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Approach to Good Faith Negotiations in Canada: What Could be the Lessons for us?

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Introduction

Six years ago, when the Employment Contracts Act was full flow, I tossed aside my tie, briefcase and 6 minute billable units, and headed back to university. Those of my lawyer colleagues who could be described as capitalists (of which I'm told there are one or two) thought I was completely mad, but I had an itch I wanted to scratch.

At the time debate had arisen about whether a duty of good faith might be introduced to the ECA, but this had fairly much stalled. One of the reasons for this was an impression that such a duty could stifle employment relationships and lead to unwanted outside interference – that courts and judges would start telling employers, unions and employees how to deal with one another. In other words, it was feared that a duty of good faith could be the very anti-thesis of growth and innovation.

This view was surprising to me because I had understood that a duty to bargain in good faith had been in place in countries such as Canada for decades, and had not been discarded. So I decided to move to Vancouver and spent 14 months studying good faith bargaining.

History and endurance

I remember vividly meeting my supervising professor for the first time. When I told him that I had come to study good faith bargaining, it is fair to say he was taken aback. He was sure I was joking and that I had simply skivved off being a lawyer to become a ski-bum and follow the ice hockey. I asked him why he was surprised, and his response provides a clue as to the first lesson I think we may be able to learn from Canada. He said that he did not know why I wanted to study good faith bargaining given that it was so uncontroversial – he said it was simply an accepted part of labour relations in every province and federally, and had been for decades.

In terms of what we might learn from the Canadian experience in 15 minutes or less, this is a good place to start - namely the history and enduring nature of the duty to bargain in good faith:

- The duty is well entrenched as a cornerstone of the Canada Labour Code and in all Canadian provinces;
- It was first introduced at the Federal level in 1944, and in the provinces within the following decade;
- The duty has remained despite countless changes of Government, both Federal and Provincial over the next 5 decades.

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What might this tell us?

- Good faith makes sense as an employment concept;
- It is not a concept that simply reflects a particular political leaning or ideology;
- Rather it reflects the core nature of successful employment relationships, i.e. relationships that are built on genuine engagement, openness and a recognition at least to some extent of the joint benefits of an agreed and progressive outcome to negotiations.

The structure of good faith collective bargaining in Canada

Graeme has outlined the approach to labour relations and good faith in the United States, and there are many similarities in Canada. It is useful to briefly discuss some of the features of the Canadian system, because they provide the core framework for good faith negotiation and its operation between unions and its employers:

- First, the duty of good faith is based in statute;
- The concept of good faith bargaining is not, however, expressly defined in any of these statutes;
- As in the United States, bargaining occurs within certified bargaining units, so coverage is the result of a certification process by Labour Boards, and not the result of negotiation as under the ERA;
- Unlike in the US, the subject areas covered in collective bargaining are for the parties to decide, provided they are not unlawful or contrary to the scheme of the Labour Codes. The distinction between mandatory and permissive bargaining topics that Graeme touched on in the United States has not developed in Canada;
- As in the United States, an allegation that a party has breached the duty to bargain in good faith takes the form of an Unfair Labour Practice (ULP) claim;
- The vast majority of ULPs settle or are withdrawn before a hearing – over 75% in Canada according to statistics I saw in British Columbia – whilst the rate of settlement in the U.S. is even higher according to certain commentators;[1]
- One of the reasons for this high rate of agreed resolution, is the deliberate focus in Canadian Labour Codes on mediation and other dispute resolution mechanisms. To use the British Columbia Labour Code as an example, it provides for:
  - The appointment of mediators by either the Mediation Division or the Minister of Labour of British Columbia;
  - Where a Mediator is appointed, the Code prevents strikes or lock-outs for a prescribed period;

[1] E. Dannin, for example, has suggested a settlement rate more in the order of 90%.

- "Special" Mediators can likewise be appointed;
- There is also provision for the appointment of fact finders;
- In cases of first contract collective bargaining, the Code provides for med/arb (a concept I will discuss further below).

- In cases that are not resolved by the parties themselves, Labour Boards issue decisions, and in doing so, seek to apply consistent principles and interpretations. Although one might think of Labour Boards as less "judicial" than higher courts, the issue of precedent is still viewed as very important, given the need to provide useful and consistent guidance to employers and unions in their future dealings;

- Lastly there are leading cases from higher appeal courts, including the Supreme Court of Canada, which provide a source of important guidance on particular legal aspects of good faith bargaining. Although these cases are far fewer in number, some of these decisions have been extremely influential in guiding bargaining practice.

What might we learn from this framework?

- Good faith negotiation works well in a frame-work which provides dispute resolution support through mediation, and other mechanisms. This endorses our approach, and suggests it should be retained as a key feature of the ERA.

- Outside intervention is not the norm – parties themselves learn what to expect in a good faith environment and to a large extent it becomes self regulating.

- There remains a very important role for decision makers such as the Authority and the Courts to provide guidance in areas of uncertainty and an enforcement mechanism where a breach of good faith has not been resolved by agreement.

Are there more specific lessons for us?

Apart from lessons that might be learned from the longevity and focus of the duty of good faith in Canada, and bearing in mind the limited time for this presentation, there are in my view specific areas we might look to learn from. I want to touch on four:

- Hurdles to collective bargaining in first collective bargaining situations;
- The possible benefits of facilitation by the Authority or another body;
- The opportunity for the Authority to provide further guidance in its decisions;
- The need for effective remedies where a breach of good faith occurs.

First time collective bargaining

Of those collective bargaining disputes that have arisen under the ERA, perhaps those that have attracted the most publicity relate to multi-party bargaining. Well-publicised examples have included:

- INL and various newspapers;
- the dispute involving Sawmill Services; and
- the dispute involving various port unions and Lyttleton Port Company.

These three cases present a useful study in contrasts. In the first two situations, INL and Sawmill Services, the parties were seeking a multi-party agreement for the first time. Ultimately, despite litigation, the unions involved were unsuccessful in achieving this result. Contrast this with the third case where the three unions and LPC had previously been parties to a multi-party document. There was a history and understanding of what that would involve. In that case, a replacement agreement was entered into.

What might this tell us? Perhaps that first time collective bargaining can be fraught – parties may well have a fear of the unknown, and be unwilling to give a collective agreement a go, even where the wish of the employees concerned is to have a collective agreement. This source of initial resistance is not unique to New Zealand. It has also been addressed in Canada. In 1980, a leading academic in North America, Paul Weiler, noted concerns about a failure of parties engaged in first contract bargaining to achieve an agreed outcome and stated:

> "The law needs to be concerned about a different first-contract history, one which poses a major threat to the integrity of the statutory representation scheme. There are stubbornly anti-union employers who in spite of the certification, refuse to accept the right of their employees to engage in collective bargaining. They simply decide to fight the battle on a different front, to go through the motions of negotiations and to try to talk the unions bargaining authority to an early demise". (P Weiler, Reconcilable Differences, 1980).

The British Columbia Labour Code has sought to provide a mechanism for addressing this hurdle though a med/arb process. This enables arbitration as a final resort, if mediation and direct bargaining have failed to result in an agreed outcome[2].

One suspects the introduction of any form of "arbitration" into the ERA is unlikely given that for some this would raise concerns about a return to "outside intervention". However, what this example does tell us is that first collective bargaining may need further support if it is to work. In other words, simply leaving the question of whether a collective outcome is achieved to the negotiating strength of the parties, may in fact be inconsistent with the objective of the ERA to promote collective bargaining. If further supports are needed, what might they be? There may be various options worth considering, some more controversial than others:

- Introducing a unilateral right on the part of initiating employees to be covered by some type of collective agreement, albeit that its terms and content must be agreed between the parties.

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[2] For an extremely useful summary of the principles underlying this med/arb process, see the discussion of the labour Board in *Yarrow Lodge Ltd v HEU*, 21 CLRBR (2d) 1 (BC) (1994).

- This "right" could be fostered if one of the express requirements of good faith was an obligation for each party to table a proposed collective agreement in terms that it would be prepared to accept.[3] In this way a counterpart at least has the option of agreeing to a collective agreement of some description.
- Bolstering the requirement of good faith in the Act as it applies to first contract situations;
- Developing other means in the ERA for resolving impasse, such as facilitation;
- Providing for effective and tailored remedies in cases where there has been a breach of good faith.

Facilitation

There appears to be a practice developing within the Employment Relations Authority whereby members offer the potential for facilitation prior to the conclusion of investigation meetings in order to assist parties to explore whether an agreed resolution may still be possible.

This development raises the question of whether or not the Act could provide a pro-active bridge between mediation and the decision making role of the Authority. Could for example the ERA provide an official status to facilitation, coupled for example, with:

- The ability for a facilitator to be appointed by a third party such as the Department of Labour, or an Authority Member;
- If facilitation is taking place, the ability to strike or lockout might be limited or restricted for a period to enable the parties to focus or refocus at the bargaining table;
- The facilitator having the power to write a report, which could be made public, as to the conduct of the bargaining and reasons for the impasse.

The opportunity for the authority to provide guidance

It is common knowledge that the decisions of the Authority on good faith bargaining have been few and far between – pronouncements by the Court even rarer. In this context, is there are role for the Authority to seek wider input into those issues of importance that come before it, and to include in their decisions more lengthy discussion on the principles involved. Some might say this is inconsistent with low-level and speedy resolution of problems. It might also be viewed as contrary to the principle in common law countries to restrict judgments as much as possible to the dispute in question.

Yet, if the number of cases before the Authority is limited, and important issues are being tested infrequently, why not take the opportunity to seek wider input so as to inform the principles that arises in the decisions. An example is the approach the British Columbia Labour Board took in the decision in *Yarrow Lodge*. The Board used this opportunity to set out guiding principles on the first contract procedure, but in doing so accepted submissions from 10 interested parties including the BC Government; the Business Council of BC and the BC Federation of Labour.

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[3] This is in fact a remedy that has been granted in Canada (see eg; *CJA General Workers Union, Loc. 1030 and Moorewood Industries,* [1987] O.L.R.B.Rep. 92 (Ont.); *Royal Oak Mines Inc* v. *Canada (Labour Relations Board)* (1996), 133 D.L.R. (4th) 129 at 161 (S.C.C.).

What this might tell us is that although decisions of the Authority are intended to be speedy, just like the decisions of Labour Boards, they may make up the bulk of guiding principle in the area, and if so, there may be a place for seeking wider input.

The need for effective remedies

The last point that I wish to raise by way of comparison with Canadian good faith practice, is the existence of effective remedies where the duty of good faith has been breached. At least anecdotally, various unions and employers have expressed the view that there is little point seeking a determination from the Authority if the remedy will simply be a compliance order. In other words, this type of remedy may do little to remedy the damage already caused to a bargaining party. In addition, a broad direction to return to the table and bargain in accordance with the Act does not provide parties with any specific guidance about how to conduct bargaining in the future.

Whilst general compliance orders may reflect a reluctance, on the Authority to dictate to parties, and whilst the absence of remedies beyond compliance orders may simply reflect the current wording of the Act, these are areas in which the Canadian experience could provide useful guidance. Canadian Labour Boards and Courts have long acknowledged that general compliance orders may be ineffectual to remedy breaches of good faith, and to promote future compliance. As a result, remedies in Canada have been used innovatively to provide meaningful sanctions and genuine deterrence. Tailored compliance orders have, for example, been granted in terms such as:

- Removing from the table a proposal presented in breach of the duty of good faith;
- Tabling the terms of a collective agreement that would be acceptable to the party;
- Tabling a detailed justification for a party's stance on a particular issue;
- Displaying a copy of the Board's decision in a conspicuous place and providing a copy to each affected employee;
- Directing that the employer agree to the union organising a meeting on work premises and during work time in order to address its members on the findings of the Board.

In addition Labour Boards have sought to award compensation in appropriate cases, such as:

- The costs incurred by an aggrieved party in the course of bad faith negotiations, including negotiating and organising expenses;
- The cost of additional litigation, organising and negotiating expenses incurred as a result of breach of good faith;
- The loss of wages employee representatives have incurred in the course of attending wasted bargaining sessions;
- The loss of wages suffered by employees because of industrial action prolonged as a result of an employer's breach of good faith;

- Damages assessed on the basis of a loss of opportunity to engage in genuine bargaining and entering into a collective agreement.

The decision of the drafters of the ERA to allow for compensation in the context of unfair individual bargaining, but not to provide express compensatory remedies for breach of good faith collective bargaining has been explained by various commentators on the basis that it is consistent with mediation and a proactive approach to good faith bargaining. What happens though if this isn't working – if despite voting for a collective agreement employees are not able to achieve this outcome because of the continued refusal of their employer? Perhaps then there is a need for other remedies? The Canadian experience might suggest so.

Conclusion

I am the first to agree with the views expressed by the Employment Court and the Employment Relations Authority in a number of cases to date that our Act needs to be interpreted in the New Zealand context, and that principles from overseas jurisdictions should not be incorporated without due reflection.[4] However, that is not to say that we cannot learn from decades of experience in Canada.

[4] See for example the comments of the Employment Court in *Meat and Related Trade Workers Union of Aotearoa Inc. v Te Kuiti Beef Workers Union Inc*, and the Authority in *INL*.