

Improving the maintenance of activities process under the *Canada Labour Code* – Discussion Paper

Unifor's submission to Employment and Social Development Canada

January 2023



Unifor is pleased to provide its comments in response to the Discussion Paper and Questions distributed by Employment and Social Development Canada.

Unifor is Canada's largest union in the private sector representing 315,000 workers in every major area of the economy. The union advocates for all working people and their rights, fights for equality and social justice in Canada and abroad, and strives to create progressive change for a better Canada.

Unifor is also Canada's largest union in the federally regulated private sector, representing more than 66,000 workers in federally regulated sectors including transportation, media, telecommunications, and financial services.

Our suggestions for improving the Maintenance of Activities process under the *Canada Labour Code* are set out below.

Legal Framework

Any limit on the right to strike must remain an exception to the federal labour relations regime. "Essential services" pursuant to s. 87.4 of the *Canada Labour Code* ("Code") is intentionally narrowly defined, because imposing any restriction on the right to strike is detrimental to the ability of unions to bargain effectively and amounts to an infringement of *Charter* protected rights. It is clear from the express language of the Code and from the Canada Industrial Relations Board's jurisprudence that "immediate and serious danger to the safety and health of the public" does not extend to other aspects of the public interest, such as shielding the public from personal difficulty, inconvenience or the economic consequences resulting from a strike or lockout.

Parliament's commitment to the practice of free collective bargaining is embodied in the Preamble to the Code. Furthermore, the Supreme Court of Canada has repeatedly confirmed that the right to strike is an indispensable component of a meaningful collective bargaining process.

Accordingly, a delicate balance must be struck between the goal of protecting the public from immediate and serious danger to safety or health and protecting the right to strike.

Application ought to be limited to key sectors

Recognizing that the restriction on the right to strike ought to be limited to exceptional circumstances, we propose that access to these provisions should only be available in sectors where there could potentially be an immediate danger to the health and safety of the public.

Unifor's experience with s. 87.4 has been almost exclusively within the telecommunications and aviation sectors. We suggest that for federally-regulated sectors, where public health and safety is not obviously engaged, a threshold test be applied for access to the Maintenance of Activities ("MOA") provisions.

s. 87.4 timelines should be enforced strictly

A problem with the current process is that a party that intends to raise a MOA issue is not required to take any further step until 15 days after a notice of dispute is filed. The party that claims that there are essential activities that need to be maintained can wait, in some instances months, to apply to the Board. This means that there is no mechanism to encourage the workplace parties to act proactively to resolve MOA issues until after the bargaining process is well advanced.

Notice of MOA issue

The current regime requires that a party taking the position that a MOA is necessary must raise the issue within 15 days of Notice to Bargain being issued. This party must provide notice to the other party, including: 1) specifics of the supply of services, operation of facilities or production of goods that, in its view, must be continued in the event of a strike or lockout; and 2) the approximate number of employees in the bargaining unit required. We suggest that this deadline should be mandatory, with no extension permitted by the Board unless upon mutual application of the parties.

Application to the Board

The current regime requires a party to apply to the Board for adjudication, where a notice has been provided under s. 87.4(2) and there is no agreement, within 15 days after notice of dispute under s. 71(1) (application for conciliation). This deadline should also be mandatory, with no extension permitted by the Board unless upon mutual application of the parties.

Deadline for the Board to render a decision pursuant to s. 87.4(4)

We propose that a deadline be imposed for the Board to issue a decision after an application under s. 87.4(4) is filed. We suggest that a Board decision ought to be rendered within 60 days of application by a party or reference by the Minister of Labour.

Processing by the Board – suggested policy

The current process is prone to delay at the Board and susceptible to deliberate stalling tactics by employers. This frustrates the progress of collective bargaining and undermines the Union's bargaining power. This is especially problematic in the context of first agreements. Delayed or slow bargaining erodes union support in newly-organized bargaining units. Employers can be motivated to frustrate new union representation. The existing scheme permits employers to raise s. 87.4 issues as a way to delay good faith bargaining.

We suggest that the Board adopt policies both to encourage parties to raise and attempt to resolve MOA issues *early* during bargaining, and to expedite disputes being heard and adjudicated by the Board when necessary.

Section 87.4(4) requires that upon application by either party (or reference by the Minister of Labour) the Board *shall* determine these issues:

- 1) whether and to what extent the supply of services, operation of facilities or production of goods must be continued in the event of a strike or lockout to prevent an immediate and serious danger to the safety or health of the public; and
- 2) the number of employees in the bargaining unit that would be required for that purpose.

In our view, applications ought to be heard on an expedited basis. To facilitate this, the Board ought to have broad powers to “case manage” essential service applications.

We suggest that the following measures be implemented to expedite the Board’s adjudication of s. 87.4 disputes:

- i. Applications ought to proceed on short notice irrespective of counsel’s schedule
- ii. Brief written submissions ought to be filed by the parties: describing the issue(s), setting out respective views, and an appropriate resolution
- iii. Agreed statement of facts should be used wherever possible
- iv. The overriding presumption should be that the Board will decide issues on basis of written submissions
- v. If the Board decides that an oral hearing is necessary, it should be conducted by way of oral submissions to supplement the parties’ written submissions
- vi. *Viva voce* evidence should only be used where it is critical to do so
- vii. Informal and flexible processes ought to be used, for example mediation/adjudication
- viii. The Board ought to provide an expeditious answer with brief reasons wherever possible

We believe that the Canada Industrial Relations Board, as the expert tribunal in all labour relations matters, ought to retain jurisdiction to decide MOA disputes. However, we would welcome the development of a dedicated body within the Board, with additional resources and knowledgeable and experienced Board staff, to mediate and adjudicate MOA disputes expeditiously.

Third Party Verification Unnecessary

Parties may agree to deal with MOA activities in a way that satisfies both sides but that would not meet the approval of an external reviewer. A verification process would limit the ability of employers and unions to address the circumstances of their unique workplaces in a flexible way that permits them to move their collective bargaining forward.

The public interest is adequately addressed by s. 87.4(7) which permits any party or the Minister to apply to the Board to vary an agreement during a lawful strike. In most bargaining in the federal sector, no MOA issues are present because neither party asserts the existence of a MOA issue within 15 days of the notice to bargain. Adding an obligation to make and have verified a MOA agreement even in those cases is unnecessary to protect public health and safety and could compromise the timely exercise of the right to strike.

/pc-klcope343