

CHAPTER 9

STRIKES, LOCKOUTS AND CONTRACT DISPUTE RESOLUTION

Preface

In this chapter, students consider the strategies of strikes and lockouts deployed by unions and employers respectively in an attempt to break an impasse in collective bargaining between the parties. Then the discussion will turn to various forms of third-party interventions, including those by government, to reduce the likelihood of, or to end these actions and conclude the collective bargaining process.

Learning Objectives

- 10.1 Describe the purpose of strikes and lockouts.
- 10.2 Outline the prerequisites for a strike or lockout.
- 10.3 Identify factors affecting strikes and lockout activity.
- 10.4 Explain the role of government intervention in contract disputes.
- 10.5 Describe other methods to resolve contract disputes.

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I. Strikes and Lockouts

The legal definition of a **strike** is broader than might be expected. Most jurisdictions provide a definition similar to the following from the *Canada Labour Code*:

strike includes a cessation of work or a refusal to work or to continue to work by employees, in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity on the part of employees in relation to their work that is designed to restrict or limit output.

A strike is not limited to a situation where employees walk off the job; it also includes situations where employees continue to work but restrict output. In some cases, unions have used the slowdown tactic of following work procedures exactly, and not engaging in any activity the collective agreement does not require. This is referred to as a **work-to-rule** campaign, and in

some situations, it could be regarded as a strike action because it is restricting output. It has even been held that employees who refuse overtime in collaboration with each other are engaging in a strike.

Where employees work at different locations, unions have sometimes used the tactic of **rotating strikes**, in which employees strike at some locations, while at other locations they continue to work. For example, in the postal system the union could have employees strike in different cities on different days. The purpose of such a strategy is to force concessions without completely shutting down the employer, and without employees losing all of their income.

In two jurisdictions—Manitoba and Nova Scotia—the definition of a strike also includes a requirement that the purpose of the refusal to work or the slowdown is to compel the employer to agree to certain terms and conditions of employment. Accordingly, a refusal to work for some other purpose would not be a strike. This difference in definition could mean that the same union action is considered a strike in one province and not in another.

A strike is only legal at certain times and if the prerequisites for a strike, including a strike vote, have been met. A strike during the term of the collective agreement is illegal. It is an unfair labour practice to threaten an illegal strike. A **wildcat strike** is an illegal strike that has not been authorized by the union—for example, if a group of employees walked off the job to protest the discipline or dismissal of a co-worker despite the fact that a collective agreement covering these employees was in force.

A lockout is the employer's refusal to allow employees to work in order to force the union to agree during collective bargaining to certain terms or conditions of employment. In most jurisdictions, labour relations legislation formally defines a lockout similarly to the following from the *Canada Labour Code*:

lockout includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, done to compel their employees or to aid another employer to compel that other employer's employees to agree to terms or conditions of employment.

It is important to note that there are two components to the definition. First, there must be a suspension of work or a refusal to employ, and second, there is a requirement that the purpose of the refusal to employ is to compel employees to agree to terms or conditions of employment. The second requirement refers to the motivation of the employer. If the employer suspends operations for economic reasons and there is no intent to force employees to agree to terms and conditions of employment, there has not been a lockout.

Functions of Strikes

Strikes serve several legitimate purposes in the labour relations system. Although it may sound strange, strikes can be a way to resolve conflict. There is evidence that where strikes are not allowed, conflict emerges in a different form, such as union grievances. In one study, it was found that the grievance rate for employees who were not allowed to strike was significantly

higher than the rate for employees who could strike.ⁱ The possibility of a strike may cause negotiators to make required concessions to reach an agreement. After a strike starts, the union and the employer will be forced to re-evaluate their most recent bargaining positions. A strike might also play a part in intra-organizational bargaining, by bringing the expectations of bargaining unit members into line with what the bargaining team can achieve.

Significance of Strikes

For many people, a reference to unions or labour relations leads to negative thoughts about strikes. Periodically news reports contain references to exceptionally long strikes or clashes between pickets and police. Before examining the significance of strikes, it should be noted that some perceptions about them may be incorrect.

There are still reasons strikes are significant and could be a cause for concern. Some have led to violence and property damage. Nine replacement workers were killed in a 1992 bombing incident during a strike at a mine in Yellowknife. In 2006, an Ontario community college professor was struck and killed by a car when he was on the picket line. Strikes may cause employers to lose business, and a few have led to a business being permanently closed. Other strikes cause inconvenience to the public, such as traffic gridlock and commuter frustration, when transit workers stay off the job. Unionized public-sector workers may face certain restrictions in their ability to strike due to a need to ensure continuity of essential services offered to citizens by police, fire and medical professionals.

Factors Affecting Strikes

There are several factors affecting the incidence and duration of strikes. Every contract negotiation is unique, because it involves different employees and employers, a particular bargaining history and certain economic factors.

II. Differences in Information Between Union and Employer

Some observers have contended that strikes are caused because the union and the employer are basing their negotiations on different information. The employer will have access to information, such as sales and revenue forecasts, which is unavailable to the union. This results in the parties having different expectations. The union may think the future looks bright and the employer has the ability to provide a wage increase, while the employer sees tough times ahead and thinks that granting wage increases in the short term is not prudent.

ECONOMIC FACTORS Generally, strike activity increases in periods of higher employment and decreases as unemployment rises. A possible explanation for this is that when the business cycle reaches its peak and unemployment is lower, employees are more willing to strike because it is easier to find an alternative job. Strike activity is lower in bargaining units that have experienced higher increases in their real wages during the previous contract. A distinction can also be drawn between different types of strikes on the basis of when the strike occurs. Strikes might occur when the parties negotiate their first collective agreement, on the renewal of an expired agreement, or occasionally during the term of the agreement. In some first contract

situations, a dispute may relate to a non-monetary issue such as the first-time establishment of seniority or compulsory union membership. Economic factors are more significant for contract renewal strikes. Although wildcat strikes during the term of an agreement are illegal, they still can occur.

BARGAINING UNIT AND COMMUNITY CHARACTERISTICS Some researchers have considered employee and community characteristics as factors affecting strikes. In larger bargaining units, there may be more alienation toward the employer, which increases the likelihood of a strike. Societal or community support for labour unions may also create tolerance for labour unrest or disruptions caused by strike action compared with communities with low union density or no historical connections with unions.

CONFLICT WITHIN THE EMPLOYER OR UNION Internal conflict within either the employer or the union could be a factor affecting strike activity. Within the union, there will be various interests and differences among the membership along the lines of gender, age, seniority, and other factors. These differences may mean that the union cannot agree on demands or concessions that are necessary to reach an agreement. Similarly, there might be divisions within the management team that contribute to an impasse in negotiations. In some cases, management bargaining representatives may lack the authority required to reach an agreement. When the real decision makers are not accessible to the management negotiating team, it risks under-estimating the union's commitment to the issues. The union may be forced to strike in some cases to get the real decision makers more involved in contract talks.

RELATIONSHIP BETWEEN THE UNION AND THE EMPLOYER The relationship between union and employer negotiators may be a factor affecting strike activity. Where there is hostility, or a history of attitudinal structuring between the parties, a lack of reasonable consideration and objective assessment of proposals create a barrier to settlement.

NEGOTIATOR'S SKILLS AND EXPERIENCE The negotiation skills and experience of the negotiating teams can affect the likelihood of a strike. Inexperienced negotiators are more likely to make errors such as committing themselves to a position they cannot withdraw from without a loss of reputation or charges of unfair labour practices. Less-experienced negotiators may not send out proper signals regarding where they would be willing to settle or fail to pick up on cues from the other side about settlement possibilities. Inexperienced negotiators might also think that in order to establish a reputation they must obtain more in negotiations, and this leads to a bargaining impasse.

BARGAINING HISTORY The previous bargaining between the parties might affect the likelihood of a strike. Prior contract negotiations and strikes might have caused hostility that in turn leads to an impasse in current talks. If a previous strike was brief and did not cause employees to lose a large amount of income, they may be more willing to again support a strike. Alternatively, it has been argued that a previous strike may have imposed costs that the parties will want to avoid, thus making a strike less likely.

LEGAL ENVIRONMENT The allocation of authority in labour relations matters to the provinces has led to policy differences on issues such as the requirement for conciliation or

mediation, and replacement worker legislation. It has been found that while legislation requiring conciliation is largely ineffective in reducing the incidence of strikes, mandatory strike votes have reduced the incidence of strikes. Some jurisdictions have legislation that prohibits the use of replacement workers. It has been found that legislation banning the use of replacement workers increased the incidence and duration of strikes.ⁱⁱ This particular finding is interesting, because unions have previously contended that a ban on the use of replacement workers would decrease the incidence of strikes. In some jurisdictions, legislation allows for a contract to be reopened during the term of the agreement. It has been found that such “re-opener” provisions lead to a reduction in strikes. A possible explanation for this is that the re-opening provision allows the parties to resolve any problems before discontent accumulates and leads to a strike.

EMPLOYEE DISCONTENT Employee dissatisfaction and frustration with their employer may be a factor that affects strike activity. It has been suggested that a collective voice approach, which views strikes as an expression of worker discontent, explains strike activity. This approach notes that because strikes involve costs and uncertainties, workers must be convinced to strike on the basis of fairness and legitimacy, not just by appealing to their economic self-interest. It is also contended that the employment relationship involves a subordination of employees to management. This is the basis for discontent, which can be expressed in a number of ways, and will more likely be expressed by a strike when alternatives are not available. Research has found that workplaces with more autonomy and progressive HRM practices have lower strike levels. Strikes are also more likely to occur where union leaders are under pressure to be more militant because of employee discontent.

The nature of many of the factors affecting strikes has led some observers to view strikes as mistakes—something that could be avoided if the parties had the same information, avoided negotiation errors and acted rationally. However, according to the collective voice approach, strikes are an expression of fundamental employee discontent and should not be viewed as mistakes.

Some see union bargaining power as affecting the size of any wage increase; however, it will not necessarily affect the incidence of strikes. It is argued that if the union has more bargaining power, management has an incentive to increase its offer and avoid a strike, hence the view that differential bargaining power is a theory of wages, not of strikes. Alternatively, if strikes are viewed as a consequence of employee discontent, bargaining power plays an indirect role in the determination of whether they will occur. If discontent is high and union strike power is high, union negotiators will be under more pressure to be militant in bargaining, and the likelihood of a strike is increased.

It is thus apparent that the causes of strikes are complex. Strikes should not be viewed simply as tests of economic strength. Strikes may be affected by numerous factors including negotiator experience, the legal environment and employee discontent.

If strikes are viewed as being an expression of employee discontent, it will be necessary to take steps to reduce that discontent. It has been suggested that having employers adopt more progressive employment practices and enacting legislation that ensures satisfactory compensation, safe working conditions and fair treatment may help reduce discontent.

III. When Can the Parties Strike or Lockout?

Several restrictions govern when a union may strike, or an employer may lockout employees. A strike or lockout that does not meet the requirements is illegal. The parties cannot strike or lockout while a collective agreement is in force. This leads to the question of whether employees not on strike, who are covered by a different collective agreement, can refuse to cross the picket line of employees in other bargaining units. The employees involved might work for the same employer—for example, where production workers face a picket line set up by striking office workers. The striking employees might work for another employer, and employees must enter the second employer's place of business to make deliveries or provide services.

Generally, a refusal to cross a picket line is an illegal strike, but there are exceptions and differences between jurisdictions. If an individual refused to cross a picket line, it would not constitute a strike, because a strike is defined as a *collective* refusal to work. Action taken by one employee cannot be a strike. To further complicate the matter, some collective agreements have a provision that employees will not be required to cross a picket line. Such provisions are in conflict with legislation that prohibits a strike during the term of an agreement and will not prevent a labour relations board from declaring a strike illegal in most jurisdictions, because the parties are not legally allowed to contract out. Unions and employers in most jurisdictions should be aware that the provisions in collective agreements allowing employees to refuse to cross a picket line will not prevent a Labour Relations Board from declaring a strike illegal. The parties are not allowed to condone activity the legislation makes illegal. However, provisions like this may have significance if the employer disciplines employees who refuse to cross a picket line. An arbitrator might refuse to uphold the discipline because of a contract provision allowing the refusal. In summary, where there is a provision in a collective agreement allowing employees to refuse to cross a picket line, employers can likely still pursue a remedy from the Board for an unlawful strike, but they may not be able to discipline employees.

Some unions have negotiated terms in collective agreements that give employees the right to refuse to work on, handle or deal with goods coming from or going to an employer involved in a labour dispute. A **hot cargo clause** may be restricted so that the employees can refuse the work only if the dispute involves their union or their employer. In most jurisdictions, this type of clause has been found to be unenforceable because it is an attempt to contract out of the statutory prohibition against a strike or lockout during the term of the agreement.

Before there can be a strike, the parties must have negotiated and complied with the duty to bargain in good faith. If this requirement is not met, a labour relations board might order the parties to resume negotiations. In six jurisdictions, the parties must have completed a conciliation process before a strike or lockout is permitted. Some jurisdictions have a one-stage process involving a conciliation officer. Other jurisdictions provide for a second stage involving a conciliation board. In all jurisdictions, the process includes a *cooling-off* period after the conciliation officer or board has reported. The parties cannot strike or lockout until after the *cooling-off* period, which ranges from 7 to 21 days.

Should a Hot Cargo Clause Be Enforceable?

The employer assigned work to composing room employees that was normally done by employees belonging to the union who were locked out at another newspaper. The union filed a grievance alleging that the employer had violated Article 16 of the agreement. The employer's position was that the employees who refused to do the work were engaging in an illegal strike. The arbitration board that heard the matter held that the refusal to do the work assigned was a strike. Furthermore, the Board held that the article relied upon by the union was in conflict with the provisions of the *Labour Relations Act*, which provided that there be no strike or lockout during the term of the agreement. Accordingly, the union's grievance was dismissed. This decision illustrates that a provision in a contract relating to hot cargo may not be enforceable.

All jurisdictions require that a strike vote be held by secret ballot. In all jurisdictions except Nova Scotia, a strike must be approved by a majority of those who vote.

In Nova Scotia, the strike must be approved by a majority of employees in the bargaining unit, a more restrictive provision because the union will have to obtain the support of a majority of employees, not just of those employees who actually vote. It has been found that mandatory strike votes reduce the incidence of strikes.ⁱⁱⁱ Certain jurisdictions require the union to give a strike notice ranging from 24 to 72 hours: in some cases, notice must be given to the employer; in others, both the employer and the Ministry of Labour must be given notice. In British Columbia, there is a provision for the Labour Relations Board to order a longer strike notice where perishable property is involved.

In the event a strike or lockout results in special hardship, governments can pass special legislation ending the labour dispute. In some jurisdictions, instead of relying on special or ad hoc legislation, a special mechanism has been established to deal with labour disputes that may cause hardship. In the federal jurisdiction, British Columbia and Alberta, legislation provides for the designation of essential services or an emergency in a strike or lockout. If a service is declared essential, or an emergency is declared, a strike is prohibited.

REMEDIES FOR ILLEGAL STRIKES AND LOCKOUTS In the event of an illegal strike or lockout, the employer or union may pursue remedies through the grievance and arbitration process, or the labour relations board. The possibility of obtaining a remedy in more than one forum, and the differences between jurisdictions, make this a complex area. The union or employer should seek legal counsel in its jurisdiction.

The union does not automatically have liability in the event of an illegal strike by employees. It will only be liable if union officers are involved in the illegal activity or the union fails to act to halt it. It follows that in the event of an illegal strike, the employer should call it to the attention of union officials immediately. Because an illegal strike or lockout is a breach of the collective agreement, the union or employer might file a grievance, and if the matter is not settled an arbitrator could award damages. The damages would be the amount required to compensate the innocent party for the breach of the agreement. Employers can be ordered to pay lost wages and the union can be ordered to pay the costs and lost profits associated with the strike. An arbitrator cannot order employees involved in an illegal strike to pay damages. In most

jurisdictions, the union or the employer might also seek a declaration from the labour relations board that there has been an unlawful strike or lockout. The board might order damages to be paid.

Strike Activity and the End of a Strike

When employees go on strike, the employer is allowed to continue to operate. There is legislation prohibiting the use of replacement workers during a strike in the federal jurisdiction, British Columbia and Quebec. Even where the law allows replacement workers to be used, in some cases the employer will not be able to continue operations because it cannot find a sufficient number of employees with the skills required to perform the work of those on strike. While employees are on strike, they will usually receive **strike pay** from the union, usually a relatively small amount of money. In order to receive strike pay, individuals are typically required to engage in picketing. If employees cannot engage in picket duty because of a disability, the union will accommodate by assigning these persons to alternative duties such as administrative work associated with the strike. The union may arrange with the employer for some benefits to be continued by paying the relevant premiums. Some affected union members may seek alternate employment elsewhere during the strike.

PICKETING The union will likely establish a picket line at the employer's place of business. Pickets cannot trespass on private property. Accordingly, pickets may be excluded from areas such as shopping malls. There is a difference between what the law allows pickets to do and what some actually do. Legally, a picket line can only be established to inform or persuade the public. The law does not allow pickets to obstruct entry or intimidate. Picketers will usually carry signs to advise the public about the strike and may also hand out leaflets. In some strikes, unions have also attempted to inform the community by putting notices in newspapers and distributing leaflets to homes. However, some picket lines have been set up and operated to block entry. The employer can apply to the courts in most provinces for an **injunction** to limit aspects of picketing. However, this is a time-limited remedy and not a permanent restriction on the union's right to picket.

In all provinces except British Columbia, labour relations legislation does not extensively regulate picketing, and picketing issues are dealt with in the courts. One court decision deserves mention. Until 2002, the courts had held that **secondary picketing**—picketing at a location other than where striking employees work, for example, at a customer of the employer—was automatically illegal. In 2002, the Supreme Court of Canada handed down a decision that secondary picketing only violates the law if it involves “wrongful action.” In the future, some jurisdictions could pass legislation to regulate secondary picketing; however, any such regulation must not contravene the freedom of expression provisions of the *Canadian Charter of Rights and Freedoms*.

END OF THE STRIKE A strike will usually continue until the parties reach a collective agreement; however, a union may call an end to the strike without a new contract being negotiated. In a few cases, the parties have not reached an agreement and a strike has continued indefinitely. In five jurisdictions—Canada, British Columbia, Manitoba, Newfoundland and Labrador and Ontario—labour relations legislation provides that the Minister of Labour or

cabinet may order a final offer vote by employees where it is in the public interest to do so. For example, if a strike by sanitation employees was causing exceptional difficulties, a vote could be ordered. If employees vote in favour of the offer, it will be the basis of an agreement and the strike will end. If this vote is unsuccessful, the parties return to the bargaining table to continue negotiations, probably with the assistance of a mediator, or more likely in the case of essential public services, the government would order binding interest arbitration to settle all remaining issues.

Legislation in the federal jurisdiction, Alberta, Manitoba, Ontario, Prince Edward Island, Quebec and Saskatchewan provides that when a strike has ended, striking employees must be reinstated and given priority over any employees hired as replacement worker.

Reinstatement of Striking Employees

Other jurisdictions that do not have an expressed right to reinstatement, the union could file an unfair labour practice complaint if an employee participating in a strike was not reinstated..

The union and management may also enter into various back-to-work protocols following the end of a strike. This arrangement could include various matters such as:

- prohibiting discipline for actions during the strike
- assuring no discrimination or retaliation for actions during the strike
- requiring any proceedings such as bad faith bargaining complaints to be withdrawn

These agreements encourage the parties to put all the unpleasantness of the strike behind them and move on.

INTERNATIONAL COMPARISONS When considering the Canadian strike record in comparison to other countries, several measurement problems must be noted. Countries have different definitions of what constitutes a strike. In Canada, all disputes in which 10 or more work days are lost are counted as a strike. In the United States, a strike is only included in the statistics if it is a work stoppage of 1,000 or more workers. Accordingly, comparisons between Canada and the United States of the number of strikes are of little value. Therefore, unless the reader of these numbers considers the definition of a strike used in each country, the wrong conclusion might be reached. However, despite these measurement problems, the time lost because of strikes in Canada is high by international standards. This is largely because Canadian strikes generally last longer than those in other countries.

IV. Contract Dispute Resolution

If union and management bargaining teams cannot agree on the terms of a first, or thereafter, renewed collective agreement, various forms of assistance are available. This is referred to as *third-party assistance* because it involves an external party conferring with the union and the employer. The most common forms of assistance—conciliation and mediation—involve a

neutral third party attempting to aid in reaching a settlement on outstanding contract issues that are preventing a conclusion to the bargaining process. In most jurisdictions, this assistance is available from the government ministry responsible for labour issues. All jurisdictions other than Ontario allow the parties to request assistance, or the government minister responsible for the labour portfolio can initiate the process without a request. In Ontario, the legislation requires a formal request to the labour minister by either the union or employer. There are significant differences between jurisdictions regarding the form and significance of assistance to the parties. No two jurisdictions provide for the same procedure. The most important of these issues is whether some form of third-party assistance is required *before* a strike or lockout is allowed.

Types of Third-Party Assistance

An easy way to remember the three forms of third-party assistance in resolving a deadlock in collective bargaining is by using the acronym CMA. The third-party assistance provided via conciliation, mediation and arbitration processes have a similar purpose but are structured and timed in a unique manner.

CONCILIATION The concept of conciliation, dates back in early Canadian labour relations history with the passage of *The Conciliation Act* (1900). In contemporary times, some, but not all, of the principles of this historical law remain in place. In all jurisdictions except British Columbia and Alberta, labour legislation provides for a conciliation process. There is either a one-stage conciliation process involving either a conciliation officer or a conciliation board, or a two-stage process involving a conciliation officer and then a conciliation board if no settlement is reached with the conciliation officer. **Conciliation officers** are government ministry employees who confer with the parties, endeavour to help them reach an agreement and report back to the labour minister on the likelihood of a settlement between the parties on the outstanding bargaining issues in dispute. Conciliation officers function as facilitators; they do not have any authority over the parties and do not make recommendations regarding the terms of the dispute. In most jurisdictions, the labour minister may appoint a conciliation officer when either or both of the parties make a request to the ministry or the labour minister may on his or her own initiate the appointment. In Saskatchewan, the legislation provides for the appointment of a conciliation board instead of an officer.^{iv}

A **conciliation board** consists of a union nominee, an employer nominee and a neutral chairperson selected by the parties' nominees. The board hears evidence from both sides and makes recommendations to the labour minister regarding a settlement. The minister may make the board's report public. This third-party settlement option is a vestige of the original 1900 federal law intended to bring public embarrassment to one or both negotiating parties and thus apply pressure to settle the labour dispute without resorting to a strike. When used, the board's recommendations are not binding. However, there is a provision in most jurisdictions that the parties can agree that the recommendations will be binding.

After a conciliation officer, or a conciliation board reports to the labour minister, there is an additional waiting period that must elapse before the parties can strike or lockout in all jurisdictions that provide for conciliation except Saskatchewan. This is known as a **cooling-off period**, and ranges from 7 to 21 days in length depending on the jurisdiction. In those

jurisdictions where the labour minister decides whether to appoint a conciliation board, the notification that one will not be appointed is often referred to as a **no-board report**. In some jurisdictions, including Ontario, where the optional conciliation board is not being used, a no-board report after the conciliation officer completes his or her work is the standard procedure.

The conciliation process is viewed as having advantages and disadvantages. It could help the parties reach an agreement because the third party may bring a new perspective to the negotiations, and the *cooling-off* period may allow the parties to reconsider their positions. However, there is no empirical evidence that it reduces the overall incidence of strikes. In situations where a strike or lockout is going to be necessary to force the parties to reconsider their positions, conciliation may only delay the process. Some unions have claimed that the process favours the employer because it provides management with additional time to prepare for an eventual strike. A conciliation board has the same potential advantages as a conciliation officer. However, the extent to which conciliation board reports actually have any effect is difficult to determine. Conciliation boards will even further delay a strike or lockout. This is a disadvantage where a work stoppage is necessary to force one or both of the parties to re-evaluate their positions.

MEDIATION In Alberta and British Columbia, the legislation refers to mediation instead of conciliation. In all other jurisdictions, the legislation allows for the appointment of mediator instead of, or in addition to, the conciliation process. **Mediators** attempt to assist the parties to reach an agreement. They cannot force a settlement of a disputed issue on the bargaining teams.

Mediators as Active Participants in Resolving Disputes in Collective Bargaining

Mediators typically play a more active role in negotiations. Their legal, management or union experience along with developed conflict resolution skills frequently enable them to help resolve key distributive bargaining issues that have frustrated both management and union negotiators.

FACT-FINDING is a process found in private-sector legislation in British Columbia and some public-sector labour relations statutes. A fact-finder is an individual who investigates the issues and reports to the Minister. The report may contain non-binding recommendations and is usually made public.

ARBITRATION **Arbitration** is a completely different form of third-party assistance because the arbitrator makes a final and binding decision establishing the terms of the collective agreement after hearing the parties. The arbitration of a collective bargaining dispute is referred to as **interest arbitration**.

Interest arbitration should not be confused with grievance or rights arbitration, which deals with a dispute relating to the administration of the collective agreement. For example, if an individual was dismissed, the union would file a grievance and if not settled, the issue could be referred to rights arbitration.

Interest arbitration is used primarily in the public sector where it is provided as an alternative to a strike or lockout. In the private sector, interest arbitration could be used if the parties agreed

to do so. However, it is seldom seen in the private sector because at least one of the parties may perceive that it does not want an arbitrator to make an award containing terms that it would not agree to in bargaining. The arbitrator is a neutral third party who hears evidence from both parties regarding the possible contents of the collective agreement. Both sides will present evidence attempting to convince the arbitrator, including references to comparable collective agreements, to make an award favourable to their preferred position.

Conventional interest arbitration has been criticized for several reasons. Establishing arbitration as the final dispute-resolution mechanism may hinder the parties negotiating a collective agreement on their own. It has been argued that arbitration may have a **chilling effect** on negotiation, meaning the parties may be discouraged from making concessions that might lead to an agreement. Consider the issue of wages and suppose the union is demanding a 4 percent increase and the employer is offering a 1 percent increase. Assuming that an arbitrator would order a wage increase somewhere between the parties' positions, the employer or the union may decide it would end up better off if it made no concessions before arbitration. It has also been suggested that arbitration may have a **narcotic effect**. Negotiators may become overly dependent on an arbitrator deciding difficult issues for them instead of making the tough decisions required to reach an agreement. Another way to view the narcotic effect is that it may be safer for union or employer negotiators to say they did their best and that the agreement was the decision, often characterized as the fault, of the arbitrator.

Final Offer Selection An alternative form of interest arbitration may avoid the problems associated with traditional or conventional arbitration. **Final offer selection** is a form of arbitration in which both the union and the employer submit their final offer to the arbitrator, who chooses one of the offers. The terms provided in the selected offer are incorporated into the collective agreement.

There are two forms of final offer selection: total-package and item-by-item. In **total-package final offer selection**, each side presents an offer that covers all of the outstanding issues between the parties such as wages, benefits and vacations. The arbitrator then must choose the entirety of either the union's or the employer's proposal. In **item-by-item final offer selection**, the arbitrator separately chooses between the union and the employer proposals for each item in dispute. For example, the arbitrator might accept the union's proposal on the issue of wages and the employer's proposals on the issues of benefits and vacations.

The major advantage of final offer selection is that it should encourage the parties to reach their own agreement. This is especially true when total-package final offer selection is used because both parties face the substantial risk that the arbitrator might choose the offer made by the other side. However, there are potential disadvantages associated with final offer selection. The process creates winners and losers, and this may cause hostility that affects the administration of the agreement and rounds of future negotiations. There may be less risk of creating hostility where item-by-item selection is used, because both parties see parts of their offer incorporated into the new collective agreement.

First Contract Arbitration First contract arbitration (FCA) was described as a policy alternative that has been adopted in most jurisdictions. FCA can be used to resolve an impasse in the first negotiation between the parties. However, as previously outlined, there are some restrictions on the availability of FCA, and it will not be ordered in all situations when there is a bargaining impasse.

Second or Subsequent Contract Arbitration Another policy option, which has been adopted in Manitoba, is to make arbitration available in second and subsequent contract negotiations on the application of one of the parties. The legislation allows either of the parties to apply to the Board for a settlement. The Board inquires into the negotiations to determine if the parties have bargained in good faith and whether they are likely to conclude an agreement within 30 days if they continued to bargain. If the Board finds that the party making the application is negotiating in good faith and the parties are unlikely to conclude an agreement within 30 days, any strike or lockout must be terminated, and the terms of an agreement are settled either by an arbitrator that the parties agree upon or by the Board. This is a significant policy development. After FCA was introduced by one jurisdiction, it was subsequently adopted by eight other jurisdictions. Second or subsequent contract arbitration could also be adopted by other jurisdictions in the future. However, it appears to be a departure from previous policy, and its widespread adoption appears to be unlikely.

MEDIATION-ARBITRATION **Mediation-arbitration** is a two-step process, sometimes referred to as *med-arb*. The individual assisting the parties first tries—as a mediator—to help them reach their own agreement. If a settlement is not reached, the same person then acts as an arbitrator and decides the terms of the collective agreement.

Med-arb has not been extensively used in interest arbitration. An advantage of med-arb is that if the mediation attempt is not successful, the parties can get more quickly to the arbitration process. Also, if the dispute proceeds to arbitration, the arbitrator will have accumulated a large amount of knowledge about the issues. A potential problem is that the parties may not be totally candid with a mediator when they know that the same person may later be acting as an arbitrator. There is also a concern that the person assisting the parties may obtain information in the mediation process that may improperly influence his or her decision as an arbitrator.

Other Dispute Resolution Methods

In addition to the various forms of third-party assistance, a contract dispute could be resolved in some jurisdictions by a final offer vote and by back-to-work legislation in all jurisdictions.

FINAL OFFER VOTE In some jurisdictions the employer may request a final offer vote or the labour minister may direct such a vote. These votes should be viewed as an alternative way to resolve a collective bargaining dispute.

BACK-TO-WORK LEGISLATION refers to a special statute passed by a government legislature to end a strike or lockout. It orders the strike or lockout to end, and usually provides for the terms of a new agreement to be determined by interest arbitration. In some cases, the legislation sets out the terms of work instead of providing for arbitration. Back-to-work

legislation has been used in the public sector in cases where employees have the right to strike but it is deemed that the continuation of a strike will impose excessive hardship on the public; for example, it has been used to end transit and teacher strikes.

There has been a major change in the frequency of back-to-work legislation in Canada in recent years. Since the early 1980s, the number of instances of back-to-work legislation is higher than any other period in the history of labour relations in Canada. In the last three decades, the federal government alone passed 19 pieces of back-to-work legislation while provincial governments across the country have enacted 71 pieces of back-to-work legislation.

Most of this legislation (51 of the 92 pieces of legislation) not only forced employees back to work after taking strike action, but also arbitrarily imposed settlements on the striking employees.

Back-to-work legislation was first used by the federal government in 1950. Parliament has used this legislative remedy 34 times prior to 2011. It has been suggested that this action not only established a new norm in labour relations but also *de facto* amended the *Canada Labour Code* to prevent strikes in the transportation and communications sectors while leaving the legislation untouched.

V. Review Questions

1. Identify the key policy variables relating to third-party assistance in contract dispute resolution.

See Figure 9-5 for a summary of policy issues related to contract dispute resolution.

- What form(s) of third-party assistance are made available?
- What is the role of the assistance provider?
- Is third-party assistance required before a strike or lockout?
- How long must the parties wait after conciliation or mediation before a strike or lockout?

2. Distinguish between conciliation or mediation, and arbitration.

Conciliation involves a neutral third party that acts as a facilitator to assist the parties reach an agreement. Legislation in some jurisdictions refers to mediation instead of conciliation. In other jurisdictions mediation involves a third party playing a more active role to assist the parties reach an agreement after conciliation has been unsuccessful. Conciliation and mediation do not involve a formal hearing, and a conciliator or mediator does not make a formal order which is binding upon the parties. In arbitration there is a formal hearing and after the arbitrator hears the evidence from the parties the arbitrator makes a formal order which is binding upon the parties.

3. Describe the possible problems that are associated with arbitration.

Interest arbitration has been criticized primarily because of the chilling and narcotic effects. The chilling effect refers to the concept that a party in negotiations may not be willing to make a

concession because it thinks that an arbitrator may be involved later in the process. For example, if a union was demanding a four percent wage increase and suspected that an arbitrator later would make an award somewhere between the unions demand and employer's offer, there is a disincentive to reduce the demand to three percent. The narcotic effect refers to the concept of the parties becoming dependent upon an arbitrator settling the terms of the agreement instead of them making the tough decisions and concessions that are required to reach an agreement.

4. Why is arbitration infrequently used in the private sector?

In the private sector both parties would have to consent to refer a contract dispute to interest arbitration. It is likely that one of the parties perceives they will be able to achieve a better outcome if they avoid arbitration and insist upon negotiation and a strike or lockout if necessary. For example, an employer may think that employees are not willing to strike so it is possible to force the union to agree to terms that may be more favourable than those an arbitrator would impose. Alternatively, a union might be in a situation where it is in a strong bargaining position and thinks that it will be able to force the employer to agree to terms that are more favourable than an arbitrator would award.

5. What concerns may unions and employers have regarding final offer selection?

Both parties fear that the arbitrator may accept the contract proposed by the other side. Each side faces a risk of a significant loss. This risk would be higher with total offer final offer selection. Final offer selection could be viewed as the nuclear bomb of negotiations. The threat that it will be used and the loss that could result will motivate the parties to make concessions to reach an agreement on their own.

6. Describe the functions of strikes.

A strike (or lockout) may be the catalyst required to achieve a collective agreement. A strike may force the union to abandon a demand or force the employer to improve its offer. Some have argued that strikes serve as a way to release pent-up frustration. It has been noted that in situations where employees are not allowed to strike the grievance rate is sometimes higher.

7. Identify the factors that affect the incidence of strikes.

It should be noted that strikes are caused by both economic and non-economic factors. Another way to classify the factors affecting strikes is to view strikes as being a result of mistakes, such as differences in information between the union and employer, or as expressions of worker discontent.

The following table refers to factors that have been found to influence strikes.

Factors Increasing Strikes:	Factors Decreasing Strikes:
Different knowledge and information held by the parties	Common knowledge and information held by the parties
Lower unemployment and economic growth	Higher unemployment and recession
Larger bargaining unit	Smaller bargaining unit
Conflict within the union or employer bargaining team	Consensus within the union and employer bargaining teams
Conflict between the union and employer	A more cooperative relationship between the union and employer
Negotiators with less skill and experience	Negotiators with more skill and experience
Bargaining history: brief strike(s) that did not impose costs on employees	Bargaining history: longer strikes that have imposed costs on employees
Legislation prohibiting the use of replacement workers	No prohibition on the use of replacement workers
Employee discontent	Employee satisfaction

8. List the legal requirements for a strike or lockout in your jurisdiction.

The two key items that could vary between jurisdictions are:

- 1) whether conciliation or mediation is a requirement, and
- 2) whether a notice is required

VI. Discussion Questions

1. Why do some individuals views strikes as harmful?

Strikes may be viewed as harmful for the following reasons:

- business closures
- loss of jobs
- inconvenience to the public
- economic impact
- violence and property damage in exceptional cases
- discouragement of investment

In a discussion regarding the effects of strikes the following points which were not referred to in the text could be explored. Is it possible that the harmful effects of strikes are exaggerated because in some cases production is simply shifted from one organization to another or to another time period? For example, if there was a strike at one video store customers could obtain their videos at another store. In some industries total production is not affected; adjustments are made before or after the strike. In the mining industry it is doubtful that a strike reduces total production, it may simply change the time when the minerals are extracted.

2. On the basis of your experience and the reading of this chapter, to what extent do you think strikes can be viewed as mistakes?

Strikes should not be viewed as mistakes if they are an expression of collective voice or employee discontent. If strikes are viewed as being caused by preventable factors such as inexperienced negotiators or information differences, they could be viewed as mistakes.

3. A newspaper report indicates that a union can legally go on strike or the employer may lockout employees at midnight on a specified date. What does the reference to legality mean? Why is the strike or lockout legal at midnight as opposed to some other time?

In order for a strike or lockout to be legal it must meet the requirements listed in Figure 10-4. In several jurisdictions one of the requirements is that the conciliation process be completed. The conciliation process includes a waiting or cooling off period. For example, in Ontario a strike is legal on the 17th day after the Minister of Labour mails a no-board report. Because the waiting period must expire, and a strike or lockout can legally start on 17th day after the no-board report is mailed, the strike or lockout is legal at midnight. This assumes that the other legal requirements for a strike, including a strike vote, have been met.

4. Arbitration of second and subsequent contract disputes on the request of one party is provided for in only one jurisdiction. What are the arguments for and against this policy?

This policy avoids a strike or lockout. It also prevents an employer from avoiding the union by carefully appearing to be bargaining in good faith, but really trying not to reach an agreement. Arguments against this policy include the possible chilling and narcotic effects of arbitration and the criticism that the parties should determine the terms that they will have to live with.

5. Is it possible that some employees and unions would not want the right to strike? Explain.

Some employees may not want the right to strike because they fear the possible consequences including the loss of income. Some employees such as caregivers may not want to see the service to their clients interrupted. A union could be in a weak bargaining position and perceive that it can achieve a better outcome if the final dispute resolution mechanism is arbitration instead of a strike.

VII. Web Research

1. Strike activity will vary in number and industry.
2. This Week in Labour History can be found under the Who We Are tab.
3. Canada appears to be in the middle to lower level of strike activity. It is also noted that several countries have not reported recent data.
4. Most jurisdiction will have provisions for medication and conciliation processes in the legislation. Variances may appear with respect to when these services can be requested. In some cases, i.e.: first contract negotiations mediation may be required.

VIII. Vignette

A Strike at IKEA

An IKEA in British Columbia served a lockout notice to the union which represented approximately 350 employees, this was the same time the union served strike notice to IKEA. This labour dispute lasted 17 months. The union called this a lockout while IKEA called it a strike, with the B.C. Labour Relations Board ruling it a strike.

The store remained open with reduced hours during the lockout, with human resources including managers, non-union employees, and bargaining unit employees who had crossed the picket line operating the store. The union filed a complaint with the B.C. Labour Relations Board alleging that IKEA was using illegal replacement employees contrary to ss. 6(3)(e) and 68(1) of the B.C. Labour Relations Code. Section 68(1). The Board ordered IKEA to cease and desist from those breaches and authorized wide-reaching industrial relations audits for the duration of any strike or lockout.

The Labour Relations Board ruled that IKEA bargained in bad faith and violated provincial labour law by trying to bargain directly with striking employees through a website posting. The union complained to the labour board that IKEA offered striking employees an additional \$2.50 per hour, weekend premiums, and incentives to cross picket lines.

A ten-year agreement was reached on wages, benefits, and operations flexibility through binding recommendations issued by the mediator. This agreement included automatic annual increases for all employees and benefits including a new health-care spending account.

IX. Case Incident: Coastal Forest Products

The purpose of this case is to illustrate an illegal strike, the responsibility of the union for an illegal strike, and the remedies that are available to the employer.

1. Is the union claim regarding the use of union suppliers a valid one? How could it be proved?

It is hard to prove the claim made by the union regarding the use of union suppliers because there is no mention in the section 3 of the collective agreement for the issue. That is why the concrete

tender for the expansion operation at the Coastal Forest Products Company was awarded to an external company M&K. And, when they began working on the property of the company, union bearers and employees tried to protest or disrupt the work for 3 hours and could not continue the disruption after that because they did not have right to strike or slow down or interfere in the work according to the collective agreement section 3 clause.

2. How does section 3 of the collective agreement “help” or “hinder” the union in this situation?

Section 3 of the collective agreement prevents the union to cause, promote, sanction, or authorize any strike, sit down, slowdown, sympathetic strike or other interference with work by the employees for any cause whatsoever until all provisions of this agreement relating to the grievance and arbitration procedure have been complied with. Therefore the work stoppage or disruption on behalf of union employees was not accounted for due to the arrival of the M&K truck at the property of Coastal Forest Products Company.

3. What action might the employer take in response to this situation? Be specific.

The employer can file a grievance, which will allege that there has been a violation of the no strike provision in the collective agreement and claim damages from the union. This could be an appropriate place to remind students that an employer cannot sue the union; the employer must use the grievance process instead of suing.

4. What outcome do you expect in this case? Explain.

An arbitrator would have to determine:

- 1) if there has been an illegal strike,
- 2) if the union was responsible for the illegal strike because it failed to take action to prevent it or failed to take action to end the strike after it had begun, and
- 3) the remedy to be awarded to the employer

It is evident that there is an illegal strike here. Employees have refused to work in concert. Although the union could argue that it took steps to get employees to return to work, these attempts were feeble. The union president advised employees to return to work but he did not do so himself. The union vice-president said that by law he was required to advise employees to return to work, however, he did not do so. The efforts of the district officer, Fern MacGregor, were also inadequate. He could have directed or called upon union officers to return to work but he did not do so.

This case is based on Riverside Forest Products Ltd. and I.W.A. Canada, Local 1-423, 70 LAC (4th) 441. The arbitrator upheld the company's grievance, holding that the union had failed to take action to end the illegal strike. The arbitrator referred the dispute back to the parties to determine the damages that had been suffered, retaining jurisdiction to fix the damages if the parties could not agree. The employer would be entitled to any losses and additional costs that were incurred as a result of the illegal strike.

ⁱ Robert Hebdon and Robert Stern, "Tradeoffs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations," *Industrial and Labour Relations Review*, 50 (1998), 204.

ⁱⁱ Ibid.

ⁱⁱⁱ Peter Cramton, Morley Gunderson and Joseph Tracy, "The Effect of Collective Bargaining Legislation on Strikes and Wages," *The Review of Economics and Statistics*, vol. 81 (1999), 475.

^{iv} Government of Saskatchewan, *The Saskatchewan Employment Act*, Chapter S-15.1 of the Statutes of Saskatchewan, 2013 (effective April 29, 2014) as amended by the Statutes of Saskatchewan, 2014, c.E-13.1 and c.27; 2015, c.31; 2016, c. 17; and 2017, c.P-30.3 and c.31, <http://www.publications.gov.sk.ca/freelaw/documents/English/Statutes/Statutes/S15-1.pdf>, accessed May 16, 2018.