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COLLECTIVE BARGAINING AND AGREEMENT

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Collective Bargaining and Agreement deals with every aspect of the collective bargaining process, including: union-management relations, preparation for bargaining negotiations, and tactics and the law. It offers a practical explanation of industrial relations laws and practices, good faith bargaining in light of recent decisions, the law governing strikes, lockouts, replacement labour and other management-union tactics, as well as why more negotiators are using mutual gains bargaining, including the inner workings of today's most effective bargaining techniques and the factors affecting union-management relations.

Collective Bargaining and Agreement also includes chapters covering key aspects of collective agreements with annotations which include a summary of the law and a discussion of applicable legal cases.

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What's New in this Update:

This release updates the case law and commentary in Chapters 1 (Canadian Employment Law and Collective Bargaining), 2 (The Union and Its Members), 3 (Management and Its Constituents), 6 (Negotiation), 8 (Duty to Bargain), 9 (Collective Bargaining Tactics and the Law), 13 (Management Rights), 14 (Non-Discrimination and Human Rights), 16 (Hours of Work and Rest), 21 (Wages), 25 (Technological Change), 27 (Benefits), 30 (Illness and Disability), 35 (No Strike or Lock-out), 36 (Grievance and Arbitration Procedure), 37 (Other Clauses), and 39 (Letters of Understanding).

Highlights:

COLLECTIVE BARGAINING TACTICS AND THE LAW — STRIKES AND LOCK-OUTS — LEGAL STRIKE — Federal civil servants, represented by the Public Service Alliance of Canada (PSAC) voted in favour of a 2023 strike, but only one-third of the PSAC members actually cast their ballots during the vote. One of their members brought an application to the Federal Public Sector Labour Relations and Employment Board challenging the strike vote alleging that he had not been given a fair opportunity to vote (*Paterson v. Public Service Alliance of Canada*, 2023 CRTESPF 44, 2023 FPSLREB 44, 2023 CarswellNat 1137, 2023 CarswellNat 1138 (Can. F.P.S.L.R.E.B.)). The Board noted that of the 120,000 federal public workers represented by PSAC, just 42,421 exercised their right to vote triggering one of the largest job actions in Canadian history. Among those who did vote, 80% voted in favour of the strike. However, there were some irregularities in the PSAC conducted vote, as the union moved the deadline to vote forward from April 19 to April 11. In the case, the Board summarily dismissed the complaint. The Board noted that voting irregularities do not fully explain the low turnout. However, the Board did note that had either the voter turnout or the margin in favour of the strike been lower, in a future case, given the voter irregularities, and with different numbers, this could have resulted in the invalidation of the strike vote.

COLLECTIVE BARGAINING TACTICS AND THE LAW — REPLACEMENT LABOUR — In a British Columbia case, the British Columbia Labour Relations Board held that a company using out of province workers who were not on strike to replace striking workers in B.C. constituted unauthorized use of replacement workers during a lawful strike in B.C. In *Gate Gourmet Canada Inc. and UNITE-HERE, Local 40, Re*, 2022 BCLRB 130, 2022 CarswellBC 3165 (B.C. L.R.B.), reconsideration / rehearing refused 2023 BCLRB 128, 2023 CarswellBC 2432 (B.C. L.R.B.), the union alleged that the employer — an airline food caterer — was using unlawful replacement workers during a strike by utilizing Alberta and Ontario employees who were

not on strike to "double cater" flights from Alberta and Ontario to British Columbia. The Board held that the employer's actions violated sections 68(1) and 6(3)(e) of the *Labour Relations Code*.

COLLECTIVE BARGAINING TACTICS AND THE LAW — UNFAIR LABOUR PRACTICES DURING COLLECTIVE BARGAINING AND LABOUR DISPUTES — BREACH OF PRIVACY — A new section has been added to the text discussing unfair labour practices, specifically relating to breach of employee privacy during the collective bargaining process. The section contains discussion of an incident in which it was revealed that an employer, SNC-Lavalin, was spying on e-mails between employees of subsidiary Candu Energy Inc. and their union, the Society of Professional Engineers and Associates (SPEA) during negotiations of a new collective agreement. SPEA then filed an unfair labor practice complaint to the Canada Industrial Relations Board alleging that the employer was unlawfully interfering with the internal administration of the union contrary to the *Canada Labour Code*. The employer admitted that it was monitoring employee e-mails to the SPEA between January 2019 and December 2021. An SPEA staff representative said she believes that SNC was spying on these communications because it wanted intelligence that would give the company an advantage in collective bargaining and various grievances.

HOURS OF WORK AND REST — EMPLOYMENT STANDARDS LEGISLATION — A new section has been added to the text discussing the new "right to disconnect" provisions found in Part VII.0.1 of Ontario's *Employment Standards Act*. The provisions require that employers with 25 or more employees develop a written policy for staff regarding disconnecting from work. The legislation defines "disconnecting from work" as "not engaging in work-related communications, including emails, telephone calls, video calls or sending and reviewing other messages, so as to be free from the performance of work." The legislation offers no guidance on what must be included in the policy. However, in a unionized environment, it would be prudent for management to engage with their union to develop and implement the policy, or develop language in their collective agreement (or a letter of understanding) in order to comply with the legislation.

TECHNOLOGICAL CHANGE — PREVENTING TECHNOLOGICAL CHANGE — Artificial intelligence (AI) will have a profound impact on unionized workplaces and will challenge both labour and management in negotiations, arbitrations and labour relations proceedings for the foreseeable future. A thorough case study from the EU, the UK and the US explores issues facing labour and management that are equally compelling in Canada. Existing legislation and collective agreement provisions involving technological change will assist in addressing the introduction of these profound

changes and the loss of unionized positions. However, it will be critically important for management to be fully transparent with union leadership regarding the introduction of these AI-related technological changes, their impact on the union membership, and proposing fair and sustainable solutions that are acceptable to both partners in the union-management relationship. Ultimately, new legislation and collective agreement clauses will be necessary.

OTHER CLAUSES — COST OF LIVING ALLOWANCE — Cost of living clauses — common during the high period of inflation in the 1970s — have come back to the forefront in 2023 in the post-pandemic climate marked by high inflation and low wage growth. This was demonstrated in a British Columbia case, *Sobeys Capital Inc. and UFCW, Local 1518 (2022 GRV-22-0205), Re*, 2023 CarswellBC 63, 347 L.A.C. (4th) 285 (B.C. Arb.), affirmed 2023 BCLRB 67, 2023 CarswellBC 1308 (B.C. L.R.B.), in which the parties first agreed in their 1997 collective agreement to include a cost-of-living clause. In March 2022, the actual British Columbia Consumer Price Index increased by 6% over the previous year. The union claimed that the clause triggered a cost-of-living wage increase of greater than 3%, while the employer claimed that the cost of living was spent. The union policy grievance was allowed: "An arbitrator should attempt to give meaning to all the words in the CA as part of a purposive approach. In my view, no purpose would be served by retaining a spent provision in the CA. The continued presence of the section in the CA, during successive renewal terms, in my view, manifests a mutual intent to protect wages against inflationary increases."

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