The CIRB's Impact on Collective Bargaining

FMCS 2005 Industrial Relations Conference
September 14-16, 2005

Graham Clarke

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I. INTRODUCTION

Traditionally, effective negotiators have needed good drafting skills and a solid background in how arbitrators interpret collective agreements. Increasingly, negotiators in the federal jurisdiction also need to stay current with CIRB jurisprudence to avoid various negotiating pitfalls.

This paper will consider some of the current CIRB trends affecting negotiations such as the continuing fallout from the Board's decision to extend the duty of fair representation to collective bargaining.

Similarly, the Board recently standardized its policy on when an employer can offer retirement packages directly to employees. The result clarifies what must be negotiated at the bargaining table.

Other Board decisions have considered the types of clauses which cannot be pushed to the point of impasse without constituting bad faith bargaining. This paper will further consider the Board's apparent interest in what takes place during conciliation and the challenges that stance places on collective bargaining.

Finally, the Board's willingness to exercise its remedial power to impose binding arbitration will be examined.

II. THE CIRB'S INTERVENTION IN NEGOTIATIONS

The seemingly never ending series of decisions involving complainants *George Cairns et al*[1] arose from the Board's fundamental change in policy for duty of fair representation complaints. For decades, the Board had held that collective bargaining negotiations fell outside a union's duty of fair representation. In *Cairns 35*, the Board signalled to negotiators that it was prepared to review whether their conduct violated the duty.

a) The Cairns Saga

In *Cairns 35*, the Board found that the union's negotiation of a Crew Consist Adjustment Agreement ("CCAA") with Via Rail privileged locomotive engineers to the detriment of conductors in a newly merged bargaining unit. The CIRB's remedy reopened the CCAA and gave the parties an opportunity to settle the remaining issues themselves.

[1] See, for example, *George Cairns et al*, [1999] C.I.R.B. No. 35 ("*Cairns 35*") and *George Cairns et al*, [2000] C.I.R.B. No. 70 ("*Cairns 70*"). The Federal Court of Appeal did not find the Board's interpretation "patently unreasonable": *Via Rail Canada Inc. v. Cairns*, [2001] 270 N.R. 237

When the parties failed to resolve their differences over the CCAA, a private arbitrator was appointed to conduct a mediation/arbitration process. The Board imposed time limits within which an award had to be rendered.

The private arbitrator requested extensions of his mandate on the basis that progress was being made. The Board extended the arbitrator's mandate twice.

In February, 2002 when no mediated settlement had been reached, the Board refused to extend the arbitrator's mandate for a third time.[2] After a delay of 2.5 years, the Board decided it would issue the appropriate remedies arising from its original decision in *Cairns 35*.

During the hearing into remedy[3], Via Rail objected to the fact that a remedy for the union's breach of section 37 would cause it prejudice. The Board rejected Via Rail's argument:

> "While the BLE bears the responsibility towards its membership for the breach to the *Code*, both the BLE and Via must share in the consequences of the Board's decision since both parties were instrumental in producing the effects of the CCAA, though perhaps not to the same degree. In the circumstances of this case, the imposition of financial consequences on Via is a necessary conclusion to give effect to the Board's orders where the object is to resolve the discriminatory effects of the CCAA." [4]

The Board went on to make significant remedial orders, including:

1. amending the parties' CCAA by creating a fully integrated locomotive engineer classification and dovetailing the seniority of all qualified locomotive engineers;
2. awarding retroactive pay for the conductors from their deemed date of qualification for locomotive engineer training; and
3. ordering payment of the conductor's legal fees and expenses on a solicitor-client basis.

Thus, the Board imposed terms on the parties. Those terms had not been proposed by the parties and were not subject to ratification by bargaining unit members.

The Federal Court of Appeal refused to intervene in the Board's decision.[5] The Court found that it was not patently unreasonable for the Board's remedy to impose terms that bound Via Rail, even though the employer was not named as a party to the breach in the original complaint. The Court highlighted the Board's finding that Via Rail and the BLE had engaged in "improper collaboration" when negotiating the CCAA.

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[2] The parties did continue to use the arbitrator's services privately for some issues.
[3] *George Cairns et al*, [2003] C.I.R.B. No. 230 ("*Cairns* 230")
[4] Ibid, Paragraph 72
[5] *Via Rail Canada Inc. v. Cairns*, [2004] F.C.J. No. 866

The Court upheld the rest of the Board's remedial order. The Supreme Court of Canada denied leave on January 20, 2005.[6]

The Board has continued to review a negotiator's conduct during negotiations. In *Mario Soulière et al*[7], the complainants criticized their union's agreement to modify the existing classification system. The Board explained its expanded role over negotiations:

> "However, in *George Cairns et al., supra,* the Board decided that its supervisory role with regard to the union's duty of representation at collective bargaining should be just as visible as with regard to the duty of representation during the grievance process. The reconsideration panel in *George Cairns et al.*, [2000] CIRB No. 70, further determined section 37 should be given a broader interpretation by considering the particular context of the labour relations and the *Code*'s provisions." [8]

In *Soulière, supra,* the Board rejected the complaint. It found that the union had adequately protected the complainants' rights and had taken into account the competing interests of members of the various groups.

b) Implications for Negotiators

The CIRB's change in policy has placed new burdens on negotiators.

For a union negotiator, there will be the concern that the CIRB may overturn a negotiated deal made in the overall interest of the bargaining unit. The concern for an employer's negotiator may be even greater.

Not only is there the concern of giving a major concession and then have the Board take away the *quid pro quo* the union offered in return.

But as *Cairns 230* demonstrates, an employer may be found jointly "liable" for a breach of the duty of fair representation.

This result seemingly imposes an additional burden on an employer side negotiator to supervise whether a union, in presenting its proposals, has treated everyone in the bargaining unit fairly. That burden is virtually impossible for an employer-side negotiator to fulfill. Any attempt by the employer-side negotiator to verify the union's authority for making a particular proposal will constitute interference in internal union affairs under s.94(1)(a) of the *Code.*

The end result is significant uncertainty about when a freely negotiated collective agreement will remain undisturbed by the Board.

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[6] [2004] SCCA No. 358
[7] [2002] C.I.R.B. No. 205 ("*Soulière*")
[8] Ibid, Paragraph 35

III. OFFERING EARLY RETIREMENT PACKAGES DIRECTLY TO EMPLOYEES

In *Aliant Telecom Inc.*[9], one panel of the Board found that the offering of early retirement packages directly to employees did not violate the *Code*. Conversely, in *Bell Canada*[10], a differently constituted panel found that an employer's offering of early retirement packages directly to employees interfered with the union's exclusive authority to negotiate terms and conditions of employment for its members.

The Federal Court of Appeal rejected Bell Canada's application for judicial review.[11]

Differently constituted reconsideration panels have now reviewed the contradictory decisions.

In *Aliant Telecom Inc.*,[12] the Board overturned its earlier decision. The reconsideration panel focused on evidence before the original panel that the union had repeatedly objected during collective bargaining to the employer's potential offering of early retirement packages directly to employees. The union's position was that the employer had to negotiate any such program.

The reconsideration panel concluded:

> "... in the face of a clear request by the bargaining agent to address voluntary separation issues and where they are dealt with, touched upon or likely to affect issues already included in the collective agreement, or where they are identified in the course of collective bargaining as issues to be negotiated, it is an interference with the rights of the bargaining agent and a violation of s.94(1)(a) of the *Code* for the employer to act unilaterally to resolve the matter so placed in issue by dealing directly with individual employees." [13]

The Board continued at paragraph 30:

> "... in the result, the employer, Aliant Telecom Inc., is found to have violated s.94(1)(a) of the *Code* by unilaterally offering the complained of SRP or ERIP on March 20, 2002, and subsequently during the period when collective bargaining discussions were underway, and by refusing in the context of such negotiations to bargain with the certified bargaining agent respecting the terms and conditions of the program introduced."

The Board similarly found that the refusal to negotiate the early retirement package, despite a request from the bargaining agent, violated Aliant's duty to bargain in good faith under s.50(a) of the *Code*.

In the companion reconsideration decision in *Bell Canada*[14], which like *Aliant 310* was issued on March 3, 2005, the original panel's decision was upheld. The reconsideration panel confirmed that an early retirement package must be negotiated with the certified bargaining agent in order

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[9] [2002] C.I.R.B. No. 181 ("*Aliant 181*")
[10] [2003] C.I.R.B. No. 212 ("*Bell 212*")
[11] *Communications, Energy & Paperworker's Union of Canada v. Bell Canada*, [2004] F.C.J. No. 2119
[12] [2005] C.I.R.B. No. 310 ("*Aliant 310*")
[13] Ibid, Paragraph 29
[14] [2005] C.I.R.B. No. 311

to respect the union's exclusive representation rights under the *Code*. This conclusion holds regardless of whether the parties are currently engaged in collective bargaining if the bargaining agent has demanded that the matter be negotiated.

a) Will the Board ever sit in Plenary Session?

The two contradictory decisions in *Aliant 181* and *Bell 212* were rendered in July 2002 and January 2003 respectively. They were not reconciled until March 2005. Both reconsideration decisions were apparently based only on the parties' written submissions.

One would have thought that contradictory decisions on similar facts would constitute the perfect opportunity for the Board to meet in plenary session in order to determine the appropriate Board policy.

It now appears, however, that the CIRB will no longer be holding plenary sessions.

In *Telus Communications Inc. v. Telecommunications Workers Union*[15], the Federal Court of Appeal revealed that the Board had changed its former practice on plenary sessions.

Under the predecessor Canada Labour Relations Board, a "reconsideration panel"[16] composed of the Chair and two Vice-Chairs or three Vice-Chairs could reconsider a panel's decision. For certain important cases, that reconsideration panel could propose that the matter be sent to the Board sitting in plenary session ie: a sitting involving the Chair, all Vice-Chairs and Members.

A plenary session determined the binding policy of the Board. Other panels would be obliged to apply that policy in future cases.

In *Telus 1253*, the Federal Court of Appeal rejected an applicant's argument that the Board was legally obligated to send a matter to a plenary panel. The Court noted that since the 1999 *Code* amendments which made the Board representational, not one case had been referred to a plenary panel.

In its own submissions, the CIRB advised the Court that an Information Circular[17] which indicated a "reconsideration panel" could refer a case to a full Board plenary was inaccurate and did not reflect the practice of the Board since 1999. The Court concluded that while the CIRB may have had a procedure to hold plenary hearings prior to 1999, it no longer had such a policy. The Board therefore did not act unreasonably when it used a reconsideration panel to review a decision.

It is unclear why the Board has eliminated the plenary process. Making the Board representational ensured that members from both labour and management, with significant

[15] [2005] F.C.J. No. 1253 ("*Telus 1253*")
[16] Formerly called a summit panel
[17] The Circular had been updated as recently as 2004

experience and practical points of view, had an opportunity to influence future binding Board policy.

Given the Supreme Court of Canada's approving comments in *Consolidated-Bathurst Packaging Ltd. v. I.W.A.*[18] about the Ontario Labour Relations Board's occasional practice of having the entire Board discuss general policy issues before a panel issues a decision, one would think that the plenary mechanism would still be beneficial federally, even if the CIRB has become a representational board.

IV. BARGAINING PROPOSALS PUSHED TO THE POINT OF IMPASSE

Several recent Board cases have considered proposals which if pushed to the point of impasse at bargaining constitute a violation of the duty to bargain in good faith. The Board has issued remedies in these cases which go far beyond the traditional "cease and desist" declarations of the past.

a) No harm proposals

In *Global Lethbridge, a division of CanWest Global Communications Corp. (CISA-TV)*[19], a reconsideration panel had to determine if the employer had bargained in bad faith. The union alleged that the employer's bargaining of a "no harm" clause to the point of impasse violated the *Code*. A "no harm" clause is broader than the usual "no strike" clause found in collective agreements. In *Global Lethbridge*, the employer was demanding, *inter alia*, the following collective agreement language:

> "The union will not ... engage in any activity which is intended to or does adversely affect the interests of CISA-TV during the term of the agreement."

The reconsideration panel found it was inappropriate for an employer to attempt to bind the union beyond the activities of its specific bargaining unit:

> "The issue in the present case is no different. It is equally as inappropriate to expect a union seeking a collective agreement for a single specified bargaining unit to enter into terms and conditions that would bind a national union representing many bargaining units in many different kinds of endeavours, as it is to attempt to force an employer to negotiate in concert with its various bargaining units should it choose not to do so." [20]

The Board continued at paragraph 40:

> "... It is apparent that the *Code* contemplates that collective bargaining under its provisions is to be conducted upon the basis of the certified bargaining unit and that it is to be in respect of the

[18] [1990] 1 S.C.R. 282
[19] [2002] C.I.R.B. No. 187 (*"Global Lethbridge"*)
[20] Ibid, Paragraph 38

> terms and conditions of the employees within that bargaining unit and related matters. A broad requirement not to engage in any activity adversely affecting the interests of the employer and which attempts to bind not only the union and the employees in the bargaining unit but all members is well beyond the scope of a collective agreement contemplated by the *Code*."

While the Board acknowledged a union and an employer can mutually agree to a no harm clause, the clause cannot be bargained to the point of impasse without violating the *Code*.

The Federal Court of Appeal refused to intervene in the Board's decision on judicial review.[21] The Court deferred to the Board's expertise:

> "We do not agree. CEP was never the subject of a bad faith bargaining complaint by CISA-TV and, relying on its previous jurisprudence, the Board held that a party is not bound to discuss a term that is either illegal or, as the Board found here, contrary to public policy contained in the *Code*.
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> As for the argument that the Board's conclusion was patently unreasonable on the basis of the evidence before it, we would note that the extent to which the "no harm" clause was out of line with industry norms is largely a question of drawing inferences based on a comparison of the clauses and the likely industrial relations impact, an exercise for which, because of its expertise, the Board is much better equipped than the Court." [22]

The original panel's remedy ordered that bargaining unit members could vote on the collective agreement without the "no harm" clause included. The employer argued that that order forced the employer to give a retroactive pay incentive for early ratification in exchange for nothing. The employer suggested the parties should have been sent back to rework the offending clause. The Court found the Board's remedial order had a rational relationship to the employer's breach of the *Code*.[23]

The Board reaffirmed its position in *CICT-TV Calgary, CanWest Global Communications Corp.*[24] that a "no harm" clause pushed to the point of impasse violates the *Code*. The Board rejected the complaint in this case only because the clause had not yet been pushed to the point of impasse.

b) Union jurisdiction clauses

The Board has traditionally protected its jurisdiction to determine the scope of a bargaining unit's certificate. If that scope is to be amended, an application can be made to the CIRB under s.18 of the *Code*. This is different from provincial jurisdictions where the parties are free to negotiate the scope of the bargaining unit once the initial certification order has been granted.

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[21] *Communications, Energy and Paper Workers' Union of Canada v. Global Television (Global Lethbridge, a division of CanWest Global Communication Corp.)*, [2004] F.C.J. No. 359

[22] Ibid, Paragraphs 19 - 20

[23] Ibid, Paragraph 39

[24] [2003] C.I.R.B. No. 247

In *Société Radio-Canada*[25], a reconsideration panel of the Board considered a bad faith bargaining complaint arising from an employer's attempt to negotiate the scope of the union's jurisdiction.

During bargaining, the employer was prepared to offer significant benefits as long as the bargaining agent was prepared to modify the scope of its certification order. The original panel found the employer's position violated the *Code*. The original panel then allowed the union to vote on the employer's entire offer but with the offending scope demand removed.

The employer argued on reconsideration that it never would have offered permanent employment to some of the union's members, as well as access to the pension plan, without obtaining agreement on the scope of the certification.

The reconsideration panel confirmed that the Board may show more flexibility with regard to parties negotiating the scope of their certification order but only in very specific situations. Accordingly, it still constitutes bad faith bargaining for an employer to push the scope of the existing certification to the point of impasse.

The reconsideration panel also upheld the original panel's remedial order, even though it had the probable effect of ending the collective bargaining process.

c) No reprisal clauses

The Board has confirmed its traditional position that an employer cannot insist upon a "no reprisal" clause to protect those workers who crossed the picket line during a strike. The parties are free to negotiate this type of clause but it cannot be pushed to the point of impasse during negotiations.

In *Brink's Canada Limited*[26], a reconsideration panel reviewed an earlier panel's decision that the employer had violated the *Code*[27]. The reconsideration panel affirmed the original panel's decision and added at paragraph 47:

> "... It will be rare that an employer whose only remaining contract demand is a "no reprisal" provision may negotiate such a "no reprisal" clause to impasse during a strike."

d) Summary

Negotiators of collective agreements need to know which clauses can be tabled initially but constitute bad faith bargaining if pushed to the point of impasse.

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[25] [2002] C.I.R.B. No. 195
[26] [2002] C.I.R.B. No. 204 ("*Brink's 204*")
[27] *Brink's Canada Limited*, [2002] C.I.R.B. no. 175

More importantly, if a negotiator is prepared to offer a significant benefit in exchange for the other party accepting one of these clauses, and that position is pushed to the point of impasse, the Board may issue a remedy allowing a vote on the offer with only the offending provision removed. Negotiators should therefore consider how far they are willing to push these clauses, even those which may already appear in other collective agreements.

V. WHEN CAN PARTIES CONTRACT OUT OF THE CODE?

Section 50(b) of the *Code* reads:

> "50. Where notice to bargain collectively has been given under this Part,
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> ...
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> (b) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(a) to (d) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege."

What is the legal effect on the *Code*'s statutory freeze in s.50(b) from a clause in a collective agreement which reads as follows:

> "34.01 This agreement comes into effect on the date it is signed and will expire on January 31, 1997. After that date, the collective agreement will continue to apply until one of the parties exercises its right to strike or lockout, as applicable." (emphasis added)

In *ADM Agri-Industries ltée*[28], the employer took the position that, notwithstanding s.34.01 of its own collective agreement, the statutory freeze ended when the conditions in s.50(b) and s.89(1) of the *Code* had been met. As a result, the employer unilaterally amended salary rates and other terms of employment for bargaining unit members.

The Board issued a declaratory opinion in *ADM 141* confirming that the employer was entitled to amend working conditions because the statutory freeze had ended.

However, an arbitrator in Quebec had earlier come to a contradictory conclusion in a grievance. He found that s.34.01 of the collective agreement was binding and that the employer could not unilaterally alter salary rates and other terms of employment.

The employer's judicial review of the arbitrator's decision in the Superior Court of Quebec was dismissed. The Quebec Court of Appeal refused leave.

[28] [2001] C.I.R.B. No. 141 ("*ADM 141*")

In *ADM Agri-Industries ltée*[29], a reconsideration panel overturned *ADM 141*. The reconsideration panel found nothing in the *Code* which prevented the parties from agreeing to continue the freeze of conditions of employment. However, the parties could not limit their statutory right to strike or lockout under the *Code*.

On judicial review, the Federal Court of Appeal did not find the reconsideration panel's interpretation to be patently unreasonable.[30]

The *ADM* series of cases suggest that negotiators can sometimes contract out of certain *Code* provisions. The reasoning in the *ADM* case seems to be that the parties are free to agree in their collective agreement to maintain the collective agreement in force, despite s.50(b), until either a strike or a lockout commences.

This conclusion may conflict with some of the CIRB's earlier decisions.

The CIRB has held previously that parties to a collective agreement cannot contract out of the *Code* as far as the prohibition on strikes or lockouts is concerned. Even if an employer and a union negotiate a clause whereby union members are not required to cross another union's picket line, the failure of the employees to fulfil their obligations under the collective agreement will constitute an illegal strike. In *West Shore Terminals Limited*[31], the collective agreement contained the following clause:

> "(c) Except for the above, the Company does not expect members of the Union to cross a picket line."

The Board in *West Shore Terminals* found the freely negotiated clause in the collective agreement did not prevent a finding of an illegal strike:

> "36. According to the uncontested evidence before the Board, employees were refusing to work in combination, in concert, and in accordance with a common understanding, in support of another union and its members. It was generally accepted that, but for the provisions of the various collective agreements, the conduct of the employees will be considered unlawful as being contrary to s.89.
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> 37. The Board determined that the specific provisions of the collective agreements that govern the relations between the parties do not change the nature of the concerted and unlawful conduct that took place on December 30, 1999, and that constituted a strike in accordance with the provisions of the *Code*."

The Board decisions suggest that the parties can contract out of the consequences of the ending of the statutory freeze in s.50(b) as long as they do not attempt to restrict the right to strike or lockout. However, even if parties negotiate a provision allowing union members to refuse to

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[29] [2002] C.I.R.B. No. 206 ("*ADM 206*")

[30] *ADM Agri-Industries ltée v. Syndicat national des employés de Les Moulins Maple Leaf (de l'Est)*, [2004] F.C.J. no. 280

[31] [2000] C.I.R.B. No. 61

cross a picket line, if the activity meets the definition of a strike in the *Code*, then the *Code* prevails and the collective agreement provision will be ignored.

It is difficult to reconcile these contradictory views of related provisions dealing with the economic warfare regime in the *Code*.

VI. CONFIDENTIALITY DURING THE COLLECTIVE BARGAINING PROCESS

It is a cornerstone of the *Code's* collective bargaining model that confidentiality must apply to parts of the process. Parties must be free to engage in conciliation, for example, without fear that their candid comments may later be used against them. A similar principle applies for mandatory mediation in civil litigation cases.

Section 119 of the *Code* protects a conciliation officer's confidential role:

> "119. No member of the Board or a conciliation board, conciliation officer, conciliation commissioner, officer or employee employed by the board or in the public service of Canada or person appointed by the Board or the Minister under this Part shall be required to give evidence in any civil action, suit or other proceeding respecting information obtained in the discharge of their duties under this Part."

It is essential for both the Board and all parties to protect the need for confidentiality in the process.

In *Brink's 204, supra*, a reconsideration panel dealt with an employer's argument that the original panel had admitted and improperly relied on hearsay evidence. The hearsay evidence consisted of a telephone conversation the witness had had with a conciliation officer. The employer alleged that the Board committed an error of law and policy when it admitted and relied on hearsay evidence respecting what the conciliation officer allegedly said to the witness.

The reconsideration panel rejected the employer's argument. The CIRB relied on the fact that it has the authority under s.16(c) of the *Code* to allow hearsay evidence. The CIRB also rejected the employer's argument that s.119 of the *Code* prevented evidence relating to conciliation officers from being considered at Board hearings:

> "While s.119 of the *Code* does indicate that the conciliator is not compellable as a witness, that section does not indicate that evidence respecting things said or actions taken by a conciliator may never be the subject of testimony." [32]

The reconsideration panel noted further that while the hearsay evidence was mentioned in the original panel's decision, it was not a determining factor.

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[32] *Brink's 204, supra*, Paragraph 20

This was not the first occasion that the Board considered a conciliation officer's activities in one of its decisions[33].

From a purely legal perspective, the reconsideration panel in *Brink's 204* was correct that the Board has the discretion under section 16(c) to allow hearsay evidence. It was also open to them to find that the original panel had not relied upon the hearsay evidence in reaching its decision.[34]

However, effective labour relations demands that even if the parties do not object to hearsay evidence about a conciliation officer's comments, the Board on his own initiative should raise its admissibility just as it would if a party tried to lead evidence about the parties' settlement discussions. By allowing this type of hearsay evidence, the Board hinders the intent of section 119 which seeks to protect the confidentiality of the conciliation process.

Even if a conciliator cannot be forced to testify, if his/her comments can be brought before the Board in other proceedings via hearsay, then parties will not open up with conciliators. Similarly, conciliators will say little to the parties out of concern their comments will later become an issue in a CIRB hearing.

The fact that CIRB did not clearly reject evidence about the conciliation process is something negotiators will have to keep in mind unless the Board's position, or the law, changes.

VII. WHEN IS BINDING ARBITRATION AN APPROPRIATE REMEDY?

The *Code* explicitly allows the Board to order binding arbitration in certain discrete situations. The binding arbitration process is one where each party makes submissions to a neutral arbitrator or a tripartite panel. The arbitrator or the panel then decide the collective agreement's content.

In extreme cases, the Board can use its general remedial power to order binding arbitration. The Board exercised this power as noted in *Royal Oak Mines v. Canada (Labour Relations Board).*[35] The Supreme Court of Canada upheld that power within the special circumstances of that case.

The Board has since struggled with when it should intervene to impose binding arbitration rather than allowing the collective bargaining process to take its regular course. A more restrictive remedial approach appears to be emerging from recent decisions.

In *Telus Communications Inc.*[36], the union alleged that employer communications with members of the bargaining unit had interfered with the union's representation in contravention of s.94(1)(a) of the *Code*. That section reads:

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[33] See, for example, *Nav Canada,* [1999] C.I.R.B. No. 13

[34] One might question why such evidence would find its way into the Board's reasons if it would later not be relied on.

[35] [1996] 1 S.C.R. 369 *("Royal Oak Mines")*

"94(1) No employer or person acting on behalf of an employer shall

(a) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union."

The Board found that Telus had violated the *Code* and ordered Telus to offer the union binding arbitration in order to settle their collective agreement. Negotiations had already been proceeding for several years without success.

Curiously, no party had requested binding arbitration. The CIRB's regulations require that parties set out the remedy they are requesting.[37]

Upon reconsideration in *Telus Communications Inc.*[38], the Board overturned the earlier panel's binding arbitration order. The reconsideration panel emphasized that the Board's mandate when imposing a remedy "is to fashion one that addresses the specific contravention that has been identified, not to choose a remedy that will result in the conclusion of a collective agreement. The *Code* does not require parties to a labour dispute to reach an agreement." [39].

The reconsideration panel emphasized that "free collective bargaining" is one of the *Code's* fundamental principles.[40] The original panel had relied on the Supreme Court's decision in *Royal Oak Mines, supra* as authority for ordering binding arbitration under its general remedial power in s.99(2) of the *Code*. The reconsideration panel contrasted the facts in *Royal Oak Mines* with those in *Telus*:

> "219. While the facts in *Royal Oak Mines Inc. v. Canada (Labour Relations Board), supra,* were exceptional and compelling, the same cannot be said for the facts in the case at hand. The following facts assist in understanding why the circumstances in *Royal Oak Mines Inc. v. Canada (Labour Relations Board), supra,* were both exceptional and compelling: a bitter and violent 18 month strike; various attempts were made to effect a settlement during the strike; frequent picket line violence; the termination of 42 employees for the picket line activities; and a mine explosion that killed 9 workers and resulted in a murder conviction.
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> 220. There is very little similarity between those facts and the facts in the present case. It is true that Telus and the TWU have been involved in a lengthy dispute and that negotiations have been very difficult. The complexity of the issues that the parties are dealing with cannot be underestimated. Some attempts have been made to assist the parties in resolving their dispute. These, however, do not constitute exceptional or compelling circumstances that would justify the imposition of such an invasive remedial order that effectively put an end to "free collective bargaining" between the parties.
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> ...

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[36] [2004] C.I.R.B. No. 271
[37] *Canada Industrial Relations Board Regulations*, 2001 s.10(h)
[38] [2005] C.I.R.B. No. 317
[39] Ibid, Paragraph 202
[40] See the Preamble to the *Code*

> 221. It is for these reasons that the reconsideration panel concluded that the imposition of the binding arbitration order in this case constituted an error in law and policy and annulled, in its bottom line decision, the order directing Telus to offer binding arbitration to the TWU." [41]

The Federal Court of Appeal refused to overturn the reconsideration panel's decision.[42] The Court agreed that there was little similarity between *Royal Oak Mines* and the situation in *Telus*:

> "78. Given the extreme circumstances described above, I fail to see the similarities between those and the fact situation in this matter. Further, even with the circumstances in Royal Oak Mines, the Supreme Court upheld the Board's decision to impose binding arbitration by only a 4-3 majority. This leads me to my next point: the extraordinariness of the binding arbitration order and the consequent reluctance to impose it. Binding arbitration is an exception rather than a rule because it runs counter to the inherent policy underlying the *Code*: free collective bargaining."

The Court commented further on imposing binding arbitration on parties at paragraph 79:

> "When the Board forces parties to go to binding arbitration, it negates the principle of free collective bargaining and such a remedy can only be imposed in extraordinary circumstances. The panel that rendered the Binding Arbitration Decision was under the impression that these circumstances warranted such intrusive measures. On reconsideration, the Board could not find a rational connection between the breach of the *Code* and the remedy imposed by the original panel. It overturned the binding arbitration remedy and devoted a significant part of the Reconsideration Decision distinguishing this case from Royal Oak Mines and to articulating policy concerns associated with binding arbitration."

In *Hudson Bay Port Company*[43], the Board had another opportunity to comment on binding arbitration. While the Board dismissed a union's application for a binding arbitration order under s.87.7(3) on the basis that no such power existed under that section, the Board did comment in *obiter* on ordering that remedy under its general remedial power.

The Board noted that the *Code* explicitly gives it the power to order binding arbitration in only two specific situations: i) essential services (s.87.4(8)) and ii) to remedy a violation of the duty to bargain in good faith (s.99(1)(b.1))[44]. Its general remedial powers can only be used to order binding arbitration in rare situations:

> "49. One of the fundamental principles underlying Part I of the *Code* is that parties to a labour dispute, who have not been able to conclude a collective agreement, acquire the legal right to strike or lockout, assuming they have complied with the relevant provisions of the *Code*. Exceptional and compelling circumstances will have to exist before this Board will interfere with free collective bargaining and the parties' legal right to strike or lockout by imposing a binding arbitration order." [45]

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[41] *Telus 317*, Paragraphs 219 to 221

[42] *Telus. 1253, supra*

[43] [2004] C.I.R.B. No. 296 ("*Hudson*")

[44] Under section 80 of the *Code* the Board can also settle terms and conditions of employment for a first collective agreement. The Board cannot proceed, however, except with a written Direction from the Minister of Labour.

[45] Hudson, Paragraph 49

The Board noted moreover that even in a situation as extreme as *Royal Oak Mines*, the Supreme Court only upheld the binding arbitration order by a 4 to 3 margin. The Board adopted the Chief Justice's comment that it would "normally be patently unreasonable for a labour board to impose such an invasive remedial order".[46]

Despite an initial enthusiasm for binding arbitration, it appears that the Board is becoming more reticent to order this extreme remedy.

The fact that negotiations have not succeeded provides no basis to order binding arbitration. Indeed, if that were the policy, then there would be an incentive not to negotiate effectively in the hope of obtaining binding arbitration. One of the concerns in *Telus 317* was that the remedy was ordered for a complaint about improper employer communications. A complaint alleging bad faith bargaining, based on a different set of facts, had already been rejected by the initial panel.

The 1999 *Code* amendments added the remedy of binding arbitration for violations of the duty to bargain in good faith. No similar remedy was added for improper employer communications.

VIII. CONCLUSION

The negotiator's role is never an easy one. The drafting process itself is replete with pitfalls resulting from unclear drafting or the use of terms of art which may have a different meaning for an arbitrator as compared to a layperson. A negotiator also has the challenge of keeping current with how arbitrators are interpreting the various clauses found in collective agreements.

This paper has suggested that negotiators in the federal jurisdiction must also stay current with developing CIRB trends. The Board has decided it is necessary to review collective bargaining negotiations. Negotiators must be aware that CIRB intervention could cause them to lose the benefit of their bargain.

For example, *Cairns 230* shows that not only can a union and an employer lose the benefit of their bargain but an employer may be affected directly by the Board's decision. This may inadvertently impose an addition burden on an employer's negotiator to consider whether the union's "concession", obtained at possibly significant cost, may be lost if an employee succeeds in a duty of fair representation complaint.

The CIRB's decisions on offering early retirement packages directly to employees force negotiators to distinguish between those things an employer can do unilaterally and those things which must be negotiated. This distinction can be difficult to draw in advance especially if a past practice exists as was the case in *Aliant 181* and *Bell 212*.

[46] Ibid, Paragraph 53

The Board has found that bargaining proposals which are initially acceptable for negotiation can then transmogrify into illegal proposals if pushed too far.

It makes sense initially to leave the parties free to negotiate even a potentially "illegal" clause. Presumably, the party willing to agree to that type of clause will be able to extract significant benefits in return. The party proposing that clause had a certain comfort under previous case law since the Board would usually order the party to cease and desist from negotiating that clause if the point of impasse had been reached.

Under recent CIRB case law, a party pushing forward one of these clauses could have the Board rule the clause illegal but then give the other party the opportunity to conclude the collective agreement, minus only the illegal clause. That remedy almost seems to be a punishment for the party which proposed the clause. This is particularly the case since the Board has said that parties are free to negotiate such clauses up to a certain point.

The future of the Board's remedies of binding arbitration or imposing terms on the parties may be subject to debate. All of the cases which had the effect of imposing collective agreements on the parties were decided prior to *Telus 317*. The Board seems to be indicating in *Telus 317* that it will hesitate to order binding arbitration given the importance of free collective bargaining. This may mean that negotiators will see a return to the previous practice whereby the Board intervened to remove illegal provisions or other impediments but then ordered the parties to complete the negotiations themselves.

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