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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 features case law and commentary updates to Chapters 1-3, 6, 8, 9, 13, 14, 19, 23, 30, 36, and 39.

Highlights:

Canadian Employment Law and Collective Bargaining—I. General—§ 1:3 The Charter of Rights and Freedoms—On August 22, 2024, work stoppages commenced at Canadian National (CN) and Canadian Pacific Kansas City Railway (CP). The Federal Minister of Labour directed the Canada Industrial Relations Board (CIRB) to order the union workers to resume their duties, assist the parties by imposing binding arbitration to reach a collective agreement, and extend the existing collective agreement until the new collective agreement was determined by arbitration. The ministerial discretionary orders were unprecedented in that they ended the strike and imposed binding arbitration. The union challenged the ministerial order alleging it was unconstitutional and that the CIRB had the jurisdiction to review it. In 1984, s. 107 of the *Canada Labour Code* was amended to permit the Minister to refer any question to the Board and to direct the Board to do such things as he deemed necessary. Section 107 has seldom been used since the 1984 amendment. The Board concluded that it does not have the authority to review the minister's direction and has no discretion to engage in the *Charter* analysis urged by the union (see *Canadian National Railway and Teamsters Canada Rail Conference, Re*, 2024 CIRB 1162, 2024 CarswellNat 4508, 2024 CarswellNat 4509 (C.I.R.B.). In *Canadian Union of Postal Workers v. Canada*, 2024 ONSC 3787, 2024 CarswellOnt 10348 (Ont. S.C.J.), additional reasons 2024 ONSC 4589, 2024 CarswellOnt 12436 (Ont. S.C.J.), the union challenged the *Postal Services Resumption and Continuation Act*, S.C. 2018, c. 25, which ended a series of rotating strikes and 14 months of collective bargaining. The Court noted that the Supreme Court has consistently held that: "Legislation substantially interfering with a meaningful bargaining process by limiting the right to strike might nevertheless be justified under s. 1 [of the *Charter*], as long as an appropriate alternative mechanism is put in place" (*Canadian Union of Postal Workers v. Canada*, 2024 ONSC 3787, 2024 CarswellOnt 10348 (Ont. S.C.J.), para. 78, additional reasons 2024 ONSC 4589, 2024 CarswellOnt 12436 (Ont. S.C.J.). The court dismissed the case as moot because the labour dispute was resolved, and a new collective agreement was in force.

Canadian Employment Law and Collective Bargaining—III. Summary—§ 1:33 Employee Privacy—In *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22, 2024 CarswellOnt 9199, 2024 CarswellOnt 9200 (S.C.C.),

two teachers employed by the school board exchanged private communications regarding workplace concerns on a school issued laptop computer that was password protected. The school principal entered the classroom of one of the teachers who was absent at the time, touched the mouse on the screen, and accessed their private communications. He took a screenshot and used it as evidence to reprimand the teachers. The teachers' union grieved the discipline, claiming the search violated the teachers' privacy at work. No *Charter* violation was alleged at the arbitration hearing. The labour arbitrator dismissed the grievance. Applying the balance of interest approach in labour arbitrations, the arbitrator found that there was no breach of the teachers' reasonable expectation of privacy and dismissed the grievance. On judicial review, the majority of the Divisional Court erred in concluding that s. 8 of the *Charter* did not apply. The Court of Appeal conducted a correctness review of the arbitrator's decision and held that the search was unreasonable contrary to s. 8 of the *Charter*. On appeal, the Supreme Court of Canada upheld the decision of the Ontario Court of Appeal. The arbitrator was empowered to decide all questions of law and was therefore required to decide the grievance consistent with s. 8 of the *Charter*. The appeal was dismissed, but there was no reason to return the grievance to the arbitrator as the reprimand was moot. The above decisions of the Ontario Court of Appeal and the Supreme Court of Canada are significant in both the private and public sectors. Although public school boards have been subject to the *Charter* for many years, private sector employers have not been subjected to *Charter* scrutiny except under the specifically listed grounds set out in the *Charter*. However, the Supreme Court of Canada has now elevated several rights enshrined in labour legislation to constitutional status: duty to bargain in the public sector, the right to unionize, collective bargaining, picketing, the right to strike, and now privacy rights within the union sector. This has made it more difficult for employers to successfully resolve labour disputes through collective bargaining, mediation and interest arbitration. Many more cases are now being litigated through costly and protracted constitutional litigation which results in costly delays and increases the conflict between employers and their unions.

Management and Its Constituents—§ 3:10 Communications During the Bargaining Process—In the *United Food and Commercial Workers Union Canada, Local 864 v. Sproule Lumber*, 2024 NSCA 27, 2024 CarswellNS 185 (N.S. C.A.), leave to appeal refused *Sproule Lumber, a division of J.D. Irving, Limited v. United Food and Commercial Workers Union Canada, Local 864, et al.*, 2024 CarswellNS 755, 2024 CarswellNS 756 (S.C.C.) case, the arbitrator found that the employer launched an attack on the union and its officials through direct communications with employees. The arbitrator found that the communications breached the recognition provisions of the collective agreement. The arbitrator awarded damages to the

union. The employer brought an application for judicial review that was granted by the Nova Scotia Supreme Court. The union appealed. The Court of Appeal reviewed the arbitration award based on a standard of reasonableness and upheld the arbitration decision. The standard of review of the lower court decision was that of correctness. The lower court erred in applying the N.S. labour law principles for employer unfair labour practices and the onus on the union to prove that the employer's communication was an unfair labour practice. That is not the test, nor the standard of review of an arbitrator's decision based on a breach of the collective agreement. The union appeal was allowed, and the employer was liable in damages. In the case of improper employer communication, a union may apply to the Labour Board alleging an unfair labour practice contrary to the applicable labour legislation, or it may file a grievance alleging a breach of the collective agreement. The union may file both a grievance and a Labour Board complaint. However, the roles of the arbitrator and the Labour Board are distinct even though they may be reviewing the same employer communication. The Labour Board will first determine if the employer has committed an unfair labour practice, and whether there has been a breach of the labour legislation. The arbitrator's role is to determine if there has been a breach of the collective agreement and if so, award the appropriate remedy. Often, when an employer is responding to both proceedings, they may apply for, and be granted, a stay pending the arbitration award. The arbitration award can then be placed in evidence before the Labour Board if the parties proceed with the application after the arbitration board has ruled.

Duty to Bargain—§ 8:2 Obligations of the Union and Management—In *Saskatoon Co-operative Association Limited v. UFCW, Local 1400*, 2022 CarswellSask 373, 2022 CanLII 73372 (Sask. L.R.B.), the union campaigned to remove the Board of Directors of the Co-op in favour of union friendly candidates. One candidate, Mr. Thebaud, was a former employee of the Co-op and the union, and a vocal activist critical of the Co-op management. The union declared an impasse and left the bargaining table. This resulted in a finding of unfair bargaining, and the Saskatchewan Labour Relations Board ordered the union to return to bargaining. The central issue was a management proposed two-tier wage level which would adversely affect the wage level of new employees. During the dispute the union was unsatisfied with the two-tier wage level and other management tactics. After a 5-month strike the parties concluded a renewal agreement that included the two-tier wage schedule. The union, with the assistance of Thebaud, organized and presented a petition to call a special meeting of the Co-op to remove and replace the Board of Directors. The notice in the petition stated that its purpose was to change the employer's bargaining position with respect to the two-tiered wage schedule. The respondents' objective was to manipulate the election in order to undermine the employer's governance

structure and interfere with collective bargaining. The union denied that Thebaud was acting as their agent. The campaign was successful in replacing 2 of 3 incumbents on the Board. The Labour Board noted that there is no specific provision in the Saskatchewan *Labour Act* prohibiting union interference in the internal affairs of management, but it is implicit. Allowing the union to interfere with management, while the employer is expressly prohibited from interfering with the union's internal affairs, would introduce an absurd double standard into the Act. The Labour Board concluded that the respondents engaged in an unfair labour practice and ordered that the Board decision be circulated to members of the bargaining unit.

Duty to Bargain—§ 8:13 Hard Bargaining Versus Surface Bargaining—In the *Van-Air Holdings Ltd Dba Radisson Blu Vancouver Airport Hotel & Marina*, 2024 BCLRB 144, 2024 CarswellBC 3146 (B.C. L.R.B.) case, the union engaged in a strike lasting more than 3 years and the employer permanently laid off or discharged approximately 140 employees. The employer owns the Radisson Blu Vancouver Hotel & Marina. After the commencement of the strike the employer operated the hotel as a quarantine facility during COVID-19 until 2022. The hotel was reopened in June 2023. The parties engaged in protracted litigation over the course of the strike involving the employer's use of replacement workers, permissible picketing, and unfair labour practices committed by the employer. The Board then declared that the union failed to bargain in good faith. The parties were without a collective agreement for more than 6 years. The union and employer engaged with the Minister of Labour over a course of approximately six weeks. The union then disagreed with the terms of reference. The union then tabled proposals that the employer alleged were designed to prolong the union's strike activity and aggravate the relationship between the parties. The union alleged that these proposals were hard bargaining, not surface bargaining as alleged by the employer. The Board held that the union failed to bargain in good faith. The Board ordered the union to make itself available for collective bargaining a stipulated number of days until a collective bargaining agreement is concluded.

Duty to Bargain—§ 8:24 Remedies—Other Remedies—In *Unite Here Local 40 v. Van-Air Holdings Ltd.*, 2025 BCSC 319, 2025 CarswellBC 454 (B.C. S.C.), the union applied to the B.C. Supreme Court to hold the employer in criminal contempt following unfair bargaining and violation of orders of the B.C. Labour Relations Board. The court succinctly summarized the legal framework that applies to a criminal contempt application. In *Carey v. Laiken*, 2015 SCC 17, 2015 CarswellOnt 5237, 2015 CarswellOnt 5238 (S.C.C.), at paras. 32–35, the court held that criminal contempt has three elements that must be proven beyond a reasonable doubt:

1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done;

2. The party alleged to have breached the order must have actual knowledge of the order; and

3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

Adopting the principles from *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, 2003 CarswellBC 2554 (B.C. C.A. [In Chambers]), and quoting from *Bassett v. Magee*, 2015 BCCA 422, 2015 CarswellBC 2864 (B.C. C.A.), at para. 33, additional reasons 2015 BCCA 511, 2015 CarswellBC 3655 (B.C. C.A.), leave to appeal refused 2016 CarswellBC 1446, 2016 CarswellBC 1447 (S.C.C.), additional reasons 2016 BCCA 329, 2016 CarswellBC 2040 (B.C. C.A.), the following principles apply to contempt proceedings:

1. The proceeding is quasi-criminal in nature, and trial rules of admissibility of evidence apply;

2. The applicants bear the onus of proving the elements of contempt beyond a reasonable doubt; and

3. If the order said to be breached is ambiguous, the alleged contempt order is entitled to the most favourable construction.

Justice Lamb in the *Van-Air* decision added:

- The party alleged to have breached the order need not have contemptuous intent, i.e., the intent to be in contempt of the order; and
- The court's contempt power is discretionary and should be used "cautiously and with great constraint."

Non-Discrimination and Human Rights—§ 14:20 Sexual Harassment—In *Calgary (City) and ATU, Local 583 (Termination for Off-Duty Sexual Harassment), Re*, 2023 CarswellAlta 550, 349 L.A.C. (4th) 335 (Alta. Arb.), the grievor was a transit operator for the City. While off-duty, the grievor and a female co-worker took a vehicle that the grievor was selling for a test drive. The grievor made unwanted advances toward his co-worker and allegedly touched her breast sexually. During the ensuing investigation, the grievor denied the allegations. He was terminated from his employment. He had 17 years' service and no disciplinary history. The employer established the grounds for the termination of employment that constituted just cause for dismissal, despite the fact that it took place off-duty. Dismissal was not an excessive response. Touching a co-worker's breast without consent is a sexual assault and sexual harassment of the most serious kind, and there were insufficient grounds to justify a reduction in the penalty.

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