union to tell employees of the directive. Usually the Board gives both forms of notice. Like Notices of Hearing, the Board prints directives in sizes appropriate to the workplace. An officer or a Deputy Returning Officer, as appropriate, posts the directive. Rarely, the Board may order its directive published in the print media.