

CHAPTER 8

NEGOTIATION OF THE COLLECTIVE AGREEMENT

Preface

This chapter will examine the practices, procedures, and tactics of traditional, adversarial collective bargaining. At the end of the chapter, an alternative, interest-based approach will also be discussed. Every year, thousands of collective agreements are negotiated in Canada. The negotiation process is critical for employers, unions, employees, and the public. The process and the resulting collective agreements determine employer costs, employee compensation and job security. Strikes and lockouts, which are occasionally a part of the process, might affect the availability of goods and services to the public.

Learning Objectives

- 8.1** Identify the factors and significance of the bargaining structure.
- 8.2** Outline the sub-processes of negotiation.
- 8.3** Describe the importance of the union–management relationship.
- 8.4** Explain practices and procedures in traditional adversarial bargaining.
- 8.5** Outline the implications of labour relations legislation for negotiation.
- 8.6** Identify strategy and tactics used in positional or distributive bargaining.
- 8.7** Describe the principles of interest-based bargaining.

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I. Bargaining Structure

The certification process results in a union representing a specified group of employees working for an employer at one or more locations. At minimum, contract negotiations must involve at

least one employer and one union representing employees working at one location. That is, negotiations must cover at least one certified bargaining unit. However, an employer might be dealing with one or more unions at one or more locations, or several certified bargaining units. There may be more than one employer in a province or territory with the same type of employees. For example, there may be several colleges in a province employing faculty at different locations. Labour relations legislation may require, or the parties might agree, that contract negotiations cover several locations, or include different unions, or even more than one employer. To relate this to certification, the parties can agree to have contract negotiations cover more than one certified bargaining unit. **Bargaining structure** refers to the number of unions, employers and locations or establishments involved in contract negotiations.

Possible Bargaining Structures

There are numerous possible bargaining structures, depending on the number of employers, unions and locations involved in contract negotiations.

- *Single employer, single establishment, single union.* This structure is common in Canada. The employer may have more than one location or more than one union at a location; however, negotiations are conducted between the employer and a union representing one group of employees at one location. For example, at a hospital there might be separate bargaining units for nurses, kitchen, and maintenance employees, each of which is represented by a different union. The contract negotiations for the three bargaining units are conducted separately, and there are three separate collective agreements.
- *Single employer, multiple establishments, single union.* The auto industry is an example of this type of structure, which involves the negotiation of one collective agreement that will affect the various workplaces operated by the employer. There may be a master agreement between the employer and the union and secondary agreements that involve only the locals at each workplace.

Other bargaining structures include combinations such as a single employer with a single establishment, negotiating with multiple unions; however, they are rarely found in Canada.

Centralized vs. Decentralized Bargaining

An important feature of possible bargaining structures is the degree of centralization involved. **Centralized bargaining** refers to contract negotiations that involve one or more of the following: multiple employers instead of a single employer; multiple establishments instead of a single establishment; and multiple unions instead of a single union. Centralization reduces the number of rounds of contract negotiations. Centralization is not a yes-or-no issue; rather, negotiations should be viewed as being more or less centralized. **Industry bargaining** is a structure in which multiple employers, with multiple locations, bargain with a single union. This type of structure might be found in hospitals where the hospitals in a province negotiate with a provincial nurses' union and the agreement covers all locations in the province. **Decentralized bargaining** is a more common form of negotiations involving one employer and one union representing employees at one location.

FACTORS AFFECTING BARGAINING STRUCTURE Bargaining structure in Canada is decentralized for a number of reasons.

- The *division of legislative and administrative authority* for labour relations among provincial and federal governments is a factor. If an employer had one location in Ottawa and another a few kilometres away in Gatineau, Quebec, the two establishments would be organized in separate bargaining units in each province and would be subject to different labour relations legislation governing contract negotiation. The existence of separate provincial and territorial jurisdictions makes negotiation more complex for a group of employees spread across business operations found in different provinces.
- *Labour Relations Boards* in each jurisdiction in Canada can decide on the appropriateness and certification of union bargaining units, which in turn can lead to decentralization in bargaining structures. In the past, some boards have established separate bargaining units for full-time and part-time employees, and separate bargaining units for employees at different locations in some provinces or territories. To facilitate organization, some boards have certified establishments in a municipality separately when there is no interchange of employees. Once a certified bargaining unit has been established, the bargaining for that unit will occur separately from other units unless the employer and the union agree otherwise.
- There may also be *economic factors* that favour a shift to decentralization. Some employers have recently attempted such a move so that they can deal with each establishment separately on issues related to cost of living adjustments or the required labour replacement costs associated with staff leaves of absence.

SIGNIFICANCE OF BARGAINING STRUCTURE Bargaining structure is significant because it can affect the negotiation process, the contract terms agreed upon, the incidence of strikes and lockouts and the relationship between the management and the union. Centralized bargaining might reduce the costs of contract negotiation because fewer negotiations are involved. However, it might make reaching an agreement more difficult. If there are different workgroups or different locations included in the same set of negotiations, these groups may have different priorities or interests. A group of workers in one part of a province might be more concerned with job security, and employees in other regions may demand better cost-of-living allowances.

Centralized bargaining may help the employer avoid the union practice of **whipsawing**. Whipsawing is when a union negotiates with several employers and may reach a settlement with one of them—likely the one it can get the best deal—and then use this as leverage to get the remaining employer(s) to agree to similar or better terms. Employers might also use whipsawing against unions. If employers negotiate as a group, the union cannot strike one employer and force it to grant concessions to avoid losing business to the others.

In Canada, centralized bargaining has not led to fewer work stoppages and less time lost to strikes. More centralized bargaining can affect the relationship between the management and the union and alienate employees. Some employee groups may perceive that their interests have not been adequately met in negotiations and they may be frustrated. This in turn may affect their

relationship with the employer. The bargaining structure might affect the relative bargaining power of the union and the employer. In the banking industry, a decentralized bargaining structure—bargaining on a branch-by-branch basis—would likely leave each bargaining unit of employees with very little bargaining power.

There is variation in bargaining structures across industries and provinces and territories. In one province, contract negotiations for schoolteachers may be decentralized, with separate negotiations between numerous school boards and the teachers' union. In the same province, the negotiation for college faculty may be centralized, with one set of negotiations between a body representing all colleges and the faculty union.

Informal Bargaining Structure

There is an informal element in bargaining structure. Even in cases where the formal structure is less centralized, there may be factors in the bargaining situation that produce results or behaviours associated with more centralized bargaining. Although an employer might bargain separately with different employee groups, it might be difficult to grant wage increases to one group and not provide them to other groups. Another aspect of informal bargaining structure is **pattern bargaining**, where a union negotiates an agreement with one employer and then attempts to have it copied with other employers. Pattern bargaining has been common in the auto industry over the last several decades. Unifor selects one of the three Detroit big three auto manufacturers—likely the one it thinks it will be able to obtain the best contract from—as a target, negotiates a collective agreement with it, and then attempts to negotiate similar agreements with added gains for members as the union moves along in bargaining with each automaker.

In some situations, pattern bargaining does not mean the first, or lead contract negotiated and subsequent agreements are the same. Instead, there may be a standard pro-rated relationship between the lead and subsequent contracts. For example, in some provinces the union representing firefighters in smaller cities waits until the contract in a large city has been negotiated and then negotiates a similar contract providing for slightly lower compensation.

II. Sub-processes in Negotiation

Negotiation brings up thoughts of individuals confronting each other across a table. Meetings between the parties are an important part of negotiation, but there is much more involved. In *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*, Richard Walton and Robert McKersie describe four sub-processes that might be involved in any bargaining situation: intra-organizational bargaining, distributive bargaining, integrative bargaining and attitudinal structuring.

Intra-organizational Bargaining

The negotiators for the employer and the union must answer to their respective constituencies. Union negotiators in particular must be concerned with obtaining the approval of the bargaining unit for any agreement negotiated. Within either side, there may be differences of opinion

regarding the objectives that should be pursued in negotiations and the methods that should be used. Some members of a bargaining unit may be more concerned with job security, while others give priority to a wage increase. Some employees may be more willing than others to strike to obtain a favourable agreement.

Intra-organizational bargaining refers to activities within the employer or union organizations to build an internal consensus of important issues. Union negotiators may face a problem reconciling the expectations of employees with additional information that they are provided during the course of negotiations. Union representatives may go into negotiations demanding a significant wage increase, which bargaining unit members perceive the employer can afford. In negotiations, the union bargaining team may be provided with financial information that shows the employer cannot afford the expected wage increase. This difference in information might lead to problems for union negotiators, because they know they have negotiated the best deal possible, but it does not meet the expectations of employees. The union negotiators will have to work to convince employees that the contract should be approved despite the initial demand for a large wage hike.

Distributive Bargaining

Distributive bargaining refers to activities and behaviours that in many cultures are commonly associated with negotiations. It is used where resources are limited and there is a resulting conflict between the parties. A good example is the determination of wages: a gain for one party such as union request for wage increases involves a loss for the other such as the employer sees increased operating expenses and a decline in funds for capital projects, reserves or investments. Because distributive bargaining is based upon demands made by the parties or positions taken, it is sometimes referred to as *positional bargaining*. The strategy and tactics of distributive bargaining are discussed below.

Integrative Bargaining

Integrative bargaining refers to a form of negotiation or activity in which the parties' objectives are not in fundamental conflict and there is a possibility of a win-win situation. For example, both the union and the employer would like to see workplace accidents reduced. Unions see improved safety records as a demonstration of their advocacy work with management. In addition to being concerned with employee safety, employers have a financial interest in reducing workers' compensation costs.

Integrative bargaining could also be described as the basis for an alternative approach to traditional bargaining. This approach is referred to as *interest-based or mutual gains bargaining*. In integrative bargaining, the parties focus on problem-solving and the interests of both union and management as opposed to demands or positions.

The distinction between demands or positions as opposed to interests is critical to an understanding of the distinction between distributive and integrative bargaining. Mary Parker Follett developed the following illustration. Suppose two siblings have one orange that they both want. In a distributive or positional negotiation, each sibling would demand the orange and

would try to justify their position. Perhaps one would say that the other got a previous orange. The siblings would have to agree that one of the parties got the orange before, or they might compromise and cut the orange in half. In an integrative negotiation, the siblings would determine what their interests were. Each would find out why the other wanted the orange. They might find that one of them wanted the orange to use the peel in a recipe, and the other wanted it for the fruit inside to eat for a snack. An integrative approach, focusing on interests, might improve the outcome for both parties—a win-win.

Attitudinal structuring

There are a number of possible relationships between union and management negotiators. Union and management officials may have little or no trust or be more or less cooperative with each other. **Attitudinal structuring** refers to the relationship the parties have and what they do to change their relationship. The relationship between the parties may be a concern for a number of reasons. The relationship could affect the likelihood of reaching an agreement. Where the parties are hostile in terms of language and behaviour during contract talks, they may miss opportunities for settlement on important issues. The relationship could also affect future negotiations and the administration of the collective agreement. Being called an offensive name or treated in an objectionable manner by a representative of the other negotiating team in the heat of hard bargaining may establish a long-term resentment by the person targeted in such a manner. Representatives from both bargaining teams do have to work together once collective bargaining concludes. These negative experiences may interfere with a positive working relationship going forward.

In reality the four sub-processes are interrelated. An action aimed at dealing with an issue in one area might affect one or more of the other three sub-processes. If a negotiator in a distributive bargaining situation makes a concession in order to reach an agreement, this might affect the relationship with the negotiator's constituents. Some employees might be unwilling to approve an agreement if concessions have been made that affect them. The failure to reach a consensus on demands—in other words, to resolve intra-organizational bargaining issues—will make distributive bargaining more difficult.

Implications of Sub-processes in Negotiation

The sub-processes described by Walton and McKersie help us understand the complexity of negotiation and have important implications. Although some issues are distributive in nature—that is, a gain for one party necessarily involves a loss for the other—there may be room for an integrative approach on other issues. The relationship between the parties is important. The relationship could be a factor determining whether an agreement is reached and the contents of the agreement. Intra-organizational issues affect negotiators. Before negotiations, each side will have to work to obtain a consensus on their demands; after an agreement is reached, both may have to convince their constituents to ratify the agreement.

III. Union–Management Relationship

The relationship between the union and the employer will vary according to each party's views regarding the legitimacy of the other's claims, the level of trust between the parties and the personalities of each of the management and union leaders. The nature of the relationship is important because it might affect the type of bargaining the parties engage in and the likelihood of a strike or lockout. The possible relationships between the union and the employer, the factors determining the relationship and the consequences of the relationship will be considered here.

Types of Union–Management Relationships

The relationship between the union and the employer can be classified into one of five types: conflict, containment-aggression, accommodation, cooperation, and collusion.

CONFLICT The conflict relationship is the most hostile. In this relationship, the employer opposes the union's representation of employees and only deals with the union as required by law. The union and the employer compete for the loyalty of the employees. The union views management as the enemy who is exploiting employees. Trust between the union and the employer is extremely low. The parties dislike or even hate each other to the point that there may be irrational behaviour to inflict damage upon the other. With this type of relationship, the parties will not be able to move away from distributive bargaining that is both harsh and critical, increasing the chances of a strike or lockout. The likelihood of alleged unfair labour practices is also high.

CONTAINMENT-AGGRESSION In a relationship classified as containment-aggression, the employer reluctantly accepts the union. The union attempts to increase its influence, and the employer attempts to contain or minimize the union's impact in bargaining. The parties view each other with suspicion and are mutually antagonistic. Management may attempt to undermine the union with direct communication to employees through newsletters and meetings. With this type of relationship, it will be difficult for the parties to move away from distributive bargaining that is adversarial. The likelihood of alleged unfair labour practices is high.

ACCOMMODATION In an accommodating relationship, each of the parties recognizes the legitimacy of the other, and there is a moderate amount of respect between them. There is also, however, limited trust between the union and the employer. This type of relationship may allow the parties to move away from traditional adversarial bargaining.

COOPERATIVE In a cooperative relationship, the parties completely accept each other's legitimacy in the workplace and are willing to collaborate. There is mutual trust between union and management leaders. This type of relationship is the one most likely to be the basis for more integrative bargaining.

COLLUSION In a collusive relationship, there is a coalition between the union and the employer to pursue common goals and practices that may be illegal. Management may pursue unfair competition practices or improper payments to themselves. The union goes along with this

situation and does not adequately protect the interest of employees. In some cases, the employer may bribe union leaders to avoid labour problems.

Factors Determining the Union–Management Relationship

Some of the factors that affect the union–management relationship are matters the parties have little or no control over. On other issues, the parties do have some control and might attempt to vary their position to change their relationship.

EXTERNAL ECONOMIC, TECHNOLOGICAL, AND LEGAL FACTORS The competitive environment the employer faces might affect the relationship with the union. If the employer faces an economic downturn or increased competition, it will place increased pressure on unions to maintain the status quo or offer concessions when bargaining the terms and conditions of work for its members. Technological innovation might lead to hostility when the employer seeks to implement changes that threaten job security of union members. The legal environment might also affect the relationship. The use of replacement workers when a union goes on strike may be constrained by law and thus influence dynamics related to hard bargaining on key issues.

PERSONALITIES OF LEADERS Union and management leaders may have personalities that make them more or less friendly, trusting or cooperative. Authoritarian personality types are typically more competitive, have lower levels of trust and are less tolerant of the views of others. Certain authoritarian behaviours during negotiations may contribute to attitudinal structuring with resulting long-term harm to labour–management relations.

BELIEFS AND VALUES OF LEADERS The social beliefs of union and management leaders may also be important. Some employers may be dominated by free-enterprise employees or managers who do not believe in the legitimacy of unions. Some union leaders may have a basic mistrust of the capitalist market system that extends to resentment toward most managers.

EXPERIENCE WITH COLLECTIVE BARGAINING The relationship between union and management negotiators might also be affected by past experiences with collective bargaining. If either of the parties has had a negative experience with previous negotiations or the administration of a collective agreement, they could be more hostile. A manager who has had a decision challenged through the grievance process and experienced cross-examination at an arbitration hearing may be uncomfortable in some collective bargaining situations.

IV. Negotiation Process

Notice to Bargain

Either the union or the employer can give a notice to bargain a collective agreement. Labour relations legislation provides that once a notice to bargain has been given, the employer cannot change the terms and conditions of employment. This **statutory freeze** continues until the union has the right to strike or the employer has the right to lock out employees.

Bargaining Teams

The union and the employer will each assemble a bargaining team. Each side can include whomever it wishes on its team. Both sides have a duty to bargain in good faith, and it is a breach of this duty to object to the presence of an individual on the other side's team. The size and composition of bargaining teams will vary according to the bargaining structure and the number of employees covered by the collective agreement.

EMPLOYER BARGAINING TEAM The employer bargaining team may include a labour relations employee or consultant, operations managers, or a financial employee. In some cases, the employer's team may include the chief executive officer (CEO) or president; however, there may be disadvantages to this. A key drawback may occur when the CEO, in such a situation, is put on the spot by a member of the union negotiating team regarding an important demand such as wage increases or layoff protocols. Not having the top decision-maker present at the time of such demands allows the management bargaining team to say that such union concerns will be reviewed in due course with the organizational executives and responded to in subsequent negotiations. Bargaining teams may also include, or add, as needed, experts in specialized areas such as pensions.

UNION BARGAINING TEAM The union's constitution and bylaws may affect the composition of the union bargaining team. These documents may provide, that certain officers, such as the local president, are designated as part of the bargaining team, and outline the process to select other team members. The national or international union may provide a representative to be part of the team and act as a resource person. This representative may be important, because they may have more experience than local union officers in some cases. The union team may also include experts in particular areas such as scheduling and health and safety.

Both teams require individuals who will maintain solidarity and confidentiality. Team members must not reveal the team's priorities or willingness to make concessions. The spokesperson or chief negotiator must have persistence and outstanding listening skills. They may be required to face rejection and sarcasm from the other side and must be able to explain proposals and pick up on cues from the other bargaining team.

Preparations for Negotiation

In the previously discussed sub-process known as intra-organizational bargaining, the union and the employer team must do extensive work before the first meeting of the parties. This preliminary work will lead up to each side preparing its own demands and anticipating what are the other party's likely positions on these issues.

UNION DEMANDS Where the parties are negotiating a renewal of the collective agreement, the experience with the expiring agreement will be important. For example, if the expiring agreement did not require overtime to be equally distributed among employees and it appeared that the employer favoured granting overtime hours to only certain employees, the union would seek contract provisions governing the distribution of overtime. The union might refer to employee complaints that have arisen over the life of the previous agreement. If the union filed

grievances that were lost at arbitration because of the wording of the agreement, the union would seek an amendment to the contract. Some unions obtain specific membership input prior to negotiations through surveys and membership meetings. This input may be required by union bylaws.

The national or international union may have recommendations for demands based on parent union policy directives. For example, a parent union may require all union locals negotiating teams to not agree to contracting out provisions in new collective agreements. The union will also obtain information regarding economic forecasts and projected increases in the cost of living. The Canadian Labour Congress has recently set out certain principles.

Principles for Collective Bargaining – Canadian Labour Congress

The CLC strongly encourages unions to include provisions designed to protect and support employees who are experiencing domestic violence in line with principles.

The employer will consider its experience with any expiring collective agreement. If the job-posting procedure provided for in the agreement has caused delays in filling vacancies, the employer would seek a shorter notice for job postings for consideration by union members. The employer would also refer to any grievances and arbitration decisions and attempt to change terms in the collective agreement that have caused problems. It might also get feedback from managers through meetings and surveys on problem areas due to unclear language or unworkable procedures in the contract. Future strategic business plans should be considered. If the employer is planning on making use of more part-time employees and the agreement restricts the use of part-time employees, it will seek an amendment to the agreement. The employer will also obtain economic information, including the projected rate of inflation and forecasts of sales and revenues, and refer to contract settlements in the industry and regional collective agreements.

Meetings of the Bargaining Teams

The meetings between the employer and the union bargaining teams will often occur at a neutral location such as a hotel meeting room. Thus, no one bargaining team has home field advantage during bargaining. The parties typically carry out face-to-face bargaining in a central meeting room, while also retaining additional meeting spaces for separate union and management meetings or **caucuses**.

STAGES OF NEGOTIATION Researchers have considered the negotiation process and broken it down into three or four stages using various names for the stages. It might appear that in some negotiations the parties have a good idea of where they are going to end up, and an observer might ask why all the haggling is necessary. The concept of stages in negotiations may help us understand why it is not possible or advisable to short-circuit the process.

Duty to Bargain in Good Faith

Labour relations legislation in all jurisdictions imposes a **duty to bargain in good faith** on both the employer and the union. Good faith is interpreted as having both the union and management negotiators be present and listening to proposals; articulating positions in favour of their proposals and refuting the terms and conditions voiced by the other negotiating team; and making a serious attempt to find common ground on a settlement of the terms and conditions raised in collective bargaining.¹ The duty to bargain in good faith does not guarantee that a collective agreement will be reached. The legislation does not require any particular concessions be made to reach an agreement. If the reason for the failure to reach an agreement is a conflict over wages or seniority rules, there is no breach of the duty. Generally, if a party has a strong bargaining position that allows it to virtually dictate the terms of the agreement, there is also no breach of the duty. This is subject to the qualification that in some jurisdictions, when the parties are negotiating their first agreement, either of them may apply for the agreement to be determined by interest arbitration if the failure to agree was caused by unreasonable demands.

Stages of Negotiation

Stage One: Establishing the Negotiation Range. In this stage, each side explains its concerns and positions on the issues. The union will typically proceed first with the presentation of written demands and an explanation of the demands. Each chief spokesperson will attempt to forcefully present his or her side's position—stressing why the issue is important and perhaps hinting at the bargaining team's willingness to push very hard for its demand. This phase may take several meetings. Each side proceeds with a reveal and conceal strategy, revealing their initial demand statement but concealing how far they are prepared to move away from that position in order to achieve a mutually agreed-upon settlement on the particular issue.

Stage Two: Search Phase. After stage one, both parties enter the longest phase represented by stage two and continue through the reveal and conceal process. Stage two will involve bluffing and other tactics, as discussed below. It is typical for each party to advance rather straightforward and low priority issues at the beginning of stage two. Early agreement on lower-priority issues allows a sense of momentum to build in negotiations. **Non-monetary issues**—items that do not involve a direct financial cost, such as the number of days to file a grievance—are usually addressed before monetary issues. **Monetary issues**—relating to wages, benefits, or vacation allowance—are matters that involve a financial cost. There is a very practical reason for the union to prefer to deal with the critical monetary issues last. If no agreement is reached, the ultimate union weapon is a strike. But this is only an effective threat if employees are willing, and employees would be more likely to support a strike over the core monetary issues.

Stage Three: Crisis Phase. In stage three, a strike or lockout is a clear possibility. The parties are forced to make decisions and final concessions if they are going to avoid this crisis and reach an agreement. This phase is shorter and might be marked by a series of last-minute proposals, counter-proposals, and agreements. In some cases, the crisis phase may involve off-the-record meetings between the chief negotiators from both teams. In the crisis phase, the employer may increase a monetary offer on hourly wage rates, or the union could withdraw a particularly key

demand such as additional vacation time. This phase may also involve the participation of a neutral third-party mediator to assist the parties to reach an agreement.

PURPOSE OF THE DUTY TO BARGAIN IN GOOD FAITH The purpose of the duty to bargain in good faith is to ensure that the employer recognizes the union as the sole bargaining agent for its members and to facilitate an agreement being reached without a strike or lockout. It is recognized that some employers will not stop their opposition to a union after certification. The certification of the union would be meaningless if the employer were allowed to refuse to bargain.

REQUIREMENTS OF THE DUTY Generally, the duty relates to the approach to contract negotiations or the form in reaching an agreement, not the contents of particular proposals. However, a few exceptional contract proposals are a breach of the duty. Although the parties are allowed to negotiate the coverage of the collective agreement so that employees are either added to or removed from the bargaining unit, it is a breach of the duty to insist upon changes in the bargaining unit. The employer or the union cannot take this issue to an impasse and attempt to cause a strike or lockout. Similarly, the bargaining structure and coverage of the collective agreement cannot be pressed to impasse. A union's insistence upon a single set of negotiations and one collective agreement for several bargaining units is also a breach of the duty. Insisting upon any illegal condition in the agreement, such as a discriminatory wage practice, would also be an example of bad faith bargaining.

A distinction has been drawn between **hard bargaining** and **surface bargaining**. Hard bargaining refers to persistent and legitimate attempts to obtain an agreement on favourable terms. An employer who is willing to sign an agreement but refuses to agree to any wage increase so that more profits can be provided to owners is engaging in hard bargaining. Surface bargaining refers to going through the motions of negotiation with no intent to reach an agreement. An employer who knows that the union cannot agree to a wage increase of less than 3 percent, and deliberately offers a wage increase of 1 percent to avoid an agreement, is engaging in surface bargaining.

It may be difficult to tell the difference between an employer who wants a contract on favourable terms and an employer who does not want a contract at all. Refusing to meet for bargaining purposes will usually be a breach of the duty. A distinction must be drawn between a refusal to meet in the early stages of negotiations and a refusal that occurs later in negotiations after the parties have exhausted an issue. If the parties have met and discussed proposals, it is possible for a party to take the position that it will not meet again unless the other side is willing to change its position. A sudden, unexplained change in position may be a breach of the duty. A labour relations board will consider the evidence and determine whether there was a valid reason for a change in position, or if it appears the change was designed to avoid reaching an agreement. In one case, the parties were divided on the issue of the deduction of union dues from employees' pay. There was an intervening change in legislation that required the employer to deduct and remit union dues. This meant that the dispute over union dues was no longer an issue. The employer then withdrew its previous monetary offer. The board found that this change in position was designed to avoid a collective agreement and was a breach of the duty.

A party who takes the position that an item will not be discussed or included in the collective agreement will have to proceed carefully. The duty to bargain in good faith is an overarching obligation to negotiate an entire collective agreement. It is not a duty that attaches to each item raised in negotiations. A party who refuses to discuss or include an issue should make it clear that it is willing to sign a collective agreement that does not contain the particular issue. It would appear that multiple refusals to discuss or include terms taken together would be a breach of the duty. Complaints about a breach of the duty will be resolved on a case-by-case basis by a labour relations board. In one situation where an employer refused to discuss changes in pension benefits for retired employees, it was found that there was a breach of the duty. However, in another case when a public school employer association refused to discuss or include an issue raised by the union, it was found that there was no breach of the duty because it was established that the employer was willing to enter into an agreement. A refusal to explain one's position on a bargaining issue is also a breach of the duty. In one case, an employer made a monetary offer and refused to explain or discuss the offer because of anti-inflation guidelines that were in force at the time. It claimed that the guidelines prevented it from providing a greater wage increase. The employer's refusal to discuss and explain the interpretation of the wage guidelines was found to be a breach of the duty to bargain in good faith.

In order to meet the duty, the employer has an obligation to disclose information. Employers who have refused to provide wage and classification information have been found to be in breach. Employers must provide the union with the names and addresses of bargaining unit members. The employer is also obligated to disclose information that the union has not solicited if that information is relevant to the negotiations. For example, if prior to the start of negotiations, the organization has decided to close one of its plant locations, which would impact union members, and did not reveal this information in the course of negotiations, it would be considered a breach of the duty even though the union had not asked about the possibility of a move. The employer does not have to reveal information when the matter is still under consideration. To avoid problems relating to the sharing of information, the union should make inquiries. It might ask the employer whether there are any plans such as relocation or contracting out that will affect the bargaining unit.

It is permissible during negotiations for the employer to send letters to employees, or put notices in newspapers to explain its position, provided the issues have been fully discussed beforehand with the union. These communications must not be misleading or threaten employees. It may be difficult to distinguish between permissible communications in which the employer expresses a view or informs, as opposed to threats or intimidation. Employers have been given more leeway when the bargaining relationship between the parties has been of a long-standing and positive nature.

It is a breach of the duty to bargain in good faith to send representatives to negotiations who do not have adequate information or authority. For example, if the employer is claiming it does not have the ability to pay, the employer bargaining team should have, or be able to obtain, financial information to support this claim. It would be a breach of the duty for an employer to send representatives to negotiations who make commitments, and then attempt to back away from them, claiming they have received new instructions from senior management.

BREACH OF THE DUTY TO BARGAIN IN GOOD FAITH: PROCEDURE AND REMEDIES Failure to bargain in good faith is an unfair labour practice, and a union or employer who thinks there has been a breach of the duty may file a complaint with the labour relations board. A board officer will attempt to settle the matter; however, if there is no settlement, the board will conduct a hearing. If it is found that there has been a breach of the duty, the board may issue a cease-and-desist order with a direction to the parties to resume bargaining. In a few exceptional cases, financial damages have been awarded to the party filing the complaint. Boards have ordered damages equal to the amount of compensation employees would have earned if an agreement had been earlier reached without a breach, and unions have been compensated for the additional expenses they incurred because of an employer's breach. First contract arbitration, which is reviewed in the next section, might also be viewed as a remedy for a failure to bargain in good faith following certification.

could not reach a first collective agreement. In response to this, federal and all provincial jurisdictions have provisions in their labour relations legislation to utilize conciliation, mediation or arbitration processes to settle unresolved disputes between the parties. **First contract arbitration** means that a neutral arbitrator or the labour relations board will hear representations from the union and the employer and then determine the contents of the first agreement. There are minor differences between jurisdictions.

V. First Contract Arbitration

First contract arbitration provides for the imposition of an agreement where efforts to reach a first contract have failed.

AVAILABILITY OF FIRST CONTRACT CONCILIATION, MEDIATION OR ARBITRATION If the parties are unable to reach an agreement, either the union or the employer can apply for first contract conciliation, mediation or arbitration. The legislation specifies the criteria used to determine whether the remedy will be granted. In most jurisdictions, the legislation provides that failure to bargain in good faith is a factor to be considered; however, a finding of bad faith bargaining is not a prerequisite to the remedy. Such intervention has been ordered where employers have taken unreasonable positions without justification. It has been granted where employers have refused to agree to any seniority provisions and have offered lower compensation to unionized employees than to non-union employees doing the same work.

CONTENTS OF THE AGREEMENT A labour relations board or a neutral third party determines the content of the collective agreement after hearing representations from union and management bargaining leaders. The compensation and working conditions of similar employees are factors influencing the terms imposed. Such first contract settlement options cannot be used by either party to obtain exceptional provisions that it could not obtain through negotiations. The union will not be able to obtain benefits not provided in the industry sector. The employer will not be able to obtain a contract that entirely avoids seniority provisions. The statutes require the term of the agreement to be between one and two years depending upon the jurisdiction.

SIGNIFICANCE OF FIRST CONTRACT CONCILIATION, MEDIATION OR ARBITRATION First contract third-party intervention is significant for a number of reasons. This remedy prevents employers from avoiding a union by adopting unreasonable positions in bargaining. The remedy also illustrates the importance of the divided jurisdiction in Canadian labour relations, which has allowed for experimentation and change. First contract arbitration was first adopted in the 1970s in British Columbia, and it has been added by other jurisdictions since that time.

VI. Strategies and Tactics in Distributive Bargaining

In distributive bargaining, each side may have three key reference points in mind for each issue as it enters negotiations: a resistance point, a target point and an initial position.

The **resistance point** is the party's bottom line—the point it will refuse to go below (or above, as the case may be). If a union's resistance point on wages is a 2 percent increase, the union would go on strike before agreeing to any increase less than 2 percent. If the employer's resistance point is a 2.75 percent wage increase, this means it would endure a strike or impose a lockout rather than go any higher.

The **target point** is the result a party hopes to obtain. Although a union thinks it will not accept anything less than a 2 percent wage increase going into negotiations, the union hopes to achieve a greater increase, for example, a 3 percent increase. Similarly, the employer will have a target point it hopes to achieve.

Each party will have an **initial position** on each issue at the start of negotiations. If the union has a target position to achieve a 3 percent wage increase, it will have to initially demand more than that amount. Similarly, the employer will have to begin negotiations by providing less in its initial offer than it is willing to pay, so that it has room to increase its offer.

In summary, a union might be willing to go as low as a 2 percent wage increase (the resistance point), hopes for a 3 percent increase (the target point) and has an initial position or demand of 4 percent. The employer's points would be in the reverse order.

Where there is an overlap of the resistance points between negotiating teams there is a contract zone or settlement zone within which the two parties should be able to reach an agreement. Where the parties end up in the contract zone (between 2 percent and 2.75 percent in the illustration provided), depends in part on the negotiation skills of the parties. Where there is no overlap of the parties' resistance points, there is no contract zone. Even if the union lowers its demands to its bottom line or resistance point, it is still demanding more than the employer is willing to pay. There cannot be an agreement unless one or both of the parties changes their resistance point.

STRATEGY In distributive bargaining, each side will attempt to find out what the other side's resistance point is so that it can push for a settlement as close as possible to it. In the previous example, the employer would like to find out that the union is prepared to settle for as low as a 2 percent wage increase. Conversely, each side will hide its resistance point from the other. The

union in the illustration is not going to announce that it would go as low as 2 percent, because that is all it would likely obtain. Each side will attempt to convince the other that its resistance point is higher or lower than it actually is. This approach, used by both parties, may also be referred to as a “reveal and conceal” strategy.

Each side would like to influence the other side's resistance point. In the case of wages, the union would like to see the employer raise its resistance point and the employer would like to see the union lower its resistance point. A party's resistance point is based on the benefits and costs associated with it. For example, a union may initially think that a wage increase of 2 percent can be obtained without a strike. If it finds otherwise, the costs associated with the resistance point have increased and the union may revise the point downward to where an agreement can be achieved without the cost of a strike. Conversely, an employer's resistance point may initially be based on the presumption that an agreement can be achieved without a strike or lockout. If it is determined that the resistance point will involve a costly strike or lockout, the employer may revise it upward.

Although explicitly threatening a strike or lockout early in negotiations is not acceptable, each side in negotiations may have to convince the other that it is willing to strike or lock out to achieve its objectives. There may be a strange paradox here for some employees. Although most employees may not want to go on strike, they may have to vote for a strike so that the union appears to have the support of employees and an agreement can be reached.

OPENING POSITIONS Both parties will begin negotiations with certain positions, demands or offers on various items. However, all positions or demands made are not of equal importance to the negotiating team presenting the particular issue at the bargaining table. Each party goes into negotiations knowing that some demands it makes may have to be significantly reduced or dropped entirely in order to obtain concessions from the other side. For example, a union might make a demand for a new benefit, such as a prepaid legal plan, knowing that it is willing to drop the demand later in exchange for a concession from the employer on one of its demands.

The opening positions in negotiations are significant. There is research that shows that commercial negotiators who make more extreme opening offers achieve better results.ⁱⁱ This may be because the offer causes the other side to re-think its position and there is more room for concessions. In commercial negotiations, the negotiator who makes an extreme opening offer is taking a risk that the other side will reject the offer and not make any further attempts to negotiate. In labour negotiations, it is not possible for a party receiving an extreme offer to break off negotiations because the duty to bargain in good faith requires each side to at least explain and discuss proposals. However, a union or employer concerned with public support, for example, a teachers' union or a school board, may want to avoid extreme offers that will cause the public to support the other side.

In the past, some employers have thought that they could avoid the haggling involved in negotiations by making their best offer first, in other words making a take it or leave it first offer. This approach, known as *Boulwarism*, is not advisable today. An employer who adopted this strategy would have several problems. The belief that the employer will eventually improve on its first offer is entrenched in Western union–management relations. An employer must allow

room to improve an offer later in negotiations. An employer who adopted *Boulwarism* would likely have to deal with labour relations board complaints that it had failed to bargain in good faith. This approach could also harm the long-term relationship between union and management representatives.

CONCESSIONS When a first offer and demands are exchanged, a bargaining range is beginning to emerge. Subsequently there will be numerous concessions and counter-offers. A party who receives an offer may take the position that it will not respond with a counter-proposal until the other side makes an improved or more reasonable offer.

The size and pattern of concessions that are made can send a significant message. If concessions are made in successively smaller increments, whether they relate to one issue or cover a package of issues, a message is sent to the other party. If an employer makes an initial offer of a 1 percent wage increase, and subsequently follows this with three successive increases, each of which is 1 percent more, the employer's offer has been increased to 4 percent. However, the union may think that if it delays, it can obtain a further increase. However, if the employer made three successive increases, to 3 percent, then to 3.75 percent, and then to 4 percent, the offer still ends up as 4 percent, but a subliminal message has been conveyed that there is no further room for concessions. Concessions may be made by shifting positions from one meeting to the next instead of formally backing down in a negotiation session.

FINAL OFFER VOTE Employers in some jurisdictions have another opportunity to test the support of employees for the union. In Alberta, British Columbia, New Brunswick and Ontario, labour relations legislation provides for the employer to have a vote by bargaining unit members on the employer's final offer made at the bargaining table but rejected by the union negotiating team. The **final offer vote** can be held only once in a round of negotiations. If a majority of the employees who vote to accept the employer's offer, that offer becomes the basis for a collective agreement, and any strike in effect must cease. An employer who thinks employees will accept a proposal the union has refused might use this provision, but it should carefully think about the consequences of losing a final offer vote before taking this step. If the employer loses the vote, it will have to re-start negotiations and will likely have to improve its offer to obtain agreement. Union bargaining team members are also likely to be hostile when negotiations resume, as they may perceive that management has attempted by a final offer vote to do an end run around union negotiators. A slightly different policy option is illustrated in Saskatchewan where the employer may request the appointment of a special mediator who may recommend a vote.

Final offer vote is a vote by employees on an offer made by the employer.

HARDBALL TACTICS Some negotiators may attempt to use an array of tactics to convince the other side to agree to their terms. Some possible tactics are mentioned here, although they are not recommended. Readers wishing further information should refer to a reference on negotiation. Some negotiators may engage in the following tactics.

- **A good cop/bad cop routine.** As the name suggests, this tactic involves one negotiator playing the role of the bad cop, making threats and offering poor terms, and the other negotiator playing the role of the good cop, attempting to reach an agreement. In labour

negotiations, this might involve negotiators taking on the role of the good cops and blaming the tough position being taken on people who are higher in the organization who are not at the bargaining table.

- **The *highball or lowball* approach.** This involves making an opening offer that is deliberately high or low. It is used to try to convince the other side that they need to re-evaluate their position. An example in labour negotiations would be an employer making an initial monetary offer that provided for wage concessions or a wage freeze. The tactic involves pretending that an issue of little importance is significant so that it can subsequently be given up to obtain a concession from the other side.
- **A *nibble* approach.** Here the party asks for a small concession on an item that has not previously been discussed in order to finalize the agreement. In labour negotiations, an example would be asking for additional vacation benefits at the last minute when vacations had not previously been discussed. This tactic may violate the duty to bargain in good faith.
- ***Playing chicken.*** This refers to one side threatening the other side to force them to agree on terms that are favourable to the party making the threat. It is important to note that this practice is illegal. An example would be management advising the union that if its offer is not accepted the employer will shut down plant operations and layoff members.

Finally, some negotiators may engage in intimidation and aggressive behaviour such as staged temper tantrums or attacks on the competence or integrity of the other team. Such behaviours risk harming the long-term relationships between union and management representatives, many of whom must work together following contract negotiations.

VII. Bargaining Power

The bargaining power of the union and the employer are important factors that influence the outcome of distributive bargaining. A party with more bargaining power should be able to obtain a more favourable agreement. The bargaining power of the union and the employer will be affected by external economic, social and legal factors and internal factors including the commitment of employees to the demands of the union.

- **Inventory levels**—An employer able to build up sufficient inventory of materials or products for sale at a later date is in a stronger bargaining position because it will be able to withstand a strike. A mining company able to stockpile nickel would be in a stronger bargaining position than one that has to meet just-in-time delivery dates. Companies that supply services that cannot be stockpiled or prepared in advance would be in a weaker position.
- **Interdependence of bargaining unit**—If the output of the bargaining unit is required by other business units of the employer, a strike will have a greater impact and the employer is in a weaker bargaining position. Conversely, if the bargaining unit is an independent operation and other units can replace its output, the employer is in a stronger bargaining position. In the meat-packing industry, employers who can replace the output of one operating unit with that of another have more bargaining power.

- **Competitive position of employer**—The competitive position of the employer refers to the possible loss of customers during a strike and their subsequent recovery. If customers lost during a strike will likely return after the strike ends, the employer is in a stronger bargaining position. The economic environment may also be a factor. If employees are able to find alternative jobs elsewhere if customers do not return to the employer after a strike and jobs are lost, the employer is in a weaker position.
- **Time of negotiations**—The time of bargaining in a seasonal business can affect the employer's bargaining power. For example, a construction employer would be in a weaker bargaining position in the peak season.
- **Ability to continue operations**—The ability of the employer to use replacement workers during a strike is a critical factor affecting the employer's bargaining power. This will be determined by the size of the employer's operations, the technology used and legislation. In some cases, the bargaining unit is so large that it is not practical for the employer to use replacement workers. It would not be practical to replace 2,000 workers in an auto plant. Where the technology allows a few supervisors to continue operations, such as in a water treatment plant, the employer is in a stronger bargaining position. The use of replacement workers during a legal strike is prohibited only in British Columbia and Quebec. No other jurisdictions in Canada prohibit the use of replacement workers during the course of a legal strike. The *Canada Labour Code*, while not prohibiting the use of replacement workers, provides that employers cannot use replacement workers to undermine a union's representational capacity rather than the pursuit of legitimate bargaining objectives. In most jurisdictions when the strike ends, the employer is required to reinstate employees who have been on strike.
- **Bargaining structure**—The bargaining structure, referred to earlier in this chapter, might also affect employers' bargaining power. An employer who operates a chain of Tim Hortons's outlets is in a stronger bargaining position when it negotiates with each outlet separately.
- **Public opinion**—Public opinion might affect the bargaining power of the employer. If the public supports employees on strike and does not deal with the employer, the employer may be forced to reconsider its position. Public opinion is especially important in parts of the public sector where voters may not re-elect political representatives, such as school board trustees.

VIII. Conciliation, Mediation and Interest Arbitration

If the parties are not able to reach a collective agreement, they may seek the assistance of a government-appointed conciliator, mediator or an interest arbitration process. In most jurisdictions, conciliation or mediation is required before a strike or lockout is legal.

IX. Memorandum of Settlement and Ratification

If the union and the employer reach an agreement, it will typically be documented in a Memorandum of Settlement. This memorandum sets out the terms agreed upon and provides for the tentative agreement to be ratified by members of the bargaining unit and the employer. The Memorandum refers to a situation in which the parties have negotiated a contract renewal. If the agreement was a first contract, it would set out all of the contract terms instead of referring only to changes in the previous agreement.

A **ratification vote** is a supervised vote required by legislation in British Columbia, Manitoba, Ontario and Quebec in which employees in the bargaining unit approve or reject a negotiated agreement. In other jurisdictions, ratification votes are normally conducted and may be required by the union constitution. In the provinces requiring a ratification vote, the legislation provides that it must be conducted by secret ballot and that all employees in the bargaining unit, including those who are not union members, are entitled to vote. If the employees vote to reject the agreement, the union and management bargaining teams will have to resume negotiations.

X. Principles for Interest-Based Bargaining from *Getting to Yes*

Interest-based bargaining does not mean being soft; it is based on the five principles discussed below.

- 1. Separate the People from the Problem** This point emphasizes that negotiators are people who have emotions, values and needs. In most negotiations there is an issue of substance in dispute and a relationship to be concerned with. The people or relationship problem is important in most negotiations, and it is especially important in labour negotiations where the parties will have to deal with each other after negotiations have been completed. The other side's ego and feelings must be taken into consideration. As the statement of the principle suggests, the problem should be the focus of attention, not the attitudes or behaviours of the people being dealt with. To separate the people from the problem, negotiators should avoid placing blame and thinking the worst of the other side. Management should not attack the union because of attendance, productivity or quality issues. These items should be viewed as problems the parties have to address together. *Getting to Yes* outlines tactics to pursue the problem, such as having individuals sit on the same side of a table focusing on an issue on a board in front of them.
- 2. Focus on Interests, Not Positions** The difference between interests and positions was previously referred to when the distinction between distributive and integrative bargaining was made.
- 3. Interests Can Include Needs, Desires, Concerns and Fears** Interests are the reasons behind demands or positions. A demand or a position in negotiations will set out a specific solution to an issue instead of leaving the door open to different solutions. It is true that management and the union will have some interests that are different. In fact, agreement is only possible because the parties have different interests. One party may want the orange; the

other may want the peel. Asking critical questions such as why?" or why not? can identify interests. Interests will also be identified if one of the parties takes the lead and talks about its own interests.

- 4. Invent Options for Mutual Gain** This principle is founded on the basic concept that there is often more than one solution to a problem. Steps must be taken by the negotiating parties to generate alternative solutions and to avoid starting the evaluation or judgment of alternatives too early. Fisher, Ury and Patton mention various tactics to develop these options, such as designating a minimum specified time for the generation of solutions and use of brainstorming techniques.
- 5. Insist on Using Objective Criteria** Here the parties should base their choice or agreement on objective criteria. In *Getting to Yes*, the authors refer to a dispute between a builder and a customer over the depth of a foundation of a building. If the builder said it was using a two-foot foundation and the customer wanted a six-foot foundation, the parties should not split the difference. They should refer to the objective criteria that establish what is required by the building code for the building.

Interest-based bargaining is an approach to negotiations in which the parties use problem solving and attempt to find a settlement that produces gains for both. It may be referred to as *mutual gains bargaining* or *principled negotiation* and is based upon the principles outlined by Roger Fisher, William Ury and Bruce Patton in *Getting to Yes: Negotiating Agreements Without Giving In*.

Interest-based bargaining is an approach to negotiations in which the parties use problem solving and attempt to find a settlement that produces gains for both.

XI. Review Questions

1. What are the distinctive features of labour negotiations?

Labour negotiations are different from other business negotiations in a number of ways. In some commercial transactions the only matters to be negotiated might be the price and delivery date. Labour negotiations often involve a larger number of issues including wages, union security, contracting out, technological change, overtime, etc. Labour relations legislation regulates the process and some of the content in labour negotiations. The duty to bargain in good faith and first contract arbitration (in some jurisdictions) affect the process the parties are involved in. There is no equivalent legislation regulating other business negotiations. Labour negotiators represent constituents who must approve the agreement. The significance of this is illustrated when the bargaining unit rejects a tentative agreement. In some commercial negotiations the negotiators will be dealing with each other only once and there will be no further contact after a contract is formed. In labour negotiations the parties are involved in a relationship that will require them to work with each other after an agreement is reached.

2. What is meant by bargaining structure and how can it affect negotiation?

A certification by a labour relations board grants a union the right to bargain for employees situated at one or more locations of an employer. Where the employer has more than one location, or more than one bargaining unit, it is possible for the union(s) and employer to agree that contract negotiations will cover more than one bargaining unit or location. Bargaining structure refers to the issue of who is bargaining with whom. In the case where the employer only has one location and one bargaining unit, the bargaining structure is not an issue - the bargaining structure will involve a single employer, a single union, and one location. Where the employer has more than one bargaining unit, or more than one location, or more than one union, bargaining structure could be more complex. It is even possible, although unusual in Canada that different employers could agree to bargain together with a union or unions. Bargaining structure should be viewed as being more or less centralized. The most decentralized bargaining would be contract negotiations that involve one union and one employer for one location, with any other locations bargaining separately. Centralized bargaining refers to contract negotiations that cover more than one location, bargaining unit, union, or employer. The bargaining structure could affect negotiations in a number of ways:

- 1) More centralized (larger) negotiations may involve more experienced negotiators and this might facilitate agreement.
- 2) Centralized bargaining could reduce the costs of negotiation because the number of negotiations is reduced.
- 3) Centralized bargaining may make negotiations more difficult because different workgroups at different locations may have different priorities.
- 4) Centralized bargaining may avoid the tactic of whipsawing.
- 5) The bargaining structure could affect the bargaining power of the union or the employer. Decentralized bargaining may leave a single union at one location in a vulnerable position when dealing with a large employer. Conversely, centralized bargaining means that a union is negotiating with the employer for a number of locations, and this may provide the union with a stronger bargaining position.
- 6) Centralized bargaining may lead to problems for some employee groups or locations that perceive that their interests are not being met.

3. Why is most collective bargaining negotiation in Canada decentralized?

Labour relations is primarily a provincial responsibility so that there is a division between 11 different jurisdictions. If a provincially regulated employer has employees in all ten provinces there will be at least ten different units certified. Labour relations boards in some jurisdictions have certified smaller fragmented bargaining units. In some jurisdictions white collar and blue collar employees have been placed in separated bargaining units. More centralized bargaining will often require the agreement of the parties and economic factors may have lead some employers to pursue decentralized bargaining. Employers may seek a more decentralized structure to obtain a better deal with a smaller weaker bargaining unit.

4. What is the meaning and significance of each of the following: intra-organizational bargaining, distributive bargaining, integrative bargaining and attitudinal structuring?

This question refers to the sub-processes in negotiation identified by Walton and McKersie. Distributive bargaining refers to traditional positional negotiations that people are most familiar with. A gain by one party involves a loss by the other. For example, a wage increase provides employees with more income; however, it increases the employer's cost. Integrative bargaining refers to a process or form of negotiations in which the parties engage in problem solving and both may achieve gains. A gain by one does not necessarily involve a loss by the other. The significance of integrative bargaining is that it protects the parties' relationship and allows them to develop better outcomes for both. An example of integrative bargaining is the resolution of a safety issue. Attitudinal structuring relates to the relationship between the union and the employer. The parties could be concerned with their relationship and undertake efforts to improve it. The parties' relationship could affect their ability to reach agreement without a work stoppage and the grievance rate. Intraorganizational bargaining refers to activities within the employer or union side. It includes the relationship between each side's negotiators and constituents. Union negotiators may have a special problem with keeping bargaining unit members informed and negotiating a contract that will be ratified.

5. What are the factors affecting the union-management relationship:

The union-management relationship could be affected by external economic, technological, and legal factors. Economic pressures such as globalization or increased competition may force the employer to seek concessions that will lead to conflict with union leaders. Technological change may lead to conflict over possible job loss. The legal environment, such as the provisions regarding the deduction of union dues, could eliminate or exacerbate conflict. The personalities of union and employer leaders may also affect the relationship. Some individuals may be more competitive or less tolerant of others. Some leaders may be more patient and understanding of the problems faced by their counterparts. The beliefs and values of leaders could also affect the parties' relationship. If managers believe in a free market system and do not accept the legitimacy of unions the relationship could be strained. If union leaders do not trust the market system and view managers as trying to exploit workers the likelihood of conflict between the parties is increased. The parties' experience with collective bargaining could also affect the relationship. If an employer or union leader has had a bad experience with contract negotiation, for example they think they were mislead or taken advantage of, the relationship will be affected. Similarly if one of the parties has had a bad experience with the grievance process this may affect their outlook and in turn the parties' relationship. For example, a manager might have been forced to reinstate an employee who was discharged and this could leave the individual with a negative attitude that affects the relationship.

6. Outline the possible composition of a bargaining team representing the employer and the union.

There is no legislation governing the composition of a bargaining team. Typically the employer bargaining team would include representatives from the financial area and operations. The union bargaining team may include union officers who are required to be part of the team pursuant to

union bylaws, elected representatives from the local, and a representative from the national or international union.

7. Identify steps the union and the employer will likely follow in the course of preparing for negotiations.

If it is perceived that the employer is abusing overtime the union will seek amendments to the agreement to prevent this. If the employer has business plans that require the use of more part-time employees, and the current agreement restricts part-time employment, the employer would seek a change in the contract.

8. What are the possible stages of negotiation and why are they important?

In the text three stages of negotiation are referred to:

- establishing the negotiation range
- a search phase
- a crisis phase

Some observers have broken the process down into four stages.

It appears that the results will be less than optimum if the three phases are short-circuited. The parties must fully explore all of the issues, and they must answer to their respective constituents. In some negotiations if a crisis phase was not reached the likelihood of the agreement being ratified is diminished.

9. Briefly describe two employer and two union actions that would be a breach of the duty to bargain in good faith.

A list of actions deemed to be indicators of bad faith is provided in Figure 8-6. Employers are guilty of failing to bargain in good faith if they refuse to meet with the union to discuss a particular issue. For example, if the union put forward a demand for a pension plan it would be a breach of the duty to refuse to talk unless the union dropped the demand. An employer would be in breach of the duty if it failed to provide information to the union that affected the bargaining unit. For example, if the employer made a decision to move or contract out some of its operations, it would be a breach of the duty to fail to disclose this. An employer would breach the duty if it introduced last-minute demands. If the employer did not refer to the term or duration of the agreement, and then indicated that it wanted the agreement to have an unusually long term, this would indicate bad faith. A union could be guilty of bargaining in bad faith if it threatened to go on strike before the legal strike date. In most jurisdictions a strike is not legally possible until conciliation or mediation has occurred and a cooling off period has expired. The union could also breach the duty if it put forward illegal demands. For example, a union proposal that discriminated against employees with disabilities would breach the duty.

10. Explain the significance of the pattern of concession-making in negotiations.

It is noted in the text that the pattern of concessions may help convince the other side that there is nothing more to be gained. If concessions are made in smaller increments the other side may be convinced the party making the concessions cannot go any further.

11. Describe hardball tactics that a party could use in negotiations:

Hardball tactics in negotiations are described in the text.

12. Identify the four principles for successful interest-based bargaining:

The principles for interest-based bargaining based on *Getting To Yes* are described in the text.

XII. Discussion Questions**1. What is the significance of the union-management relationship for negotiations?**

The relationship between the parties is important because it could affect their ability to move from adversarial to integrative bargaining. In a relationship marked by low trust and conflict the parties will not be able to move to mutual gains or interest-based bargaining discussed later in the chapter. A relationship marked by conflict increases the likelihood of a strike or lockout.

2. Why should a negotiating party not lead with its best possible offer?

Although it might seem attractive to avoid haggling and start with a best offer this is not an advisable course of action. It has become the standard or norm that an employer will eventually agree to pay more, and the union will eventually agree to accept less than their initial position. It would be difficult for an employer to convince a union that its first offer was in fact all the employer was able to pay because the union will have bargaining experience where employers have agreed to pay more than the initial offer provided. Also, the contract that is negotiated will have to be ratified by the members of the bargaining unit. If the union bargaining team accepts the employer's first offer it is likely that the bargaining unit members will question if the union has obtained all that was possible. To be able to sell the agreement to the bargaining unit, the union may have to show how the employer was forced to improve its offer as negotiations proceeded.

3. Why is it important that labour relations legislation provide for a duty to bargain in good faith?

The duty to bargain in good faith reinforces the union's right to represent employees as their bargaining agent. Bargaining rights would be meaningless if the employer could simply refuse to bargain or go through the motions of bargaining. The duty to bargain in good faith may help avoid work stoppages. By forcing the parties to discuss and explain their proposals it is possible that strikes or lockouts may be avoided.

4. What is the significance of first contract arbitration?

First contract arbitration involves the imposition of a first collective agreement in a situation where the parties are not able to negotiate a contract themselves. First contract arbitration is generally viewed as a remedy that is favourable to unions. It is significant because it will prevent an employer who has lost the certification battle to avoid the union through contract negotiation. Although the employer has a duty to bargain in good faith it would still be possible for a careful employer to comply with the duty and avoid a first agreement.

The political environment has influenced the adoption of first contract arbitration. In British Columbia, the first jurisdiction to adopt the remedy, it was established by an NDP government. In Ontario it was adopted by a minority government that needed the support of the NDP. There had also been several notorious first contract labour disputes in the province, including Eaton's that involved long strikes where the employer appeared to refuse to accept the union. In other jurisdictions the political environment may be more conservative, and governments have not seen the need for this remedy or may be unwilling to adopt a procedure that appears to benefit unions. The adoption of first contract arbitration illustrates the importance of the political environment to labour relations processes.

5. Two months prior to the expiry of the current collective agreement, a union gave the employer notice to bargain. The parties could not agree on any meeting dates for negotiation, and the employer sent a note directly to employees that it was not able to negotiate because it had encountered a major financial problem.

- a) How can the union proceed?**
- b) Explain the outcome you expect.**

The union can file an unfair labour practice complaint with the Labour Relations Board. The complaint would allege that:

- 1) the employer has breached the duty to bargain in good faith, and
- 2) the employer's direct communication to employees amounts to interference with the union's bargaining rights.

The unfair labour practice complaint would likely be upheld and the board could:

- 1) issue a declaration that the employer has violated the duty to bargain in good faith and interfered with the union's bargaining rights,
- 2) order the parties to negotiate in good faith to reach a collective agreement,
- 3) order the employer to post a notice to employees advising that the employer has been ordered to bargain in good faith.

6. For the issue of wages, give an example of the union and employer resistance points, target points and initial offers, where there is a contract or settlement zone.

If the employer and the union have the following points there is a settlement zone.

Employer: initial offer two percent increase; target point three percent; and resistance point four percent.

Union: initial demand a six percent increase; target point four percent increase; resistance point three percent increase.

In this situation there is a settlement zone because the employer is willing to go as high as four percent and the union is willing to go as low as a three percent increase.

7. Which of the following statements are interests and which are demands or positions:

(a) We need to reduce our costs by five percent by contracting out the work of Department A. This statement is a demand. It points to a particular solution or course of action, contracting out, to deal with the issue instead of opening the door to alternative measures.

(b) We are concerned about the effects of the new machinery on our employees. This statement expresses an interest. The concern is put forward without limiting possible alternatives to deal with the situation.

(c) We need a wage freeze to remain competitive. This statement is a demand.

(d) Our concern is for the job security of our members. This statement expresses an interest.

(e) We need flexibility to meet family responsibilities. This statement expresses an interest. Contrast this statement to the next one in (f). Here a reference is made to a general concept of flexibility without limiting ways to increase flexibility. It would still be possible to engage in problem solving to increase flexibility.

(f) We need flextime to meet family responsibilities. This statement is a demand. A particular solution, flextime, has been put forward as the way to deal with the issue. Although the statement may be less confrontational because it refers to a need, it is equivalent to saying "we demand flextime..." or "it is our position that there should be flextime..."

8. Why might an employer be opposed to the introduction of interest-based bargaining?

There are a number of reasons why an employer might not wish to adopt interest-based bargaining including the following:

- 1) lack of awareness. Some employers may not be familiar with the potential gains of interest-based bargaining.
- 2) opposition to change. Interest-based bargaining will involve a new approach and requires training. Some employers may simply not want to put forward the effort required.
- 3) bargaining strength. Some employers may perceive that they are in a strong position and think that they can achieve their objectives through traditional bargaining.

- 4) lack of trust. Interest-based bargaining requires trust and some employers may perceive that they cannot trust the union.
- 5) control. Some employers may perceive that interest-based bargaining will involve them giving up some measure of control to the union.
- 6) attitude. Some negotiators may perceive that interest-based bargaining is not macho, and accordingly it is not an approach that they want to adopt. They want to engage in the battle and win.
- 7) priorities. Proponents of interest-based bargaining contend that it protects the relationship between the union and the employer. Some employers may not perceive that an improved relationship is a desirable or necessary objective.

XIII. Web Research

1. The highlights provide insight into the number of agreements that have been settled for each quarter. Most agreements have been in the Health Care Sector. Recent agreements can be found under the Collective Agreements tab found on the web page.
2.
2The unions position on replacement workers will likely be that there is no evidence that anti-scab laws have any impact, positive or negative, on investment and competitiveness. Furthermore, anti-scab laws work very well at preventing the injuries, disruption and lingering anger that result from strikes and lockouts where replacement workers are used. The Fraser institute will assert that laws favouring one group (either workers, employers, or unions) over another led to lower output as well as reduced levels of employment, investment and productivity. This is particularly important for the current debate over replacement worker bans since this type of law inherently benefits one group (unions) at the expense of all others.
3. This website will provide information which identifies which legislations a labour relations board will have jurisdiction over. The number of acts in which the board has jurisdiction over will vary depending on the industry.

XIV. Vignette

How Do You Prepare to Negotiate a Collective Agreement?

According to the Canadian Union of Public Employees (CUPE Alberta) when it becomes time to negotiate a collective agreement, whether negotiating an agreement for the first time or renewing an existing agreement, there are some important steps to prepare for these negotiations. Each of these steps will support successful achievement of collective agreement terms for both the organization and employees.

First, communication is central to success collective agreement negotiations. This communication must focus the preparatory steps, plans for negotiations, and negotiation updates to all of the union members. This communication must be ongoing and utilize multiple communication channels—meetings, email, web board, in-person.

Next, CUPE suggests the PINC principle-gathering problems, interests, needs, and concerns (PINC). At the preparation stage, the union leaders collect information from their members concerning their point of view concerning workplace issues. This information could be collected with an online survey or meetings.

The third step to prepare for collective bargaining negotiations is research. In particular, information is collected from other unions, union researchers, and trends in the unionized environment. Importantly local union complaints, grievances, health and safety concerns, sick leave trends, long-term disability claims, workers' compensation claims, job duties, and new employer policies.

It is also important to not negotiate with the public and media. Negotiations must first occur at the bargaining table with the union and organizational representatives. The only exception to the guideline is speaking to the media for issues significant to the broader community and only if negotiations are particularly difficult. It is recommended that the local negotiation team lean on the broader union for guidance when speaking to the broader community.

The final preparation for negotiating a collective agreement is to recruit communicators. These individuals would be tasked with communicating with the members concerning negotiating progress and outcomes. It is important to ensure all employees are included in the communications.

XV. Case Incident: Plaza Fiberglas

The purpose of this case is to illustrate the duty to bargain in good faith, and the procedure and remedies available if there is a breach of the duty.

1. Is there any basis for the union to file a complaint with the Labour Relations Board. Refer specifically to each of the items referred to: rules, seniority, wages, addresses of employees, and the recruitment and selection of employees to work at the new location.

The union could file a complaint with the Labour Relations Board alleging that the employer has failed to bargain in good faith. This case is based upon *United Steelworkers of America v. Plaza Fiberglas Manufacturing Ltd.* 90 CLLC 16,027. In the Board's decision it was found that the employer's proposals regarding rules, seniority, and wages involved hard bargaining, but were not a breach of the duty to bargain in good faith. However, the employer did breach the duty to bargain in good faith by:

- sending uninformed representatives to negotiations
- failing to disclose the intention to move work during negotiations
- engaging in direct bargaining with employees
- refusing to provide employee names and addresses to the union.

2. What remedies could the Board order for any violations of labour relations legislation by the employer?

The Board ordered the following remedies for the employer's violations of the legislation in this case:

- 1) a cease, and desist order directing the employer to stop violating the act,
- 2) a direction to resume negotiations and bargain in good faith and make every reasonable effort to reach a collective agreement,
- 3) damages to employees to compensate them for the loss of income incurred when the work was moved by the employer,
- 4) compensation to the union for its additional negotiation costs,
- 5) an order directing the return of the work to its original location,
- 6) an order to provide employee addresses to the union,
- 7) an order to post a notice to employees in the workplace which confirmed that the employer had violated labour relations legislation and would bargain with the union and make an effort to reach a collective agreement.

This case illustrates how the duty to bargain in good faith relates primarily to conduct rather than the content of bargaining proposals. For example, the proposal regarding the specific penalty of discharge for breach of company rules was not a breach of the duty; however, the failure to send informed representatives to bargain was a breach. The wide range of remedies a Board might use is also illustrated.

ⁱ Laurence Olivo and Peter McKeracher, *Labour Relations: The Unionized Workplace*. (Toronto: Emond Montgomery Publications Ltd., 2005), p. 118.

ⁱⁱ Roy Lewicki, David Saunders, and John Minton, *Essentials of Negotiation* (Burr Ridge, IL: Richard D. Irwin, 1997), p. 45.