Strike or Binding Arbitration?
What’s the Best Way to Resolve an Impasse in Collective Bargaining?
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One of the most important decisions facing a faculty association seeking to certify as a union is whether to give up the right to strike in favour of binding arbitration as the means to settle an impasse in collective bargaining.

The right to strike and a comprehensive grievance handling process are the key powers an employee organization gains if it certifies as a union under the BC Labour Code. Unions have generally been loath to give up striking as a tool because it was a hard-won right and because of mixed experiences with binding arbitration.

Historically, binding arbitration was reserved to settle contract disputes where the employees fell into the category of “essential services” (e.g. police and firefighters). As such, its reputation in the labour movement is as an enforced means of impasse resolution rather than one freely chosen. Additionally, since arbitrators typically craft their decisions to fall in between the positions of unions and management, unions have viewed arbitration as an inadequate tool for achieving major contractual reforms.

The theory and practice of contract arbitration has evolved over the past forty years as a result of legislative changes requiring final and binding dispute resolution when grievances arise during the term of a collective agreement. Gone are the days of wildcat strikes to protest the unfair dismissal of an employee. Now, such matters are subject to a well-developed system of arbitration and judicial review to ensure an employee covered by a collective agreement is guaranteed due process of law.

Consequently, unions have become less suspicious of binding arbitration as a tool to resolve impasses in collective bargaining, but they have yet to enthusiastically endorse it for three primary reasons.

First, in regular interest arbitration (the most commonly employed type of arbitration in collective bargaining) the arbitrator attempts to replicate the type of agreement that parties would have made had they been able to conclude an agreement themselves. As a result, the arbitrator tends to craft an agreement that is in between the final positions of the union and management. This leads to fairly conservative settlements.

Second, if either party proposes a new element or substantial reworking to the agreement that was rejected at the bargaining table, then the arbitrator will almost certainly not include that proposal in the arbitrated settlement. Thus, substantial shortcomings in an agreement, particularly in light of changing economic and social conditions, remained unaddressed until they are intolerable to both parties.
Third, if binding arbitration is the mechanism for settling an impasse in collective bargaining, it can have a chilling effect on bargaining. If one or both of the parties to the negotiations are disinclined to move from their positions, rather than engage in productive bargaining to avoid strike or lockout, they can simply sit on their hands and wait for the arbitrator to sort things knowing that the “worst” they will get is the other party’s position.

Historically, strikes and lockouts have been the most effective means to achieve major changes in collective agreements. They put a great deal of pressure on the parties to find an acceptable resolution to the impasse either because of financial loss (primarily the private sector) or the expense of political capital (primarily in the public sector). Due to the substantial stakes in a strike or lockout, they are generally viewed as a last resort, after productive bargaining has reached a stalemate.

A strike is not an easy tool to wield. It requires convincing union members that the potential gains from a strike are greater than the personal and professional losses resulting from shutting down the workplace for an indeterminate period. Even though the incidence and duration of strikes in Canada have been on a general downward trend over the past 40 years, there is no accurate way to determine how long a particular strike may carry on. For this reason, unions often resort to some form of limited job action to put pressure on the employer before engaging in a full-blown strike.

Although the parties to a strike or lockout may reach agreement on their own, they often require the assistance of a mediator to move their negotiations forward. On occasion, the mediator may be asked to switch hats and to arbitrate on certain intractable issues.

Alternately, there is nothing preventing unions and employers from agreeing to forego strikes and lockouts entirely in a particular round of bargaining, in favour of submitting their outstanding matters to binding arbitration. This is not a common practice, but it could become more popular as unions and employers seek ways to avoid the substantial costs of work interruptions or stoppages.

Professionals who form unions face an additional challenge in choosing the best means to resolve an impasse in collective bargaining. Their commitment to a professional code of conduct, a community of practice, and/or their clients makes the prospect of withdrawing services unattractive. On the face of it, such a withdrawal of services appears to contravene their pledge to the higher ideals of their profession. This might well be true if collective bargaining was merely about wages and benefits – however, contemporary collective bargaining is about much, much more.

Unlike professionals who operate independently of a particular employer, professionals who are employees have their practice constrained in many ways by the policies and actions of their employers. It is through the collective agreement that unionized professionals can collectively codify their professional practice and defend it against arbitrary interference by employers.

Consequently, unionized professionals who go on strike are, for the most part, striking to retain the integrity of their professional practice to fulfill their responsibilities to their profession and their clients. In this context, although a strike may be unattractive, it may also be the only means to uphold professional standards.
If a union gives up the right to strike in favour of binding arbitration, it is committing itself to a perpetual status quo. Under binding arbitration each party effectively wields a veto against significant reform of contractual provisions, until a matter becomes so intolerable to both the employer and the union are forced to act. This affects not only salaries and benefits but, all contractual provisions, including those dealing with professional practice.

To this end, it appears that a union would be ill advised to trade off its right to strike for a guarantee of binding arbitration until such time that it has a mature and well-functioning collective agreement. This is especially important for a newly-formed union, which is unlikely to achieve such an agreement until after several rounds of bargaining. Once the right to strike is given up, it is very difficult to regain and so should not be given away quickly or without substantial, legally enforceable guarantees from the employer.