Canada Industrial Relations Board Conseil canadien des relations industrielles

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November 10, 2022

BY WEB PORTAL

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In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and a referral by the Minister of Labour to the Canada Industrial Relations Board pursuant to section 80(1) thereof involving a dispute between LTS Solutions Ltd., employer; Local Union No. 213 of the International Brotherhood of Electrical Workers, certified bargaining agent. (033606-C)

Further to the hearing held in the above-noted matter, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board (the Board), composed of Paul Love, Vice-Chairperson, and Gaétan Ménard and Barbara Mittleman, Members.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,

Tanya Venable

Tanya Venable
Team Leader, Registry

Encl.

c.c.: Lindsay Foley

Canada

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Reasons for decision

Local Union No. 213 of the International Brotherhood of Electrical Workers,

applicant,

and

LTS Solutions Ltd.,

employer.

Board File: 033606-C
Neutral Citation: 2022 CIRB **1047**
November 10, 2022

The panel of the Canada Industrial Relations Board (the Board) was composed of Mr. Paul Love, Vice-Chairperson, and Mr. Gaétan Ménard and Ms. Barbara Mittleman, Members. A hearing was held from April 19 to 22, 2022. The parties provided written submissions prior to the hearing of final oral submissions on June 17, 2022.

Appearances

Mr. Brandon Quinn, for the Local Union No. 213 of the International Brotherhood of Electrical Workers;
Mr. Peter A. Gall and Ms. Justina Sebastiampillai, for LTS Solutions Ltd.

I. Nature of the Referral

[1] On December 13, 2019, the Local Union No. 213 of the International Brotherhood of Electrical Workers (IBEW or the union) applied to the Minister of Labour (the Minister) to refer its collective bargaining dispute with LTS Solutions Ltd. (LTS or the employer) to the Board under section 80 of the *Canada Labour Code* (the *Code*) to settle the terms and conditions of the first collective agreement (CA). The union's application to the Minister referred to its inability to negotiate a first

CA with LTS and alleged that LTS had committed unfair labour practices (ULPs). The union did not send the employer a copy of this application.

[2] On March 5, 2020, the Minister referred this dispute to the Board, pursuant to section 80 of the *Code*. A referral pursuant to section 80 of the *Code* involves a two-step process whereby the Board first decides whether it is advisable to settle the terms of the first CA between the parties and then, if it does decide to intervene, settles the terms of the CA. The employer considers that the Board must not intervene in the parties' collective bargaining dispute, whereas the union is of the view that the Board should exercise its discretion under section 80 of the *Code* to settle the terms of the CA.

[3] At the time of the section 80 referral, the union had previously filed four ULP complaints between March 9, 2018, and October 18, 2019, against the employer. These complaints were consolidated for hearing. The Board heard an initial issue about the scope of the bargaining unit with hearings on November 13 and 14, 2018, and issued a decision in *LTS Solutions Ltd.*, 2019 CIRB 896 (RD 896 or the scope decision), on January 25, 2019. In that decision, the Board found that the bargaining unit included all technicians employed on the Customer Premises side of LTS, including technicians in the installation and repair (I&R), business field services (BFS), MXU and drops classifications but not splicers or linesmen. The distinctions are set out further in this decision.

[4] The Board issued a decision in the ULP complaints on July 26, 2021, in *LTS Solutions Ltd.*, 2021 CIRB 982 (RD 982 or the ULP decision). In that decision, the Board dismissed three of the four ULP complaints. It allowed one of the ULP complaints, finding that the employer had violated sections 50(a) and 94(1) of the *Code* as it had failed to recognize drops and MXU technicians as members of the bargaining unit. In the hearing in those matters (the ULP hearing), the Board limited the scope of the parties' evidence to events that had occurred before April 30, 2020, on the basis that the events that had occurred after April 30, 2020, were more relevant to the section 80 referral.

[5] On April 28, 2020, the Board held a case management meeting with the parties on the section 80 referral. At this meeting, the Board directed that the parties engage in meaningful collective bargaining and indicated that Ms. Lindsay Foley, Industrial Relations Officer (the IRO),

was to assist them in their discussions. The Board notes that it had previously instructed the parties to engage in meaningful collective bargaining during earlier proceedings before it, including on November 14, 2018, at the end of the proceedings in Board file nos. 032511-C and 032512-C—the proceedings resulting in the scope decision—and on February 14, 2020, at the end of the first set of hearing dates in the ULP hearing.

[6] The IRO met with the parties on May 13, 2020. As a result of that meeting, on June 9, 2020, she issued a report cataloguing the CA terms that had been agreed to and those that were outstanding. The parties provided comments on the report.

[7] The Board understands that further negotiations between the parties were conducted in late 2021 on a without-prejudice basis and is not aware of whether any further progress has been achieved.

[8] In *LTS Solutions Ltd.*, 2022 CIRB LD 4653 (LD 4653), the Board dealt with evidentiary issues related to the tendering in this process of evidence about the parties' communications before the IRO acting as mediator and in conciliation that occurred during the collective bargaining process. As a result of this decision, the parties were unable to tender bargaining evidence that could be characterized as being covered by mediation privilege. The Board also dismissed the employer's application to summarily dismiss the section 80 referral.

[9] At the section 80 hearing, Mr. Robin Nedila, Assistant Business Manager, testified for the union, and Mr. Daniel Geheran, Regional Vice-President–Operations Support and Business Improvement, testified for the employer.

[10] The union submits that the Board should fix the terms of the CA. It argues that the employer's conduct since the organizing drive in 2017 supports a finding that the employer has engaged in surface bargaining. The union also points to the Board's findings in the ULP decision where it found that the employer had violated sections 50(a) and 94(1) of the *Code* with respect to the issue of whether certain technicians—the drops and MXU technicians—were included within the scope of the certification.

[11] The union argues that there is a distinction between cases where CAs are imposed as a remedy for a ULP and cases under section 80 of the *Code*. The union argues that under

section 80, the Board takes a broader building-block approach and considers all the circumstances to determine whether there are any indicia that the employer is not interested in bargaining a CA, whereas, when imposing a remedy for a ULP, the Board considers the severity of the ULP and determines whether it ought to impose a CA.

[12] The employer argues that the referral should be dismissed as it is an unwarranted intrusion into free collective bargaining and that the Board should not assist the union in correcting the missteps and miscalculations the union made during bargaining. It submits that there are no exceptional or compelling circumstances that would warrant imposing a CA (see *Hudson Bay Port Company*, 2004 CIRB 296). It states that the Board should not intervene where the parties have genuine and strongly held differences about the terms of a CA, in the absence of demonstrated anti-union animus and provided the employer has, as has been shown, a genuine interest in bargaining a CA. The employer argues that, in the ULP decision, the Board disposed of the union's anti-union animus argument and the basis for its application to the Minister. It states that the post-April 2020 evidence that the union led at this hearing does not warrant the Board's intrusion into free collective bargaining. The employer submits that the section 80 referral is a barrier to settlement and that this collective bargaining dispute will resolve once the Board dismisses the section 80 referral.

[13] The present decision should be read in the context of other orders and decisions that the Board has issued regarding the labour relations at LTS:

- Board certification order no. 11171-U, issued on August 31, 2017;
- *LTS Solutions Ltd.*, 2018 CIRB LD 3953 (LD 3953) (application for reconsideration of certification order);
- RD 896 (the scope decision);
- RD 982 (the ULP decision); and
- *Howell*, 2022 CIRB LD 4639 (bottom-line revocation decision).

[14] This is the Board's decision in step one of the section 80 referral —the determination of whether it is advisable to settle the terms of the first CA between the parties.

[15] For the following reasons, the Board has determined that this is one of the rare instances in which it is advisable for it to settle the terms of the first CA.

[16] The principal reason for the Board's intervention is the employer's lack of good faith bargaining at least for the period since it tendered an offer to the union on September 17, 2019 (the September 2019 offer). The employer tendered an offer on wages that permitted it unilateral control to set and reduce them. This was a marked departure from what is normal in collective bargaining. It also refused to meet and bargain with the union for many months following that offer. Therefore, the employer has not made every reasonable effort to enter into a CA.

[17] The Board notes that collective bargaining is about ascertaining and determining what is possible. Where a party refuses to meet or sets preconditions on meetings, that is a hallmark of bargaining in bad faith. The Board expects the parties to rise above a dysfunctional relationship and continue to negotiate. In particular, the Board has exhorted the parties to continue their CA negotiations on a number of occasions, as the parties cannot just sit back and wait for the Board to issue adjudicative decisions.

[18] Following the issuance of this decision, the Board directs that the parties meet with the IRO so that she can update her report of issues settled and those in dispute, and that the IRO report within 30 days. The parties will then have seven days to provide comments on the IRO's report. The Board also encourages the parties to use that opportunity to make a last-ditch effort at settling the outstanding issues. The Board will then hold a case management teleconference (CMT) with the parties to determine the process for settling the terms and conditions of the first CA.

II. Procedural Issues

[19] The Board needs to address two procedural issues that arose during the hearing, and which were the subject of oral rulings, before addressing the further aspects of this case.

A. Mr. Geheran's Witness Statement

[20] Shortly after Mr. Geheran commenced his testimony at the hearing, the employer attempted to introduce his witness statement (a summary of evidence to be presented at the hearing) as an exhibit and have him adopt the statement. The witness statement was 113 pages long

(199 paragraphs). It referenced portions of the ULP decision and included excerpts from notes taken by co-counsel Ms. Melanie Vipond of Mr. Geheran's testimony at the ULP hearing. The employer was prepared to call Ms. Vipond as a witness to authenticate the notes and for cross-examination on their authenticity.

[21] The union objected to this approach, as it was not part of the process that the parties had agreed to and it would be prejudicial to modify the process after the union had closed its case.

[22] At the hearing, the Board determined that it would not admit Mr. Geheran's witness statement for adoption and tendering as an exhibit. The Board concedes that some economy would have been achieved by the filing of the statement and its adoption by the witness.

[23] The Board noted that the ULP decision contained factual findings from the ULP hearing. No official transcript was kept of the ULP hearing. The purpose of this part of the section 80 hearing is not to re-do or re-litigate the 23-day ULP hearing.

[24] At the CMT on November 15, 2021, the Board discussed the process for the section 80 hearing with the parties. One of the issues raised was whether the evidence-in-chief of a witness would be tendered in writing before the hearing, with the hearing reserved for cross-examination of the witnesses. The parties agreed to proceed in the ordinary course with the evidence-in-chief and cross-examination of the witnesses at the hearing. As a result, four days were scheduled for the hearing.

[25] On January 19, 2022, following the CMT of January 17, 2022, the Board issued a letter confirming hearing dates and requested that the parties provide, pursuant to sections 27 and 46 of the *Canada Industrial Relations Board Regulations, 2012*, a witness statement for each witness containing "a summary of the evidence he/she will be providing."

[26] Generally, the purpose of such a statement is in the nature of discovery—it provides the opposing party with an indication of the witness's anticipated testimony. It provides information to the Board to allow it to prepare for the hearing. A witness statement, however, is a summary of the witness's proposed evidence. It is not generally evidence. In this case, the parties specifically agreed to a process for oral testimony.

[27] It was open to the Board to direct the parties to prepare affidavits and conduct a hearing based on cross-examination of the witnesses on their affidavits. That occurs in some cases but is not the process that the parties had agreed to or that the Board had contemplated in this matter.

[28] There would have been significant prejudice to the union if the employer had been allowed to change the agreed-upon process, as that was not how the union had approached the preparation of its case. The Board did not permit the filing of the witness statement as evidence in this case.

B. The Employer's Closing Statement Containing a Portion of Counsel's Notes

[29] At the end of Mr. Geheran's testimony, the employer attempted to adduce its closing statement from the ULP hearing and make it an exhibit in this matter. This closing statement is a 240-page document that includes some of counsel's notes of hearing testimony, in the form of questions asked and answers given. The employer's principal reason for adducing this document was to put counsel's notes of the parties' evidence in the past ULP hearing before the Board. The Board notes that the Vice-Chairperson sat alone in hearing the ULP case and in rendering the ULP decision because of the incapacity of the Board's employer-representative Member. In the present process, the panel comprises the same Vice-Chairperson as well as two Members.

[30] Counsel was prepared to authenticate the notes by calling Ms. Vipond as a witness.

[31] The union opposed this, as it was not part of the process that the parties had agreed to. Its secondary position was that, if some of the notes were admitted, all of the notes should be before the Board.

[32] The Board gave an oral ruling, declining to admit the closing argument from the ULP case or the notes of the ULP hearing as evidence.

[33] The focus of this section 80 hearing is on whether the Board should intervene in the bargaining process. Both parties have tendered evidence about the bargaining process, and, in the Board's view, that evidence should be sufficient to consider that issue, within the context of the findings that the Board has already made.

[34] The Board stated that the ULP and scope decisions form part of the background of this matter. In those decisions, it made certain findings that may bind the parties, particularly on the scope of the bargaining unit and the ULP allegations.

[35] In the Board's view, it is unnecessary to adduce counsel's notes. It would be unfair to file some but not all of the notes, and the ULP hearing was a 23-day hearing. This was not a procedure that either party had contemplated or agreed to. In this section 80 referral, the Board is primarily focused on the bargaining process, and the parties have done a very good job of putting that evidence before it.

[36] The Board notes that following its ruling, the employer closed its examination-in-chief of Mr. Geheran.

III. Background and Facts

[37] In 2005, there was a lengthy strike at TELUS, which the parties refer to as "The Event" (the event). The TELUS CA resulting from this work stoppage eliminated all the restrictions on TELUS's ability to contract out work, or its obligation to use solely union contractors when contracting out work. As a result, TELUS has contracted out work to a small number of other contractors (6 to 12), primarily non-unionized contractors, under highly competitive terms. TELUS sets the terms and conditions for its contractors.

[38] LTS has been a TELUS contractor for many years. It commenced its relationship of providing I&R services to TELUS following the event.

[39] LTS employs technicians who work on telecommunications systems owned by others. At the outset of the union's certification application, LTS was also involved in constructing a fibre optic system for TELUS known as Project Falcon.

[40] In the ULP decision, the Board described the work as follows:

> [6] It is important to understand the nature of the work performed by LTS and by each type of technician within the bargaining unit. This was set out in the Board's decision on the scope issue, rendered on January 25, 2019 (*LTS Solutions Ltd.*, 2019 CIRB 896 (the scope decision)).
>
> [7] LTS is part of the Ledcor group of companies. It is a construction company that engages in the designing and building of fiber-optic networks. It does not own or operate the infrastructure. It also

> provides technicians to service networks owned by different telecommunications companies, such as TELUS, Rogers Communications (Rogers) and Bell Canada (Bell), which includes providing services to individual customers and businesses who are the downstream users of those networks.
>
> [8] LTS is a labour supply company that is primarily connected to TELUS, although it clearly has other customers as well.
>
> [9] Non-bargaining-unit construction-side employees are involved in building the network. That can include the work of linemen, fusion splicers (splicers) and other employees on the core infrastructure side of LTS or subcontractors.
>
> [10] The drops technician connects a cable from a network access point (NAP) outside the home, for example on a pole or underground access point, to a home or business. In larger, multi-unit buildings such as apartments, condos or offices, the fibre-optic technician—inside wiring (referred to as an MXU technician) installs a fibre distribution hub inside in the communications room of the building, installs an intermediate distribution hub on each floor, runs the cable through duct work and uses Invisilight—a clear, gel-like substance—along the junction between the ceiling and walls to complete the fibre path to each suite. It is a complicated task, and a crew of four would typically spend a whole week completing this task in a building.
>
> [11] The work of a drops technician differs from that of an MXU technician in that a drops technician only connects one strand of fibre from the NAP to the home and this connection takes about 45 minutes, unless the work is complicated by factors such as garden suites or multiple suites within the building or disruption of the underground service by collapsed or blocked conduits. The MXU work is more complex.
>
> [12] The installation and repair (I&R) technicians and BFS technicians run the cable from a NAP on the outside edge of the home by putting a plug or socket on a single strand of fibre on the edge of the home and run a cable inside the home to the router or gateway. The I&R and BFS technicians commission the service, test the service and demonstrate that the installed products, such as internet, television, telephone or alarm systems, work. This work is performed on a live network and can involve minor repairs or replacement of components.
>
> [13] BFS technicians also provide services such as fixing breaks in the fibre-optic trunk line by fusion welding (break fix), locating underground services prior to someone else disturbing the surface (locates) and performing installations and repairs inside above- or below-ground shelters. Some of this work for certain companies such as Bell or Rogers is provided in remote locations in British Columbia, Alberta and in other provinces.
>
> [14] Sometimes the I&R or BFS technician will perform the drop if this is needed and sometimes the drops technician will perform it.

[41] In the spring of 2017, the IBEW began its organizing drive at LTS.

[42] The employer resisted the certification application, arguing that the bargaining unit should be national in scope and not limited to employees residing in British Columbia and that the group should include field technicians performing sales work. The employer argued for a bargaining unit

that paralleled its business structure. The union felt that it would be unlikely to gain a certification for such a large unit as proposed by the employer.

[43] On August 31, 2017, the Board issued Board order no. 11171-U, certifying the union as the bargaining agent for a unit of employees described as "all technical field employees employed by LTS Solutions Ltd., in British Columbia, **excluding** office, sales, warehouse and casual employees, and supervisors."

[44] The employer sought a reconsideration of the certification order, and the Board dismissed this application in LD 3953. On April 30, 2018, the employer filed an application for judicial review of LD 3953 in the Federal Court of Appeal. On March 13, 2019, the employer withdrew the application.

[45] Although the employer challenged the certification, there is no evidence before the Board that it delayed its bargaining with the union because of the reconsideration application or proceedings in Federal Court.

[46] On September 6, 2017, the union's lawyer sent the employer's lawyer a notice to bargain. In correspondence with the union, Mr. Iain Morris, Chief Operating Officer, confirmed that the union should contact Mr. Jack Hoosen, Vice-President Industrial Relations, and Mr. Dale Hildebrandt, Manager of Industrial Relations.

[47] It has now been almost five years since the Board issued the certification order and more than five years since the organizing drive commenced, and the parties have not yet reached a first CA. At the time of the certification order, the bargaining unit consisted of 238 employees: 188 I&R technicians, 8 BFS technicians, 25 drops technicians and 17 MXU technicians. The bargaining unit now consists of 65 employees: 26 MXU technicians, 4 BFS technicians, 25 small medium business (SMB) technicians and 10 fibre in a day (FIAD) technicians.

[48] The union has filed a number of ULP complaints against the employer, but none of these complaints alleged surface bargaining. The Board did not adjudicate the first ULP complaint, which was filed prior to the issuance of its certification order, as the union withdrew it following certification. The union filed ULP complaints over a period of time after it gave its notice to bargain to the employer.

[49] As a result of issues arising during the course of the ULP complaints, the Board heard and determined an issue about the scope of the bargaining unit. In that decision, the Board found that the MXU and drops technicians were within the bargaining unit and that the splicers and linesmen were not within the bargaining unit (see the scope decision).

[50] In an August 19, 2019, email written by Mr. Nedila, the union raised allegations with the employer of surface bargaining. The primary thrust of the union's section 80 referral is a complaint of surface bargaining by LTS.

[51] On July 27, 2020, Mr. Jordan Howell filed an application with the Board to revoke the union's certification. At the time of his application, Mr. Howell was an MXU employee. On January 31, 2021, the Board dismissed that application by way of a bottom-line decision, with reasons to follow (see *Howell*).

[52] In the ULP decision, the Board described the clash of ideologies between the IBEW and LTS:

> [28] In British Columbia, the IBEW has had a lengthy presence in the telecommunications industry, holding certifications for many CAs for which Shaw Cablesystems (Shaw) is the employer.
>
> [29] An example of this is the Cable Contractors Standard and Project Labour Agreement (August 10, 2015, to August 9, 2020), signed by the IBEW with several cable contractors (cable contractors' agreement). This agreement provides for union recognition, for a bar on the use of non-union workers (Article 2.03), for a bar on contracting out unless it is to a contractor with an IBEW certification, that the union may discipline its members (Article 2.05), for a prohibition on contracting out bargaining unit work (Article 2.09(b)) and for labour to be supplied through a union hiring hall (Article 4.0).
>
> [30] The cable contractors' agreement is a closed-shop agreement, which means that the employees must remain members of the union in good standing to remain employees of an employer. The union can call on the employer to terminate an employee who is not in good standing. Employees are generally paid based on an hourly rate with those terms set out in the CA. Many of these CAs in the lower mainland of British Columbia have existed since the 1960s with limited use of unionized subcontractors.
>
> [31] Prior to the certification of this bargaining unit, LTS had minimal exposure to trade unions that advanced closed-shop provisions during collective bargaining. This is standard in many CAs. The closed shop is not mandated by the *Code*; it can be negotiated and agreed to by the parties. The very few Ledcor CAs based on an open-shop arrangement are with either the Christian Labour Association of Canada (CLAC), the Carpenters' Union or the Labourers International Union of North America.

A. Bargaining History Prior to September 18, 2019

[53] The parties met for six sessions of bargaining for a total of 18 days, before the commencement of a strike on October 1, 2019. The Board described the bargaining history in the ULP decision and has taken the following findings from that decision.

[54] The parties met for bargaining from November 7 to 9, 2017, and from January 23 to 25, 2018. The parties eventually agreed to put bargaining on hold until the Board resolved some issues about the scope of the bargaining unit. That hearing was held on November 13 and 14, 2018, and the Board issued the scope decision on January 25, 2019.

[55] On January 29, 2019, after receiving the scope decision, the union filed a notice of dispute with and requested conciliation assistance from the Federal Mediation and Conciliation Service (FMCS). The employer objected to the appointment of a conciliator, expressing that it was premature and a precursor to a strike. The parties met with the conciliator for bargaining between April 1 and September 18, 2019.

[56] On May 22, 2019, Mr. Morris wrote to Mr. Jim Lofty of the union, asking for a commitment that no strike would be called from June to October 2019. On the face of the letter, there is no explanation for the request, which apparently originated from TELUS. On May 24, 2019, Mr. Nedila communicated that the signing of a CA would provide LTS with assurance of labour peace. He declined to make the requested commitment but indicated that the union was committed to bargaining a CA. On May 29, 2019, Mr. Morris again wrote to the union, asking it to reconsider.

[57] On May 30, 2019, Mr. Morris wrote to the I&R technicians, reporting that the union had refused to give the “required guarantee.” He also attached the exchange of letters between himself and the union and Mr. Nedila. On May 31, 2019, the union responded both to Mr. Morris’s May 29, 2019 letter and Mr. Morris’s direct communication with the I & R technicians on May 30, 2019. Mr. Nedila confirmed that the union was committed to the process of negotiating a CA and pointed out that LTS had not responded with a counter proposal to most of the union’s offer, and that it had in good faith extended the period for conciliation.

[58] In August 2019, the union took a strike vote and, on August 15, 2019, notified the employer that 79 per cent of the employees were in favour of the strike. Mr. Nedila's evidence was that the union took a strike vote so that the employer would make a complete written CA offer.

[59] On September 17, 2019, the employer provided a comprehensive written offer in the form of a CA. This offer was tendered towards the end of the day and discussed by the parties on September 18, 2019 (the September 2019 offer referred to above).

[60] The employer's September 2019 offer was unpalatable to the union on several bases.

[61] Article 15.01 of the offer, "Hours of Work," had the potential to turn employees into "day labourers," as there were no scheduled shifts set out in the CA:

> 15.01 **Hours of Work**
>
> **a)** The Employer will determine the necessary work schedules required to fulfil its contractual obligations with its clients. The Employer will also determine the number of employees required to work on each workday and each work schedule in order to meet its contractual obligations.

[62] Article 17.01 of the September 2019 offer gave the employer the unilateral right to set pay rates and to introduce changes without notifying or consulting with the union. Further, this offer did not set out the existing rates:

> 17.01 **Wages**
>
> The Employer will determine the appropriate remuneration rates for each position within the bargaining unit. Employees may be paid hourly and / or a piece rate depending on the work they perform and the nature of the Employers contracts with its clients.
>
> Current hourly rates, deemed rates and piece rates of pay, at the time of the execution of this agreement, will be maintained.
>
> As per Management Rights the Employer reserves the right to alter, increase or decrease rates of pay from time to time.
>
> (a) Hourly Paid Employees
>
> Hourly paid employees will be paid their hourly rate for each hour they spend conducting the work of the Employer.
>
> (b) Piece Rate Employees

> Piece rate paid employees will be paid as per the published Piece Rate "Rate Card" for each piece of work completed in accordance with customers and Employers expectations.
>
> [*sic*]

[63] On September 19, 2019, the union sent out notice of a membership meeting, one of the purposes of which was to possibly vote on the September 2019 offer. The union notified the members that it was the bargaining committee's position that the employer's offer should be rejected.

[64] On September 25, 2019, the employer notified the union that it had terminated 31 residential I&R technicians. As a result, Mr. Nedila felt there was no choice but to declare a strike. Mr. Nedila did not have the members vote on the employer's offer. The union declared a strike, which commenced on September 30, 2019.

[65] The employer's evidence was that 52 per cent of the employees are crossing the picket line. The vast majority of the picket line crossers are in the MXU group, where 85 per cent of the employees are crossing the picket line.

[66] In considering the IRO's June 9, 2020, report and the comments, many substantive issues remain outstanding, without an agreement having been reached. These issues include: scope and recognition, union security, seniority, duties and definitions of employees, automation severance pay, hours of work, premium pay and travel expenses, wage schedule, vacation, leaves of absence, health and welfare, pension and retirement, time of scheduling and exclusive union jurisdiction.

[67] The parties have agreed to provisions including: a preamble, human rights, management rights, union stewards, grievance procedure, arbitration, impact of legislation, labour management relations, health and safety, Netcom Training Fund, no other agreement and employee discipline.

[68] In the ULP decision, the Board described the process as one of hard bargaining, rather than one from which the Board could infer anti-union animus supporting the ULP claims made by the union.

B. The September 2019 Offer Was a Final Offer Precipitating a Strike

[69] In the ULP decision, the Board found as follows:

> **4. The September 17, 2019, Offer**
>
> [153] On September 17, 2019 at 3:54 p.m., the union received the employer's bargaining proposal that was in the form of a CA. It contained terms that Mr. Nedila felt would be unacceptable to the union and bargaining unit members. While there was recognition of the union (Article 5.01) and union dues check-off and remission (Article 5.03), there was no union closed shop, no prohibition on contracting out, no recognition of seniority, no union hiring hall...
>
> [154] Particularly galling for the union was the wage schedule proposed by the employer. The employer's proposal for hours of work and the "wage schedule" was as follows:
>
>> **ARTICLE 15.00–HOURS OF WORK**
>>
>> 15.01 **Hours of Work**
>>
>> a) The Employer will determine the necessary work schedules required to fulfil its contractual obligations with its clients. The Employer will also determine the number of employees required on each workday and each work schedule in order to meet its contractual obligations.
>>
>> **ARTICLE 17.00–WAGE SCHEDULE**
>>
>> 17.01 **Wages**
>>
>> The Employer will determine the appropriate remuneration rates for each position within the bargaining unit. Employees may be paid hourly and / or a piece rate depending on the work they perform and the nature of the Employers contracts with its clients.
>>
>> Current hourly rates, deemed rates and piece rates of pay, at the time of execution of this agreement, will be maintained.
>>
>> As per Management Rights the Employer reserves the right to alter, increase or decrease, rates of pay from time to time.
>>
>> (a) Hourly Paid Employees
>>
>> Hourly paid employees will be paid their hourly rate for each hour they spend conducting the work of the Employer.
>>
>> (b) Piece Rate Employees

> Piece rate paid employees will be paid as per the published Piece Rate "Rate Card" for each piece of work completed in accordance with customers and Employers expectations.

> [155] In contrast to the union's proposal that was based on a regular work week, the employer proposed no weekly hours of work, other than work at its discretion.
>
> [156] In essence, the employer's proposal contained insufficient particulars for any employees to determine the basis of pay and hours to be worked in a week, other than work hours and pay at the employer's discretion.

[70] The Board also stated the following in the ULP decision:

> [157] After receipt of what appeared to be the employer's final proposal, Mr. Nedila had some thought of referring the offer to the membership for its consideration and a vote. The union's recommendation was to decline the employer's offer.
>
> [158] On September 19, 2019, the union sent out a notice for a membership meeting. From the material before the Board, it appears that certain unnamed employees kept the employer well informed of the union's dealings with its membership. The employer was aware of the date of that meeting.
>
> [159] On September 25, 2019, the employer notified the union that it had terminated 31 residential I&R technicians. As a result, Mr. Nedila felt that there was no choice but to declare a strike.
>
> [160] On October 1, 2019, the union commenced a lawful strike after serving a strike notice.
>
> [161] The union remains on strike; however, the evidence before the Board is that most members are crossing the picket line.

[71] The Board finds that at least up until the employer learned about the section 80 application in January 2020, it communicated through its conduct that its September 2019 offer was its final offer.

[72] For example, in an email to all employees on October 18, 2019, the employer wrote: "the strike will last as long as it takes the IBEW to recognize the realities of our business and realize adoption of our proposals is what is necessary to ensure that we win work and continue to employ our employees."

[73] On October 25, 2019, the union made a counteroffer.

[74] On November 8, 2019, the employer rejected the union's counteroffer, stating that the proposal removed the employer's flexibility, competitiveness and productivity and harmed its

business. In the email response on that date, the employer urged the union to accept its September 2019 offer.

[75] On December 20, 2019, Mr. Geheran wrote to Mr. Nedila, urging the union to accept the September 2019 offer. In this email, Mr. Geheran stated that the employer was starting negotiations with TELUS about a renewal of the TELUS Business I&R contract and that it expected it to be a challenging process with TELUS seeking cost and efficiency savings in any new contract.

[76] The letter reads in part as follows:

> We will shortly start discussions on our TELUS Business I&R contract as well and without doubt we will face the same cost and efficiency challenges.
>
> We have provided the IBEW with our proposals, based on our current terms and conditions and the realities of our business environment. We are competing against other companies that are not encumbered with these substantial additional costs and restrictive work practices.
>
> We urge you to recognize the realities of our business and accept our proposals, as provided on 18th September, so we can be successful in securing a new contract for residential I&R work in B.C. Without the IBEW recognizing these realities our B.C. residential I&R work will come to an end.

[77] On December 27, 2019, Mr. Nedila emailed the employer, expressing his alarm with the possibility that the I&R work would come to an end. He proposed referring the collective bargaining dispute to an independent arbitrator to settle and finalize a CA. On January 6, 2020, Mr. Hildebrandt emailed Mr. Nedila, requesting a meeting with the union, with or without a mediator. The employer wanted to meet with the union to extract a commitment from it so that it could pursue its contract renewal process with TELUS. Mr. Hildebrandt's email did not contain any further proposal to continue collective bargaining.

[78] On January 22, 2020, the parties met with Ms. Susan Fisher, a mediator with the FMCS. Ms. Fisher provided the employer with a copy of the union's section 80 letter to the Minister during a break. The parties met briefly, and the employer's representatives left the meeting for a break after expressing the view that it was bad faith for the union to refer the dispute to the Minister without notifying them. The employer's representatives did not return that day.

[79] The Board finds that in attending the meeting that day, the employer did not have any intention of bargaining the terms of a CA with the union; it was only interested in obtaining a commitment from the union so it could pursue its contract renewal process with TELUS.

[80] This is evident from a review of the bargaining notes of the January 22, 2020, meeting, in which it is stated that the union tried to determine whether the employer had any flexibility about its September 2019 offer.

[81] Mr. Nedila's notes show that the union raised issues about cost neutrality and whether cost neutrality applied to the MXU employees who were not part of the I&R contract renewal process. The employer refused to engage on these issues at this meeting.

[82] Mr. Geheran's bargaining notes for January 22, 2020, state that the union asked the employer where it would sit on the open shop and MXU issue if the union were open to cost neutrality. Mr. Geheran's notes state that the focus that day was on the I&R BC Contract renewal and whether the IBEW could accept cost neutrality.

[83] Mr. Hildebrandt's notes refer to the union asking about the MXU technicians and being told that that was not what the meeting was about—it was about the I&R contract and whether the union would accept cost neutrality. He said that LTS needed flexibility to utilize subcontractors without restrictions and that membership in the union was open for further discussion.

[84] Mr. Hildebrandt's notes also refer to the open shop being a matter for further discussion. This seems odd in light of the employer's past resistance to a closed shop and, in particular, its communications to employees on October 18, 2019, during the strike:

> LTS has been very clear with the IBEW, we will never sign a collective agreement that makes membership with the IBEW a condition of your employment.

[85] It is apparent from a review of the bargaining notes that, at the meeting, the employer hoped to extract a concession of cost neutrality from the union without addressing the balance of the outstanding collective bargaining issues between them. As such, the January 22, 2020, meeting was not truly a CA bargaining session but a meeting that the employer called to address its concern with the TELUS I&R contract.

C. Commencement of the ULP Hearing in February 2020 and the Lack of Continuing Negotiations

[86] On February 12, 2020, during the ULP hearing, Mr. Nedila emailed Mr. Hildebrandt about comments that the employer's counsel had made during opening statements and that Mr. Geheran had made during his evidence. Mr. Nedila emailed Mr. Hildebrandt and asked: "Are you guys saying that if the IBEW agrees to cost neutrality and drops the limit on subcontractors that you guys can agree to our language proposals?"

[87] The Board notes that there is a basis in the employer's written opening statement at the ULP hearing for Mr. Nedila to have raised the issue of reopening CA negotiations. In paragraphs 416 to 420 of the opening statement, the employer's counsel describes the last meeting between the parties on January 22, 2020.

[88] This description seems to suggest that there could be a trade on the issues in the terms suggested by Mr. Nedila. These paragraphs read as follows:

> 416. LTS explained this to the IBEW, and the January 22, 2020 session was scheduled in an attempt to save the TELUS I&R work.
>
> 417. To save this work, the IBEW would have had to agree to no increase in labour costs, which the IBEW refused to do.
>
> 418. Mr. Nedila says in his witness statement that the IBEW told LTS at this January 22 meeting, that the IBEW "could look at agreeing to a cost neutral collective agreement but he would need assurances that LTS would agree on many of the non-monetary IBEW proposals outstanding". He says that "LTS would not give these assurances".
>
> 419. This is not accurate. He said that the IBEW would consider looking at a cost neutral agreement if LTS agreed to certain non-monetary items, such as a closed shop. **LTS said that all of the other items were open for bargaining, but it had to get a commitment that the IBEW would agree on no cost increases, including no restrictions on sub-contractors.**
>
> 420. The IBEW refused to give this commitment with the result that it is extremely likely that LTS will lose all of its BC residential I&R work (which is all I&R work in BC, other than the SMB work).
>
> (emphasis added)

[89] On February 13, 2020, during the hearing, the employer informed the Board that on February 12, 2020, it had learned from TELUS that LTS had lost its I&R contract in British Columbia.

[90] Later that day, during a break in the hearing, Mr. Hildebrandt and Mr. Nedila had some discussions. Later that evening, Mr. Nedila summarized that discussion in an email and indicated that the union was open to meeting, quickly if necessary. The email reads as follows:

> I wanted to follow up on our quick conversation during the hearing. I'm a little confused about what you meant by LTS not being aligned with how I phrased my email. To be clear, what I'm saying is that the Union is willing to move on the issue of subcontracting. We have already offered to be cost neutral. If I understand what you've been saying at the hearing, those are the two main sticking points for the Employer. I think if we can work out those two issues, we should be able to get agreement on the remaining stuff. We are open to meeting quickly if necessary.

[91] On February 14, 2020, Mr. Nedila again emailed Mr. Hildebrand:

> I am writing to follow up again on a conversation we had today when you approached me on a break at the CIRB hearing. It was in follow up to my last email. You stated that negotiating a collective agreement is now a mute [*sic*] point, but as I stated to you we obviously disagree because the residential I&R work may come back to LTS at some point and even if it didn't there are still 70 plus members of IBEW employed at LTS.
>
> The CIRB panel suggested strongly today that the Union and the Company get together and bargain. I suggest we meet as soon as possible and also try to use the dates that were previously confirmed (April 7-9) for the CIRB which may be cancelled.

[92] Rather than directly answering Mr. Nedila's inquiry, in a February 18, 2020, email to Mr. Nedila, Mr. Hildebrandt put a condition on resuming bargaining:

> And finally, and importantly, to move forward, it is necessary for you to publicly retract your false statements about LTS—which significantly damages our reputation and hence our competitiveness. We expect you to do this immediately if you have any genuine interest in establishing a productive and harmonious collective bargaining relationship with us.

[93] Later that evening, Mr. Nedila again suggested that the parties meet and bargain. He referred to the hearing and stated that he was aware that LTS had given the "striking residential I&R employees" termination notices that day.

[94] In the ULP decision, the Board found that the employer refused to bargain further with the union unless the union published a retraction of derogatory public statements about LTS (paragraph 177).

[95] In a July 3, 2020, email response to Mr. Nedila's June 30, 2020, email suggestion that the union was open to negotiating at Mr. Hildebrandt's earliest convenience, Mr. Hildebrandt stated, in part, the following:

> [Redacted per LD 4653] In the ongoing Covid-19 environment, the challenges to our contracts and to the sustainability of our business are potentially greater than they were at that time. [Redacted per LD 4653] we see no reason to think that a resumption of negotiations as you suggest would produce any different result—certainly not until the CIRB rejects your attempt to impose an agreement on us and you no longer have your s. 80 application as a backstop.

[96] This indicates that the employer's position at that time was that it was not prepared to resume negotiations until the disposition of the section 80 referral. The Board notes that because of the rulings it made during the course of the ULP case, this evidence was not before it at the time of the ULP hearing.

[97] Later on July 3 and 16, 2020, Mr. Nedila emailed Mr. Hildebrandt, asking whether the September 2019 offer was the last offer and "[i]f it isn't a final offer and there is room to address some of [the union's] concerns why aren't we negotiating."

[98] On July 20, 2020, Mr. Hildebrandt's response constituted a non-answer:

> As we have stated time and time again, we are waiting for you to confirm that you acknowledge and accept the realities of our business.

[99] On July 28, 2020, Mr. Nedila emailed Mr. Hildebrandt: "If the September 2019 offer isn't a final why not make another offer?''

[100] Mr. Hildebrandt refused to make a further offer, stating in an email dated July 31, 2020:

> As we have repeatedly told you, given the impact on our business from the pandemic and other changing circumstances, we need to assess the business requirements moving forward with our TELUS contracts, before we can determine what is needed in a collective agreement to enable us to retain our remaining TELUS work. **A lot has changed since we made our previous offer that you rejected.**
>
> **As you know, an application for decertification has been filed by the remaining LTS employees. Obviously, any future agreement would have to meet their interests if the IBEW remains their bargaining representation. Given these circumstances, it is best in our view to defer further bargaining until our situation with TELUS and your situation with our remaining employees is clarified.**
>
> (emphasis added)

[101] Again, the Board notes that because of the rulings about the post April 2020 history it made in the ULP case, this information was not before it in the ULP hearing.

IV. Analysis and Decision

A. Ministerial Referral to the Board

[102] The employer submitted that had the Minister been aware of the union's false and misleading allegations in the letter to the Minister, it is unlikely that the Minister would have referred the issue to the Board at all. The employer repeatedly submitted that the union had made false allegations or engaged in deception. The employer has essentially alleged that the union engaged in fraud in its application to the Minister. For the reasons that follow, the Board does not agree with this argument.

[103] The employer has referred many times to the fact that the union did not notify it that it was making an application under section 80 of the *Code*. The employer responded negatively when it learned of the union taking this step at the meeting on January 22, 2020, by walking out of the meeting and alleging bad faith against the union. Mr. Geheran repeatedly testified that it was disingenuous or dishonest for the union to have applied under section 80 while suggesting it was ready and willing to negotiate a CA.

[104] The Board's task is not to review the Minister's exercise of discretion in referring this matter to it. As the Board's predecessor, the Canada Labour Relations Board (CLRB), stated in *CJMS Radio Montréal Limitée* (1978), 27 di 796; and [1979] 1 Can LRBR 332 (CLRB no. 160) (*CJMS Radio Montréal*), it is not up to the Board to question the facts and reasons that convinced the Minister to refer the matter to it. When the Board receives a referral under section 80, it must inquire into the dispute and, if it considers it advisable, settle the terms and conditions of the CA. In inquiring into the dispute, the Board will consider the entire course of conduct of both parties during the collective bargaining process (see *Royal Bank of Canada* (1980), 41 di 199; and [1982] 1 Can LRBR 16 (CLRB no. 267)).

[105] The Board accepts that when the union filed the section 80 application, it had legitimate concerns about a bargaining process that had lasted more than two years, with little progress and unusual proposals about wages. Mr. Nedila felt that the process was going nowhere, and the union

lacked further options. At the point of the union's letter, the union had bargained directly with the employer, bargained with a conciliator, had been on strike for a period and had suggested interest arbitration. One of the complaints to the Minister, at the time of the letter, was that no bargaining dates were pending.

[106] Further, when the union filed its application with the Minister, it was very suspicious of the employer's actions after it gave the employer a notice to bargain. There had not yet been a full hearing of the ULP complaints. What the union experienced was substantial attrition of its membership—the layoff of I&R employees—as well as changes in its members' terms and conditions of employment. The employer had communicated very little information to the union before it implemented these changes. It is not surprising that these changes, made during the statutory freeze period, created an atmosphere of distrust, following or at the same time as a period where the employer had also been resisting the certification process.

[107] The Board notes that after many attempts by the union to get an offer in writing from the employer that set out its CA proposal, the employer's only full CA offer—its September 2019 offer—was very unpalatable to the union. The union attempted to modify its position in an offer of October 25, 2020, particularly on contracting out. However, as indicated in the ULP decision, when the union made this offer in October 2019, it was not in the same ballpark as the employer. The parties had exhausted the mediation and conciliation process. The union was on strike. The employer had rejected the union's October 25, 2020, offer, made no counteroffer, rejected the union's offer of interest arbitration and was not prepared to meet to bargain.

[108] Further, the Board finds that an application under section 80 of the *Code* is not inconsistent with the union's duty to bargain in good faith. It is a tool available to either party under the *Code*. It is the Board's view that regardless of another right of recourse—such as a section 80 referral—the duty to bargain does not cease because of an ongoing proceeding or a right of judicial review or reconsideration of a certification (see *Martin et al.* (1979), 37 di 50; [1979] 3 Can LRBR 184; and 80 CLLC 16,004 (CLRB no. 203); *Austin Airways Limited/White River Air Services Limited* (1980), 41 di 151; and [1980] 3 Can LRBR 393 (CLRB no. 262); and *Northern Telecom Canada Limited* (1980), 42 di 178; and [1981] 1 Can LRBR 306 (CLRB no. 281)).

[109] In particular, the Board refers to *CKLW Radio Broadcasting Limited* (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101), a case under the former provisions of the *Code* that required ministerial consent before a union could proceed with a bad faith bargaining complaint. These provisions were replaced by the current section 50 in later amendments to the *Code*. The salient part of the CLRB's decision on this point reads as follows:

> Finally, we have the employer's refusal to meet once the ministerial consent was given and the complaint was filed. In McCord's words, the complaints "preclude any resumption of bargaining until those charges have been heard and disposed of". The union asserts that this refusal to meet was a violation of the good faith duty. Does the request for ministerial consent or the making of a complaint relieve the other party of its obligations? We think not. **The duty to bargain in good faith and make every reasonable effort is a continuous duty from when notice to bargain is given until a final resolution of an agreement. It survives the intervention of a work stoppage, although the character of the duty may change. It also survives a complaint of failure to bargain in good faith. Of course, the existence of the complaint may make it very difficult for the parties to meet face to face on their own.**
>
> (page 89; emphasis added)

[110] Likewise, in the Board's view, the duty to bargain continues despite an adjudication process under section 80 of the *Code*. In this case, the Board deliberately put the section 80 process into abeyance because it needed to deal with outstanding ULP matters, which could have impacted the proceedings under section 80. It nevertheless exhorted the parties to continue bargaining.

B. Impact of Findings of no Anti-Union Animus in the ULP Decision

[111] As noted above, after the publication of the ULP decision, the employer made an application on August 13, 2021, for a summary dismissal of the section 80 referral. The Board dealt with this application in LD 4653. In that case, the Board held the following:

> The Board did not dismiss all of the ULP complaints in *LTS 2021*, *supra*. In that decision, the Board found that the employer had violated sections 50(a) and 94(1) of the *Code* by failing to recognize that drops and MXU technicians were part of the bargaining unit in the November 2017 collective bargaining negotiations for the period from November 7, 2017, to January 25, 2019 (when the Board issued a decision on the scope of the bargaining unit). Moreover, the Board made it clear in its decision that there was a separate proceeding concerning the section 80 referral and acknowledged that certain evidence not admitted as part of the ULP complaints could potentially form part of the section 80 referral, in particular evidence related to events that had occurred after April 30, 2020 (subject to mediation privilege, which will be examined below):
>
> > [57] The Board indicated that evidence relating to events that had occurred after April 30, 2020, was more relevant to the Board's intervention under section 80 and

> was not relevant to the events that had resulted in the filing of the ULP complaints in 2018 and 2019. The Board was conscious of the fact that the section 80 application has been referred to a panel and that it is for that panel to decide issues related to it.
>
> [58] The Board notes that this ruling confined the union to lead evidence relating to events that had occurred before or on April 30, 2020. This period was longer than the employer claimed was relevant and shorter than the union wanted to lead evidence for as it claimed that it had made substantial concessions in bargaining after April 30, 2020.
>
> [59] Whether the union made substantial concessions in bargaining after the Board's section 80 process commenced is a matter more relevant and better canvassed in the section 80 process.

> Furthermore, this is not an application brought by the union. This is a referral by the Minister pursuant to section 80 of the *Code*. Therefore, and for all the reasons above, the Board is of the view that a hearing is necessary in order to determine whether it is advisable to intervene in the parties' dispute, based on the particular circumstances of this case and considering the parties' collective bargaining history.

(pages 3–4)

C. The Employer's Argument

[112] The employer has strongly argued that the union's section 80 referral is an abuse of process or, alternatively, governed by *res judicata* or issue estoppel principles. It argues that if the union disagreed with the Board's conclusions in the ULP decision, it should have sought a reconsideration of that decision. The employer states that the union is trying to put old wine into new bottles. The employer provided a helpful chart in its written submission setting out the positions that the union had advanced in this case and in the ULP case. The employer states that, with the exception of some post-April 2020 emails, the union is relying on the same factual allegations and leading the same evidence in this matter.

[113] The employer argues that the Board rejected the allegation of anti-union animus in the ULP decision and that the union is now trying to use the same evidence and history to argue that the employer was acting with anti-union animus and had no intention of concluding a CA, even on its own terms. The employer relies on *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63; [2003] 3 S.C.R. 77; and *Noade* v. *Blood Tribe*, 2001 FCT 802.

[114] The employer argues that the Board's processes would be clogged and it would contribute to uncertainty in labour relations if parties were able to relitigate issues that the Board previously

decided (see *Global Television Networks Inc.*, 2010 CIRB 535; *Air Canada*, 2004 CIRB 305; and *Seaspan International Ltd.*, 2010 CIRB 513, at paragraphs 36–42).

[115] The employer argues that the union should not be permitted to take the same evidence and allegations led in the ULP hearings where the Board concluded no anti union animus, and ask the Board to reach a fundamentally different conclusion, i.e. — that the employer is anti-union and therefore is refusing to enter into a CA.

D. The Union's Argument

[116] The union argues that the Board needs to look at the whole relationship to determine whether the employer is seriously interested in concluding a CA. The primary issue is whether, on the whole evidence, the employer has engaged in surface bargaining, which the union submits it has done. The union states that in the ULP hearing, the Board only heard half of the evidence, and the issue was not the same; therefore, the concept of *res judicata* does not apply.

[117] The union submits that the employer's September 2019 offer was its final offer. The union could not accept this offer as it made the union redundant and superfluous. This was not a case of the union demanding a CA in the style of the cable contractors' agreement (described at paragraph 29 of the ULP decision); it was about presenting a draft, when the employer had nothing to offer, and attempting to pin down the employer about what worked for its business. The employer's waffling reasons for refusing to meet and bargain with the union shows that the employer had no intention of reaching a CA. The employer was attempting to "tank the process" in order to discourage the employees.

E. The Board's Determination

[118] While the Board dismissed the majority of the union's claims in the ULP decision, it was only able to do so after a lengthy hearing where the employer tendered significant "business as before" evidence. In that case, the Board reviewed the parties' dealings in attempting to determine whether there was any anti-union animus in the discrete ULP events alleged by the union. The Board considered the bargaining evidence for the limited purpose of determining whether the ULPs had been established.

[119] In the ULP decision, the Board found as follows:

> [192] What most of the history shows is hard bargaining and some progress, but not on the main items. Hard bargaining in and of itself is not evidence of anti-union animus. Further, the failure of the employer to agree to a mandatory union membership article, or a closed shop, or a union hiring hall is not evidence of anti-union animus. These types of arrangements are permitted under the *Code* but are not mandatory requirements of the *Code*.

[120] The Board stated in particular:

> [194] The Board is going to be faced with the issue of whether to impose a CA on the parties in the separate section 80 process, which is being considered by a three-member panel.
>
> [195] The Board, however, is unpersuaded that the differences between the parties about the terms of a CA or the bargaining history equate to anti-union animus by LTS **for the ULPs alleged by the union**. The Board notes that the union has not alleged that the employer's refusal to agree to a closed-shop CA breaches its duty to bargain in good faith. Instead, the union has raised other very specific allegations of violations of different provisions of the *Code* that occurred over a period, which will be examined later.
>
> [196] LTS appears to have the honestly held belief that it cannot compete with other TELUS contractors if it is "hampered" by a CA that contains a closed shop and hiring hall provision whereby it cannot maintain control over who it hires or flexibly respond to changes implemented by its main customer. While the employer's refusal to agree to a closed-shop agreement makes it difficult to reach a CA, the Board finds that this is not indicative of anti-union animus. However, the Board must still turn to the union's other more specific allegations to determine whether the employer committed any specific ULPs in relation to the particular circumstances of each case.
>
> (emphasis added)

[121] At the time of the ULP case, the Board did not have a surface bargaining complaint before it and was therefore not required to address the issue of surface bargaining.

[122] In the ULP decision, the Board was cognizant of the need to ensure that the section 80 hearing panel could make the determinations required to exercise its discretion, without having that discretion improperly fettered by the ULP panel. In the ULP decision, the Board attempted to deal with its task at that time, which was to determine whether the employer had engaged in the discrete ULPs alleged by the union. Part of that task involved assessing whether there was anti-union animus, on the whole of the admissible evidence.

[123] The subject matter of this section 80 dispute is whether the Board should intervene and fix the terms of the first CA. It is a broader question than just whether the employer committed ULPs

and whether it engaged in actions motivated by anti-union animus. Further, in the ULP case, the cut-off date for considering the bargaining evidence was April 30, 2020. In the section 80 process, the Board has additional information since April 30, 2020. A section 80 dispute involves an assessment of whether a party has bargained in good faith, on the whole of the evidence.

[124] The primary problem for the Board to consider is whether this is simply a case of hard bargaining or whether there has been bargaining in bad faith. This is a difficult line to draw; it can only be drawn on the basis of all the evidence.

[125] Further, it is clear that there is a continuing duty to bargain in good faith and make every reasonable effort to enter into a CA. A finding that there was no anti-union animus does not necessarily preclude a finding that the employer has bargained in bad faith. If the Board concludes that this is simply an example of hard bargaining, then it should not intervene to rescue the parties from their inability to finalize a CA.

[126] The Board has had the benefit of the post-April 2020 evidence, as set out below, which persuades it now, along with the evidence of events since the strike, that the employer is only willing to make a deal that renders the union inconsequential to the operation of its business. In effect, it is not prepared to acknowledge the union's certification and right to bargain the terms and conditions of employment. This is a factor set out in *Yarrow Lodge Ltd.*, BCLRB No. B444/93 (*Yarrow Lodge*), a case under the British Columbia *Labour Relations Code* that dealt with the involvement of the British Columbia Labour Relations Board (BCLRB) in fixing the terms of first contracts.

[127] Further, it seems that at least since July 2020, LTS has hoped that the union will simply go away as a result of a revocation application brought by employees and that it will be allowed to carry on its business unimpeded by a CA that might impose costs, reduce its flexibility and alter its performance-based structure.

[128] The reality of any CA is that it often imposes costs and reduces the employer's flexibility in its business. Certification generally means that, through the collective bargaining process, the union will have some impact on employees' terms and conditions of employment. Generally, a

certification is successful because a majority of employees wish to change their terms and conditions of employment.

[129] Given the reality of certification, it is the Board's view that the employer's approach to bargaining, particularly since the advent of the strike, makes a mockery of the collective bargaining process. The employer acts as if it can and should evade any consequences of a certification of this union because it believes that its business can only continue to exist without any operational constraints.

[130] In the ULP decision, the Board found that this was an honestly held belief, based on the pre-April 30, 2020, evidence that had been tendered. The employer subjectively acted in its own best interest; however, that does not preclude a finding that, nevertheless, and on the whole of the evidence, the employer failed to bargain in good faith or make every reasonable effort to enter into a CA.

[131] If the union has no ability to influence terms and conditions of employment, there is little reason for employees to retain the union as a bargaining agent. This is an active issue, as the Board has had to deal with a revocation application. This is particularly the case where the employer refused to meet to bargain with the union, holding up a myriad of excuses. Further, putting forward a wage rate proposal such as the one here eliminates any chance of the union being able to participate effectively in improving wage rates for the LTS employees. The wage rate proposal is unique and not one that the union has seen before.

[132] While the parties are bound by certain findings in the ULP decision, the issues are broader in the section 80 referral. Further, the Board needs to examine all the circumstances in determining whether there is a need to take the unusual step of intervening (see *Canadian Imperial Bank of Commerce* (1986), 65 di 1; and 86 CLLC 16,023 (CLRB no. 564) (*CIBC*)).

F. Section 80 Principles

[133] Section 80(1) of the *Code* provides that the Minister may "direct the Board to inquire into the dispute and, if the Board considers it advisable, to settle the terms and conditions of the first collective agreement between the parties."

[134] Section 80(3) provides as follows:

> **80 (3)** In settling the terms and conditions of a first collective agreement under this section, the Board shall give the parties an opportunity to present evidence and make representations and the Board may take into account
>
> **(a)** the extent to which the parties have, or have not, bargained in good faith in an attempt to enter into a first collective agreement between them;
>
> **(b)** the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and
>
> **(c)** such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable in the circumstances.

[135] The main purpose of section 80 is to provide a remedy against bad faith and intransigence, as explained in *CJMS Radio Montréal*, the CLRB's first case under what is now section 80 of the *Code*.

[136] The Board has taken the view that its involvement under section 80 is a two-step process, whereby it first decides whether it will exercise its discretion to intervene in step one and then, if it chooses to intervene, settles the terms in step two. This approach was first clearly articulated by the CLRB in *Graham Cable TV/FM* (1986), 67 di 1; and 86 CLLC 16,039 (CLRB no. 585).

[137] In deciding whether to exercise its discretion to intervene, the Board considers all the circumstances surrounding the duration of collective bargaining.

[138] The decision to intervene is in response to highly individualized facts in a case. Generally, exceptional circumstances are required given that there is a right to free collective bargaining.

[139] There is a limited history of section 80 referrals before the CLRB and the Board. Of those referrals, some have been successful and some unsuccessful. The Board is only aware of seven cases where it or the CLRB dealt with the merits of the referral. In the Board's view, this is because the parties look to the risk of a contract being imposed and bargain to avoid the imposition of a contract. Further, the Board intervenes only in exceptional circumstances, to protect free collective bargaining. It is problematic, however, when one party refuses to meet, as free collective bargaining is in fact founded on the basis of the parties being willing to discuss and negotiate their differences.

[140] Intervention under section 80 of the *Code* should be rooted in the employer's denial of the union's representational rights, for example, the refusal to meet or to engage in a rational discussion of their differences. Obviously, this can be difficult to ascertain, as parties may not "do as they say" or "say what they do."

[141] The negotiation of a first CA is difficult, and there is no automatic right to have the Board settle the terms.

1. The Union's Argument About the Applicable Test

[142] The union argues that there is a difference between fixing the terms of a CA under section 80 and imposing the terms of a CA under section 99 as a remedy in a ULP process. The union says that in section 99 cases (those cited by the employer), the Board has to determine whether there has been a breach of the *Code* and whether the breach is "bad enough" to justify the imposition of a CA. The union says that under section 80, the Board looks to any indicia that the employer is not interested in getting to a CA—this may be a ULP, it may be bargaining in bad faith or it may be other indicia that do not constitute a violation of the *Code*.

[143] The union indicates that the approach is to refer to the presence or absence of factors in a building-block type of approach.

2. The Employer's Argument About the Applicable Test

[144] The employer argues that there is in effect no difference between the section 80 and 99 processes. The employer submits that the following principles are established in the Board's jurisprudence:

> 459. …
>
> i. First, the primary and overriding consideration in this context is the importance of maintaining free collective bargaining wherever possible, as it forms the bedrock for the entire regime of labour relations under the Code;
>
> ii. Second, section 80 is not intended to be used to resolve protracted bargaining impasses, to relieve the parties from the consequences of economic sanctions, or to address intense or rancorous bargaining disputes;

iii. Third, parties are fully entitled under the Code to maintain inflexible, unshakable, or even "indefensible" positions in bargaining that they genuinely consider necessary to protect their interests, without the risk of a collective agreement being imposed;

iv. Fourth, the Board will only intervene to impose an agreement in very exceptional circumstances to address, for instance, a sustained pattern of illegality demonstrating anti-union animus, or circumstances involving a refusal to bargain or recognize the Union at all;

v. Fifth, in order to demonstrate a refusal to bargain sufficient for the imposition of an agreement under s. 80, an applicant must demonstrate with "rigorously established" evidence that the other party would not agree to **any** agreement, such that the purposes of the *Code* are defeated, not that the other party would only agree to a collective agreement on their own terms, which is entirely permissible.

3. Articulating the Approach to Section 80

[145] In the Board's view, the test articulated by the employer is an overly narrow reading of the case law.

[146] The Board notes that it is difficult to articulate a clear and simple test. The Board will exercise its discretion under section 80 based on the facts of each unique bargaining dispute. The section is rarely applied, although it has been part of the *Code* in its present form for more than 40 years.

[147] In *CIBC*, the CLRB reviewed the types of cases where it had intervened under section 171.1 of the *Code* (now section 80):

- where there was bad faith bargaining and intransigence (see *CJMS Radio Montréal*);
- where the bargaining agent's ability to represent employees was being undermined (see *Huron Broadcasting Limited* (1982), 49 di 68; [1982] 2 Can LRBR 227; and 82 CLLC 16,167 (CLRB no. 378) (*Huron Broadcasting*); and *Graham Cable TV/FM*); and
- where there was a refusal to bargain (see *Fort Alexander Indian Band et al.* (1984), 56 di 43 (CLRB no. 462)).

[148] In *CIBC*, the CLRB characterized its intervention as "a classic example of what Parliament had intended section 171.1 to be used for" (page 19). It referred to the Canadian Imperial Bank of Commerce's aversion to collective bargaining as "grudging tolerance":

… **The bank's strategy throughout these negotiations went far beyond what it claimed to be legitimate business concerns about competitiveness or other such bona fide entrepreneurial interests. It became clear to us that the bank's underlying motive was to render the UBE**

> **impotent,** the intended result of which is threefold. It effectively denies the employees who have joined the union of their fundamental right to participate in meaningful collective bargaining. Without meaningful collective bargaining the attraction for the system disappears and the possibility for revocation of the union's bargaining rights are heightened. Much more important to the bank, an ineffective union practically guarantees that collective bargaining will not spread to other areas of its establishment. In short, what we saw was the bank's uncompromising yet skilfully camouflaged rejection of the principles of freedom of association upon which the *Code* is founded.
>
> (page 19; emphasis added)

[149] The union argues and the Board agrees that there are significant parallels between the *CIBC* case and the present case, including:

- deep concern that the union sought third-party intervention through a conciliator;
- minimal progress made, and the progress that was made only on insubstantial issues;
- intransigence on wages and benefits, and particularly on those terms where there was a threat to the employer's ability to deal directly with its employees to the exclusion of the union—management rights, layoffs and recall, promotions and the merit-based pay system;
- late tabling of the employer's proposals based on the status quo— As Mr. Nedila stated at the hearing "after four months of bargaining we were back at day one." Here, almost two years after the notice to bargain was issued;
- direct communication with the employees by memorandum at sensitive times in the negotiations;
- allegations of unlawful strike activities; and
- the employer entering negotiations with the intent of ridding itself of the union (not clearly established in the present case, but the union established the employer's intent of operating with a union that was unable to influence the terms and conditions of employment).

[150] The primary reasons for intervention in *CIBC* were the steps that the employer had taken, including bargaining proposals it had made, which rendered illusory the union's ability to have meaningful input regarding the terms and conditions of employment.

[151] The Board notes that in *Yarrow Lodge,* the BCLRB compared the approach to the imposition of first contracts in British Columbia and other jurisdictions, including the federal jurisdiction. Part of the rationale in *Yarrow Lodge* was the focus on the interest in repairing dysfunctional bargaining relationships. The BCLRB stated the following in respect of the British Columbia legislation:

> It is clear that these criteria go beyond the bad faith/exceptional remedy test which seemed to be simply an extension of the unfair labour practice remedies. Although the bad faith/exceptional remedy test appeared to leave the traditional labour relations ethos intact, it failed to achieve one of the very purposes for which it was enacted—the establishment of enduring collective bargaining relationships. Although this approach was in many respects necessary for the initial acceptance of first collective agreement policy, the subsequent adoption of this remedy in a majority of jurisdictions in Canada, and our subsequent labour relations experience in regard to this remedy, has moved the policy model from bad faith/exceptional remedy test to a mediation/breakdown model. **Therefore, Section 55 and first collective agreement imposition no longer fall within an unfair labour practice framework. It is instead a remedy which attempts to repair the breakdown in first contract negotiations resulting from the conduct of one of the parties, even if that conduct is not in violation of the unfair labour practices provisions of the *Code*.**
>
> (page 34; emphasis added)

[152] It is the Board's view that repairing a dysfunctional relationship is not the sole basis for intervening under section 80 of the *Code*. It may be a factor that the Board will consider. In *CJMS Radio Montréal*, for example, the CLRB considered that the poisonous negotiating environment, with escalating use of hostile language, ultimatums, *sine qua non* conditions, stonewalling, pre-requisites, prior conditions and preliminary conditions, would likely not lead to a fruitful result. The CLRB noted in that case, the notion of relationship repair under what is now section 80 is a misnomer. The process of intervention is rather a surgical intervention with a hope that the parties will be able to establish a relationship conducive to continued collective bargaining during the two-year "recovery period" or term of the CA.

[153] *Yarrow Lodge* includes some helpful factors to consider in assessing the parties' conduct to determine whether to intervene to settle the terms of a first CA:

> (a) bad faith or surface bargaining;
>
> (b) conduct of the employer which demonstrates a refusal to recognize the union;
>
> (c) a party adopting an uncompromising bargaining position without reasonable justification;
>
> (d) a party failing to make reasonable or expeditious efforts to conclude a collective agreement;

> (e) unrealistic demands or expectations arising from either the intentional conduct of a party or from their inexperience;
>
> (f) a bitter and protracted dispute in which it is unlikely the parties will be able to reach settlement themselves.
>
> (page 36)

[154] The BCLRB commented in *Yarrow Lodge* that the federal approach was modelled on the 1973 British Columbia legislation endorsing the bad faith/exceptional remedy test in *Re London Drugs Ltd.*, [1974] B.C.L.R.B.D. No. 30 (QL) (*London Drugs*). The BCLRB also noted that the *CIBC* case seemed to broaden the circumstances and look at the totality of the negotiating conduct, as opposed to focussing solely on ULPs or bad faith bargaining complaints.

4. Surface Bargaining

[155] In past cases, including *Royal Bank of Canada* and *Société Radio-Canada*, 2001 CIRB 151, the CLRB and the Board distinguished between surface bargaining and hard bargaining, adopting the views of the Ontario Labour Relations Board as set out in *Daily Times*, [1978] OLRB Rep. July 604 (QL):

> ... Surface bargaining is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between "surface bargaining" and hard bargaining. The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even "predictably unacceptable" is not sufficient, standing alone to allow the Board to draw an inference of "surface bargaining." This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made.

[156] In *Royal Bank of Canada*, the CLRB refused to intervene and fix the terms of the CA under section 171.1 (now section 80) of the *Code*. In that case, the employer's primary argument was that the positions of both parties were defensible, the union had chosen strike action and "[s]ection 171.1 should not be used to destroy the ultimate mechanism provided by the *Code* for

settling disputes, namely, recourse to economic sanctions associated with a strike or lockout" (page 200).

[157] There are two factors of particular significance in determining the existence of surface bargaining: union recognition and the quality of the discussion (see *Canadian Industries Limited*, [1976] OLRB Rep. May 199 (QL)).

[158] The Board notes that in those cases where it (or the CLRB) has chosen to intervene under section 80 of the *Code*, there has usually been an element of bad faith or surface bargaining and conduct which demonstrates some refusal by the employer to recognize the union's right to bargain on behalf of the employees.

[159] The Board's role is not to rescue a party from the consequences of their collective bargaining strategies (see *MacLean-Hunter Cable TV Limited* (1980), 42 di 274; and [1981] 1 Can LRBR 454 (CLRB no. 290) (*MacLean-Hunter*)). The Board does not intervene to correct an imbalance in bargaining power. For example, where the union has not been able to muster the clout of a strike because employees are crossing the picket line, the Board should not intervene under section 80 simply because the union incorrectly gauged the level of support of its members.

[160] While collective bargaining is a protected right under the *Canadian Charter of Rights and Freedoms*, the right does not include the right to a substantive outcome (see *Health Services and Support – Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27; [2007] 2 S.C.R. 391, at paragraphs 89 and 91–92). In particular, while certification often leads to a CA, there is no mandated step of compulsory arbitration under the *Code* to ensure that the parties reach a first CA.

[161] The Board accepts the principle in *Re Noranda Metal Industries Ltd*, [1974] B.L.C.L.R.D. No. 149 (QL), where Chairman Paul Weiler commented on the nature of bargaining in good faith in the context of the BC *Labour Relations Code*:

> The reason why agreement has not been reached, despite the efforts of both parties, is because each side wants to reach an agreement at or near its own terms and these opposing positions remain some distance removed. **A failure to reach a collective agreement because of a determination not to make the concessions necessary to secure the consent of the other side is not, in and of itself, an unfair labour practice. It would be inconsistent with the fundamental policy of the *Code*—the fostering of free collective bargaining—for the Board to**

> **evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction.** That interpretation of Section 6 would amount to compulsory arbitration in disguise, and without the restrictions carefully placed around Section 70. **The theory of the *Code* is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make the concessions.** Again, that is what occurred here. …
>
> (emphasis added)

[162] Further, in *CJMS Radio Montréal*, the CLRB cited with approval the BCLRB's comments in *London Drugs*, in respect of the BCLRB's intervention in first contract disputes:

> … Even parties who are both quite willing to agree on terms each considers plausible may fail to do so. The union may be strongly committed to basic standards it has negotiated elsewhere and be unwilling to risk diluting them by accepting less in this unit. The employer may believe that these same terms are inappropriate for the special economic circumstances in which it operates. Both sides are genuinely prepared to sign a collective agreement but neither will budge from the position it feels is reasonable from its point of view. In our judgment, that is not the kind of case for which Section 70 is designed.

[163] In short, it is not a ULP for the parties to fail to reach a CA. Nor is the failure to reach a CA always a breach of the duty to bargain in good faith or make every reasonable effort to enter into a CA.

[164] The Board should tread carefully in dealing with a section 80 referral. The *Code* promotes free collective bargaining, and the case law strongly suggests that the worst negotiated CA is better than an agreement imposed by a body that does not have the parties' expertise in determining what will work in their situation.

[165] The Board will intervene, however, if it becomes clear that intervention is required to support the integrity of the collective bargaining process as a whole. The underlying premise of the *Code* is to protect the right to collective bargaining, which is afforded by certification. The parties must bargain in good faith and make all reasonable efforts to enter into a CA.

G. Examining all the Circumstances

[166] In examining all the circumstances, the Board needs to be conscious that some of the parties' narrative does not stand up to scrutiny. These are parties that are extremely distrustful of

each other. There is a significant ideological divide. Some of the subjective beliefs are not objectively based.

1. Certification and Pre-Bargaining

[167] The Board notes that the certification process was drawn out in the sense that the employer resisted the bargaining unit proposed by the union, challenged the Board's determination in a reconsideration application and then filed a judicial review application in the Federal Court of Appeal, which it subsequentially abandoned.

[168] In the Board's view, the certification and pre-bargaining events do not assist it in determining whether it should intervene.

[169] The union suggests that the employer committed ULPs during the certification process, and it points to a letter written by the employer's counsel at the time as well as a ULP complaint that the union filed in connection with that letter. As that ULP complaint was withdrawn in Board file no. 032266-C and the Board did not have the opportunity to hear evidence or the employer's explanation with respect to this allegation, the Board puts no weight on the allegations in that application, in the absence of oral testimony. It is simply proof of a withdrawn application.

[170] In *MacLean-Hunter*, the CLRB pointed out the problems in overly relying on pre-certification ULP evidence, as this may be the employer's first confrontation with the reality of employees joining the union, and the granting of a certification offers an opportunity for the employer to correct and modify its behaviour. In *MacLean-Hunter*, there was no post-certification employer misconduct, and it appears that there was some irresponsibility in calling a strike where the union knew there was limited support.

[171] The Board accepts, however, that it likely would have been harder for the union to obtain certification for a unit as defined by the employer.

2. The Bargaining Process

[172] In the ULP decision, the Board determined that, with the exception of issues relating to the scope of the bargaining unit, it was unpersuaded that there was anti-union animus in the discrete ULPs alleged.

[173] The Board noted that although there was a complaint of bad faith bargaining regarding the employer's refusal to recognize a group of employees represented by the union, there was no complaint about surface bargaining. That is a significant issue for the Board to determine in a section 80 referral.

[174] The Board notes that, on the whole of the bargaining evidence, it is clear that much time was wasted in the bargaining process in resolving relatively minor issues in a time-consuming way, as outlined in the ULP decision at paragraphs 136 and 192. Substantial economy in bargaining would have been achieved had the employer simply tendered one of its CAs with another union as a template, or even the form of the agreement eventually tendered in September of 2019. At least then, the union would have had a proposal in writing that it could have considered or taken to the membership.

[175] There was ill will that arose in the dealings between the employer and the union. There is a significant lack of trust on both sides. From the end of the November 2017 bargaining sessions, the tone of the written communications arising on the employer's side was less than cordial.

3. The Strike

[176] The employer has alleged union misconduct during the strike. It filed some materials alleging misconduct. At times, certain union members disparaged the owners of the company and personalized the dispute by targeting Mr. Geheran with posters or signs. The union also appears to have spoken to the press about certain issues, as there was some reporting on the strike by trade publications and in a local newspaper.

[177] From the evidence about picket line crossing, this was a strike that appears to have been unsupported by the majority of the employees at LTS. However, the union did have a significant strike mandate when it took its vote in August 2019.

[178] The union has apologized for some misconduct—particularly, statements made during picketing activities.

[179] The Board has before it a consent interim injunction order issued by the Supreme Court of British Columbia. A consent injunction, however, is not proof of that misconduct. It is simply proof that the Court, with the consent of both parties, issued an injunction.

[180] The Board makes no findings of union misconduct. The Board noted in the ULP decision that the employer had not filed any ULP complaint with it about the union's activity. Strikes are meant to create economic conditions conducive to settlement and can have negative impacts on the employer and its business, as well as on the relationship between the parties.

[181] The Board notes that collective bargaining, including exercising the right to strike, is not a game that is played according to the Marquess of Queensbury rules.

[182] It is clear that the parties' relationship deteriorated during the strike; however, it was never a good relationship. LTS comes from a perspective of open-shop dealings with its unions, and this was its first encounter with a closed-shop trade union. It was not pleased to be unionized by the IBEW. The tone of the communication on both sides was not conducive to a harmonious relationship.

[183] In certain circumstances during a strike, an employer may not be obliged to bargain if there is no reasonable indication of a change in position that might break the impasse (see *CKLW Radio Broadcasting*; and *Nordair Ltd.* (1985), 60 di 55; and 85 CLLC 16,023 (CLRB no. 500) (*Nordair*)). The rationale for this was outlined in *Nordair*:

> Common to the position of both parties was that the requirement to bargain in good faith subsists throughout a strike or lockout. This point has been maintained in decisions of this Board (*CKLW Radio Broadcasting Limited (no. 1)* (1977), 23 di 51; and 77 CLLC 16,110 (CLRB no. 101); *General Aviation Services Limited* (1982), 51 di 71; [1982] 3 Can LRBR 47; and 82 CLLC 16,177 (CLRB no. 385)).
>
> Equally common between the parties was that the nature of the bargaining procedure changes dramatically once one party resorts to economic sanctions against the other. The general duty to bargain remains; but the state between parties is now best characterized as a state of war. The Marquis [*sic*] of Queensbury rules no longer apply. It is the fittest that will survive the "fight to the death". (See *General Aviation Services Limited*, *supra*, pages 83; 56–57; and 15,466–15,467); *Arthur Ecclestone* (1978), 26 di 615; [1978] 2 Can LRBR 306; and 78 CLLC 16,142 (CLRB no. 132).)

(page 63)

[184] In this case, despite the acrimonious environment, the parties are obliged to continue to bargain a CA, particularly where the union quickly signalled that it was prepared to move off its positions regarding contracting out and wages and did move off those positions in its October 25, 2020, offer. Further, the threat of the loss of the I&R contract was another opportunity to resume negotiations, as piece rate was a major method of remunerating these employees, who no longer would be employed by LTS.

[185] As the Board has noted, the January 22, 2020, meeting was not a true collective bargaining session; the employer attended it for the limited purpose of attempting to obtain commitments from the union that would facilitate its negotiations with TELUS. The employer walked out of the meeting once it learned of the section 80 application.

4. Continuing Nature of the Duty to Bargain in Good Faith and Breaches of That Duty by the Employer

[186] The principal reason why the Board has chosen to intervene in fixing the terms of this CA is that it finds that the employer engaged in surface bargaining at least from the tendering of its September 2019 offer onwards.

[187] The Board found in the ULP decision that the employer's conduct up until April 30, 2020, did not amount to a ULP, with the exception of the scope issues related to the drops and MXU employees. The Board, however, found the following:

> [190] Generally, the parties address the terms and conditions of employment in a CA. The Board notes that the parties are fundamentally at odds regarding the remuneration of I&R employees. Those employees have been paid on a piece-rate system, and the union seeks to change that compensation system.
>
> [191] The Board notes that in examining proposals, one cannot truly ascertain the subjective intent of a party, as a party might depart from the rigidity of a proposal if it suits its needs or interests at a particular time. Despite that ideological gap, the parties made some progress on issues that were relatively easy to deal with and were non-monetary.
>
> [192] What most of the history shows is hard bargaining and some progress, but not on the main items. Hard bargaining in and of itself is not evidence of anti-union animus. Further, the failure of the employer to agree to a mandatory union membership article, or a closed shop, or a union hiring hall is not evidence of anti-union animus. These types of arrangements are permitted under the *Code* but are not mandatory requirements of the *Code*.

> [193] What seems clear is that the parties are not negotiating in the same ballpark. For example, contracting out is one of the major issues in the negotiations. While the IBEW made a counteroffer in bargaining that it considered reasonable, it was an offer that did not reflect the historical use of subcontractors by LTS before and at the time of certification.

[188] The Board notes that there were some changes in the union's position following the start of the strike. On October 25, 2019, the union started to back away from its proposal that was based on its cable contractors' agreement, offering reduced restrictions on contracting out. In examining this proposal and the employer's rejection of it in the ULP hearing, the Board determined that the employer historically used subcontractors at a much higher rate than what was sought in the union's proposal, that is, to make limited use of subcontractors not exceeding 20 per cent of the number of employees in the bargaining unit.

[189] Finally, the union's October 25, 2019, offer indicated some softening on its position on the piece-rate issue.

[190] The union attempted to resume negotiations and test the employer's willingness to accommodate some of its concerns—these were principally around the closed-shop union membership. By the start of the ULP hearing, the union had clearly signalled that it was abandoning the contracting out issue in the CA negotiations. Further, the union had accepted the principle of cost neutrality.

[191] LTS failed to meet with the union over a number of months, giving a variety of different reasons or articulating ultimatums before it would resume bargaining.

[192] For example, in the January 22, 2020, meeting, the employer was not prepared to collectively bargain; it was only prepared to discuss whether the union would agree to cost certainty so that it could negotiate a renewal of its I&R contract with TELUS. The employer walked out of the session and did not return to the room after it learned of the union's section 80 application.

[193] Mr. Nedila continued to communicate with the employer about resuming bargaining. Mr. Geheran has suggested, and the employer has argued, that this was contrived behaviour or a game played by the union. The Board does not accept this subjective view. It is not consistent with the surrounding circumstances or probabilities. The Board notes that the union is paying strike pay to employees, that it put significant efforts into attempting to negotiate a CA and that it has received

no dues from the employees and will not until a CA has been negotiated. The union has a significant financial interest in concluding a CA. Further, it is under some pressure from its members to deliver results—which means concluding a CA.

[194] Further, the employer had warned the union that it could lose the I&R contract. It is clear that I&R technicians formed the majority of the union's support within the bargaining unit, and the union was concerned about the potential loss of this work and particularly the loss of its support within the bargaining unit. The Board notes that this loss was particularly acute given what the union already perceived as substantial job loss within the bargaining unit that precipitated the filing of a number of the ULP complaints, which alleged attrition of the bargaining unit and losses due to contracting out and in particular the loss of 31 I&R positions immediately before the strike.

[195] The employer's suggestion that this was just a union game does not have an aura of reality about it.

[196] The Board accepts the union's argument that LTS could easily have tested the genuineness of the union's willingness to bargain by meeting.

[197] The Board finds that the lack of meetings, the shifting excuses and the responses communicated by the employer clearly establish that the employer was unwilling to meet with the union.

[198] The Board notes the following shifting employer responses to the union's attempts to resume bargaining in its communications with the union:

(a) Mr. Nedila incorrectly heard the opening submissions of counsel and Mr. Geheran's testimony at the ULP hearing;
(b) The point of resuming bargaining is moot now that LTS has lost the I&R contract;
(c) The employer will not meet until the union apologizes for comments in the press that the employer perceived to be hurtful to its business;
(d) The employer is not prepared to meet unless the union agrees to the principles of cost neutrality, flexibility and a merit-based environment;
(e) The employer is not going to meet with the union because of COVID-19 and pandemic-related economic circumstances;

(f) The employer is not going to meet with the union because of the filing of the section 80 application; and

(g) The employer is not going to meet with the union because certain employees filed a revocation application.

[199] Mr. Nedila considered that the employer's communications during the hearing in February 2020 indicated that it was possible to resume negotiations. Mr. Nedila attempted to get back together to bargain with the employer, conceding the issue of contracting out and cost neutrality. These were very significant concessions on the union's part. The Board finds that the union had a genuine interest in resuming bargaining in hopes of reaching a CA.

[200] The Board notes that at the end of the February 2020 hearing days, with the hearing due to resume in April 2020, it gave a clear message to the parties that they should resume bargaining. No further bargaining took place, however, until 2021.

[201] In reviewing all the communications between the parties from January to September 2020, it is the Board's view that the employer breached its duty to bargain in good faith and make every reasonable effort to enter into a CA.

[202] The Board notes that this is distinct from a finding of anti-union animus. The employer clearly had CAs with other unions. It is not necessarily an anti-union employer. It is clear that the employer did not wish to have a collective bargaining relationship with this union, with a CA containing a closed shop and hiring hall. As indicated in the ULP decision, this alone cannot form the basis for a finding of anti-union animus, as the *Code* permits but does not require these collective bargaining arrangements.

[203] In contrast to the employer's position at the hearing, the Board finds that before the employer learned of the section 80 application, the employer's September 2019 offer was its final offer that the union must accept. The employer did not communicate any room to move. Any reasonable recipient of all the employer's communications up until the January 22, 2020, meeting would have viewed this as a final offer.

[204] After it learned of the section 80 application, the employer refused to meet with the union. Further, it refused to clearly communicate that even its September 2019 offer was open for acceptance. The communications of July 28 to 31, 2020, are very telling.

[205] On July 28, 2020, Mr. Nedila emailed Mr. Hildebrandt, stating: “If the September 2019 offer isn’t a final why not make another offer?”

[206] In his email of July 31, 2020, Mr. Hildebrandt in effect refused to negotiate further and even refused to clarify whether the September 2019 offer remained open for acceptance:

> As we have repeatedly told you, given the impact on our business from the pandemic and other changing circumstances, we need to assess the business requirements moving forward with our TELUS contracts, before we can determine what is needed in a collective agreement to enable us to retain our remaining TELUS work. **A lot has changed since we made our previous offer that you rejected.**
>
> **As you know, an application for decertification has been filed by the remaining LTS employees. Obviously, any future agreement would have to meet their interests if the IBEW remains their bargaining representation. Given these circumstances, it is best in our view to defer further bargaining until our situation with TELUS and your situation with our remaining employees is clarified.**
>
> (emphasis added)

[207] In the Board’s view, this is evidence that the employer did not respect the union’s exclusive right to bargain a CA on behalf of the employees, which arises from the Board’s certification of the union as the exclusive bargaining agent. The union has the exclusive right to bargain on behalf of the members of the bargaining unit. The exclusive right is not dependent on whether a revocation application is filed with the Board and there is a pending adjudication process. The persons bringing the revocation application generally have no right to interfere with the union’s bargaining rights for a first CA after the union has initiated a strike. The employer’s refusal to meet with the union until the revocation matter was resolved was a denial of the union’s bargaining rights granted by the Board’s certification.

[208] Further, it is evident that the employer was not making every reasonable effort to enter into a CA, as required by section 50 of the *Code*. The employer’s refusal to meet is evidence of a further undermining impact with bargaining unit employees. If the union is unable to even meet with the employer to resolve collective bargaining issues, it sends the message to LTS employees

that the union is redundant and superfluous and tends to reinforce attempts to revoke the union's certification.

[209] Further, during a time when it refused to meet with the union, the employer failed to clarify whether the September 2019 offer was a final offer and whether it was even open for acceptance given the employer's characterization that "a lot ha[d] changed." In the Board's view, this lack of clear communication breached the duty to make every reasonable effort to enter into a CA.

[210] As a result of its communications in July 2020, the Board finds that the employer was hoping that its problem of negotiating a CA would disappear through a revocation application and refused to meet to bargain a CA with the union in furtherance of that hope.

[211] Further, the Board has a concern that whenever the union used available tools under the *Code* in its attempts to advance bargaining, there was a strong pushback from the employer. There are many examples of this. One such example was the union attempting to use conciliation as a bargaining tool following the release of the scope decision. The Board notes that conciliation can often be very helpful in resolving collective bargaining disputes and can avoid strikes. As set out in Mr. Morris's letter to the union of February 6, 2019, the employer viewed this negatively, as simply a precursor to a strike and premature. The Board does not accept this characterization of the request for conciliation.

[212] The union took a strike vote. The Board notes that strikes and lockouts are the primary methods of resolving bargaining impasses. The employer responded that it would not change its bargaining positions because of a strike.

[213] The union made an offer of arbitration to resolve the issue, which the employer rejected. It is in this context that the union applied to the Minister for the Board to fix the terms of the CA, as it was clear to the union that it was getting nowhere.

[214] The Board notes that the union's use of tools available to a party under the *Code* to attempt to resolve a collective bargaining dispute cannot be the basis for the employer's refusal to meet with the union and bargain the terms of a CA. The duty to bargain in good faith is a continuing duty. It persists until a CA is signed by both parties. The employer's duty to make reasonable efforts to enter into a CA does not cease because of lawful strike action, because the employer is

upset with alleged picket line misconduct or adverse publicity from a strike, because the employer does not trust the union or because the union has filed a section 80 application and the Minister has referred it to the Board.

5. The Employer's "Fundamental Requirements" and Bargaining in Good Faith

[215] The employer has argued that it was the union's failure to accept its fundamental requirements of cost neutrality, flexibility and preservation of the performance- or merit-based culture that resulted in the parties' inability to reach a CA.

[216] The employer states that it is not required to concede these issues that it believes are essential to its continued viability in the TELUS open-shop environment. The employer says that the fact that the union did not concede these issues has resulted in the impasse that the union is now using to support its section 80 referral.

[217] The union argues that collective bargaining involves the exchange of proposals, not principles.

[218] The Board notes that the notions of cost neutrality, flexibility and preservation of the performance- or merit-based culture are bargaining principles or theoretical underpinnings to the employer's position. One might describe them as interests or values. These are not bargaining proposals or terms set out in a CA. There is a degree of nebulousness about these principles in the context of CA making. These principles articulated by the employer are about as concrete as the union seeking an agreement based on respect for the working person and fair wages and working conditions. The language is simply not concrete enough to be considered a bargaining proposal or a term in a CA.

[219] CA making is about coming to the terms in a CA that both parties are able to agree upon. To use the language in *CJMS Radio Montréal*, it is about the "art of seeking what is possible on both sides."

[220] In order for the parties to bargain in good faith, they bargain in respect of terms of a CA. A party is not required to accept the "theoretical underpinnings" of the opposing party's bargaining position. Many parties reach a CA despite having fundamentally different outlooks or approaches.

[221] The employer's repeated articulation of its bargaining principles at the various bargaining sessions was not helpful in advancing collective bargaining; what is necessary is the formulation of specific bargaining proposals that can be examined and discussed.

[222] The Board is precluded from considering some of the bargaining history between the parties because of mediation privilege. The parties appear to have met in 2021 for a period, but the Board is unaware of those negotiations, which were conducted on a without-prejudice basis. The Board was not told of any new signed-off proposals and therefore assumes that no progress has been made.

[223] Based on the admissible evidence, there is no evidence that the employer moved off of its September 2019 offer or made a new offer since that offer. There is evidence that the employer rejected the next union proposal on October 25, 2019. There is evidence that by January and February 2020, the union was prepared to abandon any restrictions on contracting out and that it accepted the principle of cost neutrality. Further, with the loss of the I&R work, the issue of piece rate for I&R employees has likely become less of an issue as only the SMB and I&R technicians are paid by piece rate. The Board also notes that LTS was able to reach a CA with the Construction and Allied Workers Union, CLAC Local 68 (CLAC) that has scheduled hourly rates for its technicians on the construction side of Ledcor.

[224] The union attempted to explore the ambits of the September 2019 offer on January 22, 2020, when the parties met to discuss the I&R contract with TELUS. The employer ended up walking out of the meeting when it learned of the section 80 application. The union learned 10 to 15 minutes later that the employer had left.

[225] Further, between January and September 2020, the union attempted to restart negotiations. It made requests to the employer to clarify its position about whether the September 2019 offer was a final offer. The employer did not communicate that it was not a final offer until September 21, 2020. In an email sent that day, the employer stated: "We have never said LTS's September 2019 proposal was our final offer." The Board notes that this communication was inconsistent with the employer's past conduct. The employer has never made an offer since its September 2019 offer. The Board concludes, in fact, that the September 2019 offer was a final offer.

[226] The Board notes that there is a degree of gamesmanship about the employer's communications with the union, which was not apparent until the Board had before it all the admissible communications between the parties. In the ULP decision, the Board was looking at a snapshot about the bargaining that ended as of April 30, 2020, in relation to ULPs that allegedly occurred up to and in October 2019. Realistically, the bargaining ended much earlier.

[227] In the Board's view, the employer is not permitted to take CA negotiations to impasse because the union failed to communicate its acceptance of the theoretical underpinnings of the employer's September 2019 offer. Collective bargaining is about the exchange of offers, not agreement on principles. It is to be based on discussions.

[228] Further, the employer is not permitted to cease negotiating because employees have filed a revocation application. Nor can it cease to negotiate because the union has taken strike action or filed a section 80 application.

6. Is the Union Seeking to Impose a Cable-contractors-style CA?

[229] In the ULP case, the employer asked the Board to conclude that the union was seeking to impose a Shaw-style CA on it. The Board clearly informed the parties that it was unable to reach a finding on that issue because it did not have all of the bargaining evidence before it. In the ULP decision, the Board set out its findings about how the union had tendered a form of the CA because the employer had asked the union to do so:

> [129] Mr. Geheran testified that he had expected to hear what the employees wanted, but the union had instead delivered a full set of proposals with language that they had not seen before in a full draft CA. Based on Mr. Geheran's testimony, the employer's position was that this was an attempt by the union to force a Shaw-style CA on the employer.
>
> [130] Mr. Nedila testified that he was asked by Mr. Hoosen to provide a copy of a CA that the union had used with another telecommunications employer so that LTS could determine whether this agreement suited its business needs. The union bargaining committee tweaked the cable contractors' agreement to ensure that there was input from the LTS employees; however, the form was largely based on this agreement.
>
> [131] The Board prefers the evidence of Mr. Nedila over that of Mr. Geheran on the point of why the union provided a full offer in the form of a CA instead of simply articulating a list of what the employees wanted to change in the existing LTS terms and conditions of employment. Mr. Geheran has no first-hand knowledge on this point, as the initial communications leading to the union producing a full CA were the result of a request by Mr. Hoosen. Furthermore, there is no evidence that Mr. Geheran had any work experience bargaining with unions that advanced a traditional CA

> containing closed-shop and hiring hall provisions. The Board does not find it unusual for the union to provide a full set of proposals, particularly where it had a long history of organizing in the telecommunications industry and had CAs with TELUS competitors in the same geographic market area.

[230] The employer could have easily tendered its own form of CA based on agreements Ledcor had with other bargaining agents. Further, the employer had access to other forms of a CA that it had with the CLAC, the Carpenters' Union and the Labourers' International Union of North America, which the employer could have modified to suit its business environment. It knew its existing terms and conditions and what it needed for a CA. It had no proposals other than the status quo. What the employer was seeking could have clearly and quickly been encapsulated in a draft CA, by articulating and particularizing the status quo. The Board notes that the employer quickly produced the September 2019 offer when the mediator asked it to do so.

[231] The employer argues that it made it clear what the union needed to do to conclude a CA; however, while the employer made its principles clear, it did not show how they applied in the context of a CA. The easiest thing would have been to put forward a draft CA that demonstrated LTS's principles around flexibility, cost neutrality and a merit-based system. The union then would have had a basis on which to consider the proposed terms.

[232] In reviewing all of the evidence, the Board accepts that the union's long-term goal is to bring parity between the TELUS and Shaw worlds so that there is no undermining of its long-standing gains in the telecommunications industry. The Board accepts Mr. Nedila's testimony that the union was not expecting to realize this objective in the short run—meaning the first round of collective bargaining with LTS.

[233] The Board notes that in its original section 80 submissions, the union asked the Board to impose a CA that is largely based on its October 25, 2019, offer. The Board has reviewed the version of the agreement that the union put forward in the section 80 referral as one that the Board should impose on the parties. The Board appreciates that, as a matter of remedy, the union is not now seeking the imposition of that agreement.

[234] Part of the proposed agreement contains articles that have been negotiated and agreed to between the parties, and part contains the union's acceptance of some of the employer's September 2019 offer. The rest of the articles are proposals that the union made to the employer

in bargaining. The proposed agreement uses some of the language contained within the cable contractors' agreement, but it is significantly different from that agreement. The differences include:

(a) an I&R piece rate in Appendix A, with a minimum of $2,500.00 per pay period, with employees who do not reach that amount to be topped up; and
(b) permission to contract out, to the extent that the employer will not exceed 20 per cent of the number of employees in the bargaining unit.

[235] On the whole of the evidence, the Board finds that in bargaining this CA, the union is not seeking to impose the cable contractors' agreement on LTS. The template was used as a starting point, and it is evident that the union is willing to substantially depart from its cable contractors' agreement. It did so by its offer of October 25, 2019, in which it made substantial movement on contracting out. Further, on January 22, 2020, the union attempted to probe the employer's position, inquiring as to what the employer's position with regard to MXU technicians and the open- or closed-shop issue would be if the union were to give the employer contracting out and cost neutrality for the I&R technicians.

[236] The Board finds that in the January 22, 2020, meeting, the employer was not prepared to discuss any issue other than one that would have bolstered its ability to renegotiate its I&R contract with TELUS.

[237] Further, when the ULP hearing began in February 2020, Mr. Nedila signalled in his emails to the employer that the union was open to wage neutrality and no restrictions on contracting out. The employer blew off the union's attempts to bargain by offering different excuses and preconditions.

[238] The Board rejects the employer's theory that this is a case about the union seeking a Shaw-style or cable-contractors-style CA. That was the template provided by the union, at the employer's request. It was certainly open to the employer to provide a template for collective bargaining; it appears to have chosen not to do so as a matter of its strategy—it was content with the existing terms and conditions of employment. The Board notes that by the time of the referral to the

Minister, the union had abandoned the idea of using its cable contractors' agreement, in particular the bar on contracting out.

7. Is this a Case Where, as the Employer Alleges, the Union Will Not Make the Concessions Necessary to Reach an Agreement Because it Hopes That the Board Will Impose Terms Under Section 80 of the *Code*?

[239] The Board may dismiss a referral in circumstances like *MacLean-Hunter*, where the evidence demonstrates that the union is simply seeking a strategic advantage and did not negotiate seriously and realistically. The Board notes that in *MacLean-Hunter*, a strike by the union had lacked support from its members from the outset, and there was no indication that the employer had committed ULPs or bargained in bad faith.

[240] A party applying to the Minister to have the Board settle the terms of a CA has no guarantee that the Minister will refer the application to the Board. There is also no guarantee that the Board will intervene and, even if does, that the Board will impose terms favourable to the applicant party. The Board notes that it applies section 80 in a conservative fashion and that a party cannot expect any novel terms (see *CJMS Radio Montréal*).

[241] There is no cogent evidence before the Board that the union is simply waiting for it to impose the terms of a CA while ignoring its duty to bargain in good faith. It is clear that the union was seeking to meet and bargain with the employer at all material times. On a balance of probabilities, the evidence supports the union's theory that the employer has simply refused to negotiate since it tendered its September 2019 offer immediately before the strike.

[242] The employer's strategy of refusing to meet and bargain with the union over many months is evidence that it was not bargaining in good faith or making every reasonable effort to enter into a CA. This is despite Mr. Geheran's testimony that LTS was interested in concluding a CA, on its terms. The Board might have expected a short hiatus in bargaining immediately after the calling of the strike for the parties to be able to gauge the impact of the strike and assess their respective positions. The Board comes away with the sense that the employer was stonewalling the union by refusing to meet.

8. Unusual Offers and Intransigence

[243] The employer argues that it is not the Board's business to comment on the appropriateness of the parties' bargaining positions, provided that the employer has a genuine interest in engaging in collective bargaining.

[244] The process of free collective bargaining may not result in a party getting what it wants—its preferred bargaining outcome. Typically, in determining whether to intervene, the Board does not consider the content of offers. The *Code* encourages free collective bargaining and does not provide a template approach to CA making.

[245] Intransigence about unusual terms and conditions, however, may be an indicator of bargaining in bad faith (see *Yarrow Lodge*).

[246] The employer clearly outlined the business risks, as a labour contractor, that it has in its dealings with TELUS, where TELUS has control over the work assigned and the price it pays for that work.

[247] The employer has chosen to deal with its TELUS business risks by preserving an unrestricted and discretionary contractual right to change CA entitlements, without any notice to the union. Further, the approach that the employer has taken, particularly with respect to wages and scheduling, sterilizes the union's ability to have any meaningful impact on the working conditions of the LTS employees.

[248] The employer appears to believe that this is essential to the continuing viability of its TELUS business. The Board notes, however, that the reason for the existence of a union certification is to permit the union to bargain collectively on behalf of the employees, to improve conditions, including their wages.

[249] Many CAs recognize the need for flexibility in a CA. For example, even in the cable contractors' CA, the parties to that agreement address the circumstances where there is a need to be competitive in bidding on new work. They then have a mechanism to negotiate changes to the CA. This is expressed in the Letter of Understanding Number 2 in the cable contractors' CA:

> The Local Union in conjunction with the Employers' representative or the Employer bidding work, may determine on a job by job basis if special dispensation is required to become competitive, and should the necessity arise, may by mutual agreement in writing, amend or delete any terms or conditions of the Agreement for the length of the job.

[250] Article 15 of the employer's September 2019 offer provides for complete employer discretion over the hours of work, and this is unusual. Typically, shift schedules are set out in a CA. It is possible for the employer to use this clause to convert a full-time employee into a day labourer, with hours set at the employer's whim.

[251] Article 17 of the employer's September 2019 offer was a very unusual offer in terms of remuneration to employees.

[252] The employer stated the following in its written argument:

> 337. As long as the prevailing pay structure was maintained, there could have been adjustments around the edges regarding the need for LTS to exercise ongoing flexibility regarding wages, but the Union never accepted the existing pay structure. Therefore, there could be no discussion about adjustments. The Union had to first accept that the existing terms were fair and reasonable, and necessary for LTS to continue to obtain work from TELUS.

[253] However, there is no evidence that, during the bargaining process, the employer ever communicated this position about adjustments to the union. Mr. Nedila was never cross-examined on this issue. That is something that arose in Mr. Geheran's testimony and perhaps can best be characterized as the employer's subjective and undisclosed intention first articulated at the hearing. The employer never gave any signals to the union that there was flexibility about this issue. Indeed, the employer did not put a monetary offer on the table for almost two years of bargaining and has not put a subsequent monetary offer on the table since its September 2019 offer, despite a lengthy strike. This is an example where the conduct shows a lack of flexibility on the employer's part.

[254] The Board notes that in an email of March 6, 2018, the union indicated that the employer had not responded to the majority of its proposals made in November 2017, and the union asked that the employer either accept the offer or provide a counteroffer in writing. The Board finds that this was a direct request for an inclusive offer, including a wage offer. The Board notes that at the conciliation sessions of April 1 to 3, 2019, the union agreed to extend conciliation, and bargaining dates were set for June 3 and 10 to 14, 2019. Mr. Nedila's notes stated: "the purpose of the

agreement aspect of monetary to come together." Mr. Nedila testified that the union agreed to extend conciliation in order for the employer to provide a monetary proposal by the June 2019 bargaining dates. The Board also notes that on June 10, 2019, LTS provided the union, through the conciliator, with what appeared to be an agenda for the June 10 to 14, 2019, bargaining sessions. Article 14 (hours of work) and Article 16 (wage schedule) are listed on the agenda. The Board notes that the employer did not tender any proposals about wages at the June 2019 bargaining sessions; nevertheless, the union agreed to extend conciliation. Mr. Nedila explained that the union was hoping to see a proposal from the employer in writing. On July 26, 2019, when the employer still had not presented a monetary offer, the union advised the employer that it would not extend conciliation but would agree to further bargaining. The union expressed the concern that they were not getting anywhere. It referenced monetary aspects of the proposals.

[255] The employer rejected the union's October 25, 2019, offer, which contained a different wage structure from the employer's September 2019 offer. It repeatedly urged the union to accept the September 2019 offer and communicated to the employees that it was the only offer that would allow the employer's business to remain viable. Further, it is unclear whether the September 2019 offer remains on the table in light of subsequent communications about the impacts of COVID-19 and the loss of the I&R contract.

[256] The Board notes that wages or pay are a fundamental part of any CA.

[257] The Board notes particularly that with the loss of the I&R contract, there was an opportunity for further negotiations that could have resulted in common ground on Article 17. The union had some objections to the use of the piece rate as a basis for compensating I&R employees. At LTS, the use of the piece rate had historically been limited to the I&R and SMB technicians. The employer had experimented in the past with this approach with the BFS technicians, but this was not how it compensated the BFS technicians during the relevant period. With the loss of the I&R work, there was an opportunity to reconsider, rethink and negotiate the compensation schedule.

[258] The Board also notes that the employer's approach in Article 17 is markedly different than that set out in the CA between a related company, LTS OSP Services Limited, and the CLAC for splicers and linesmen, who had schedules and hourly rates for work performed. In the ULP decision, the Board found as follows:

[32] An example of such an open-shop agreement in the Ledcor group is a CA between LTS OSP Services Limited and the Construction and Allied Workers Union, CLAC Local 68 (expiry date September 9, 2022). This is the company whose labour relations are under provincial jurisdiction, to whom LTS transferred the linemen and splicers it employed at the time of certification. This is an open-shop agreement with no requirement for union membership (Article 7.02). There is no union hiring hall. The wage schedules applicable to job descriptions are set out as a schedule to the CA and the wage rates are based on hourly rates, not piece rates. There is a provision that the parties will meet and agree on a wage scale applicable to a project prior to its commencement (Article 10.02). The CA also sets out a normal work week of 40 hours per week (Article 11.01).

[259] Mr. Geheran testified that the pay provisions in Article 17 of the September 2019 offer were not about LTS making cuts; however, it is also clear that LTS was seeking operational flexibility to respond to changes that TELUS might make in the type and price of work assigned to LTS. Mr. Geheran made it clear in his evidence that TELUS does demand changes. It is also clear from Mr. Geheran's evidence that LTS is responsive to requests that TELUS makes and that it is a customer-centred organization.

[260] It is not difficult to foresee that the employer might be incentivized to reduce wages as a result of changes made by TELUS. Article 17 provides that wages can be reduced at any time and without notice to the union.

[261] The Board notes that the existing pay structure was not set out in the September 2019 offer. Mr. Geheran testified that it was easier for everyone if it was not in the CA. The Board disagrees. Wages are a basic and fundamental element of any CA. A CA should clearly set out a basis for compensation that is understandable to an employee. The only clearly understandable feature of the employer's proposal in Article 17 was that the employer could unilaterally alter the existing pay rates with no notice to the union or to the employees.

[262] If the pay structure were not clearly set out in the CA, it would be extremely difficult for employees to be able to ascertain whether their pay was correct or for the union to pursue any grievance concerning pay.

[263] Mr. Nedila had never seen such pay provisions in his years of experience. LTS led no evidence that these were normal pay provisions in the industry; however, the Board accepts that they were part of the terms and conditions for I&R technicians at LTS at the time of the certification.

[264] Further, the pay provisions are substantially different in comparison with the pay provisions applicable to other technicians within LTS (albeit construction-side employees), for example, who

are represented by the CLAC. They are substantially different than the wage structure in the closed-shop system with the cable contractors.

[265] The Board finds that the piece-rate system was not an industry standard in comparison with the dealings of LTS with splicers and linesmen, or in the Shaw CA with technicians. The employer filed an extract of the CA between TELUS and the United Steelworkers, USW, Telecommunications Workers Union, National Local 1955 (November 27, 2016, to December 31, 2021), but the extract did not include information about how TELUS pays its technicians.

[266] The Board also accepts that the offer was unusual because many employees are paid an hourly rate and not by piece rate. There are some exceptions. The Board takes adjudicative notice that in some industries, such as interprovincial trucking, it is common for employees to be paid on a per-mile basis, which is a type of piece work. Ordinarily, however, employees are paid by the hour or a salary for work performed.

[267] Generally, the hourly rate and adjustments over the term of the CA are set out in the September 2019 offer. Further, the piece rate was not set out in the September 2019 offer. Finally, it is rare that a union would agree to a CA that could result in a wage reduction at the employer's discretion.

[268] The Board notes that in *Intek Communications Inc.*, 2013 CIRB 683 (*Intek*), in the context of a bad faith bargaining complaint under section 50(a) of the *Code*, the Board found that a proposal that provided for the employer's unilateral right to change wages—"a wage proposal cast in jello"—was an unjustified impediment to collective bargaining, or a breach of the duty to bargain in good faith. The bargaining unit in that case was a group of technicians who supplied services to the home cable customers of Rogers Communications Inc. (Rogers), the sole customer of Intek Communications Inc. (Intek). The Board notes that there are some parallels with the work performed by the employees in that matter and the I&R work that LTS performed for TELUS. The salient term of that proposal was set out in the decision as follows:

> [96] For example, Intek's opening wage proposal (Ex-1; Tab 23) in the introductory paragraphs of Appendix A "Job Classifications and Wage Rates", read:
>
> > APPENDIX "A"

> JOB CLASSIFICATIONS and WAGE RATES
>
> PIECE RATES FOR PIECE WORK TECHNICIANS AND PIECE WORK TECHNICIANS (COMMERCIAL)
>
> Effective on the date of ratification and for the duration of this Agreement the piece work rates shown on Appendix "C" attached shall apply.
>
> **It is expressly understood that the Employer reserves the right to implement reductions, charge backs or and reversals to piece work rates or earnings and to make changes to Appendix "C" in order to respond to business and customer requirements.**
>
> (emphasis added)
>
> [97] The above reference to "customer requirements" refers to Rogers, Intek's sole customer. The reference to Appendix C refers to a list of the piecework codes that Intek technicians use. Employees are paid on a piecework basis, meaning that they receive a specific payment based on each code they complete during their workday.

[269] In *Intek*, the Board noted that the employer had modified its position to provide for arbitration where there was a dispute between the parties about new piecework codes, but Intek maintained the right to charge back for work that Rogers deemed unsatisfactory. The Board was satisfied that the union had "never received a full and lawful wage proposal that Intek could not change unilaterally" (paragraph 412). Further, the Board found that unilateral changes would negatively impact employee remuneration, without any recourse for the union.

[270] The remedy imposed in that case was for Intek to table a final offer withdrawing the term that purported to give it the unilateral right to impose those changes. The Board notes that in *Intek*, it determined that while the employer had breached the duty to bargain in good faith, imposing a CA was not a proportional remedy. In comparing the facts of the matter before it to those in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 (*Royal Oak Mines*), the Board found that they were not sufficiently exceptional to justify imposing the terms of a CA. *Royal Oak Mines* was an unusual case involving "tragic violence, and a cancerous ill will that divided workers from management, workers from workers and indeed the whole community of Yellowknife" (paragraph 4).

[271] The Board notes that the effect of Article 17 is to neutralize the union's ability to effectively negotiate wages, a critical condition of employment for its members. As the union put it, it is an offer that no reasonable union would accept. Putting forward an unusual contract proposal and

taking it to impasse is an example of a party failing to make every reasonable effort to enter into a CA (see *Yarrow Lodge*). This supports a finding that LTS is not making every reasonable effort to enter into a CA.

[272] Further, an employer putting forward a term that it knows is bound to fail is not bargaining in good faith (see *Royal Oak Mines*; and *Brewster Transport Company Limited* (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574)). The employer may argue that it is an existing term and that it is acceptable to the employees; however, it is the union that has the right to bargain the CA, not individual employees. The Board notes the evidence that the union was vociferous in its response to this clause.

[273] Under section 50(a)(ii) of the *Code*, the parties have an obligation to make every reasonable effort to enter into a CA. That means that irrespective of whether a strike has been declared, the fact that the employer does not like union conduct during the strike, including media communications or personal attacks on the owners or managers, the fact that the union sought intervention under section 80 of the *Code* and the fact that certain employees wish to decertify the union, the employer is obliged to meet with the union and bargain the terms of a CA.

[274] Further, the Board finds that the duty to bargain in good faith and make every reasonable effort to enter into a CA is a duty that persists even for labour suppliers such as LTS.

[275] The Board notes that employees' wages are not the same as commodities where there are daily fluctuations or downward corrections based on the price paid to the employer by its customers. Nor are they the same as other business inputs, such as the cost of supplies, which may increase or decrease in value. Generally, wages are a significant cost to a business. Employers that are unable to remain competitive make business decisions about the services they offer.

[276] The employer has repeatedly submitted that it will simply cease operations, "like Telecon did," if it cannot get what it wants through the collective bargaining process. In the past, Telecon Inc. was another contractor with TELUS. On February 19, 2018 (Board order no. 11227-U), the Board certified the IBEW as the bargaining agent for a unit of technical field and warehouse

employees working for Telecon Inc. in British Columbia. Telecon Inc. later ceased operating in British Columbia, without reaching the terms of a CA with the IBEW.

[277] LTS has said that it would prefer to continue operating in British Columbia but that doing so would require the Board to dismiss the referral on the basis that it has bargained hard but in good faith. It states that the union clearly does not accept the principles of cost neutrality, flexibility and a merit-based culture, which the employer honestly believes are necessary to maintain its business with TELUS.

[278] The Board has no power to compel LTS to remain in business against its wishes.

[279] As Mr. Geheran pointed out in his evidence, although the Ledcor Group is a big set of companies, LTS is a standalone division. LTS has to decide whether it is "worth it" to have a business relationship with TELUS, in which TELUS apparently repeatedly seeks cost reductions from its contractors. For example, if TELUS wishes to engage in a "race to the bottom" where it insists on regular 6 per cent reductions from its contractors such as LTS, as it did for its I&R contract renewal process in 2021, LTS will need to make a business decision as to whether its business relationship with TELUS is sustainable.

[280] The Board notes that that decision—whether to remain in business in British Columbia—is for LTS to make. Assuming that TELUS and Shaw need technicians for their telecommunications systems, regardless of whether LTS remains in business, a decision by LTS to exit from TELUS work in British Columbia may ultimately have little long-term effect on technicians. The Board cannot assume that LTS leaving the field will necessarily result in long-term job loss for technicians, particularly given, as LTS has pointed out, that the services it offers are ubiquitous, and entry into the technician market has a low threshold. It may be that while there will be continuing work for technicians, there may be a shift in who employs the technicians. While there might be a demand for technicians, there may be a limited demand for the labour contractors who supply the technicians. Again, this is LTS's decision to make.

[281] The Board finds that LTS failed in its obligation to make every reasonable effort to enter into a CA, in part by creating an impasse on unusual terms about wages and scheduling. The Board

is persuaded that these types of proposals are a marked departure from industry standards, and it is a factor that the Board should consider in deciding to intervene.

9. Alleged Game-Playing

[282] The employer argues that any communication from the union to LTS negotiators following the section 80 referral is simply posturing or game-playing by the union. The employer argues that this was simply building a record for the section 80 referral.

[283] It is clear that LTS lacks trust in the union, and vice versa. Part of the lack of trust is portrayed as arising from the union's filing of the section 80 application without notifying the employer. The Board notes that there is no obligation to provide an employer with notice of a section 80 application.

[284] The employer cross-examined Mr. Nedila on the issue of the union's alleged game-playing. Unsurprisingly, Mr. Nedila did not concede this point.

[285] It is the Board's view that the employer's allegation that the union was playing games is improbable.

[286] The Board rejects the employer's assertions, contained in many of the contemporaneous emails from Mr. Hildebrandt, that Mr. Nedila was playing games and attempting to build a record for the section 80 referral. It would have been very simple for the employer to test whether the union was genuine by meeting with it. In the Board's view, the lack of trust is not a reason for not meeting.

[287] The Board notes that there was adverse media publicity about the strike that was concerning to the employer. There is no evidence, however, of any business harm arising from the publicity. The employer addressed some of the adverse publicity by obtaining apologies from certain union officials. The employer cannot set up adverse publicity as a ground for failing to negotiate a CA.

10. Employer Conduct Demonstrating a Refusal to Recognize the Union

[288] The Board is persuaded that the employer has engaged in conduct that would render the union impotent in the eyes of employees and that this supports a finding that it failed to make a reasonable effort to enter into a CA (see *Huron Broadcasting*; and *Yarrow Lodge*).

a. Denial of the Bargaining Unit That Included Drops and MXU Technicians

[289] The clearest example of this failure occurred in the first bargaining session in November 2017, where the employer refused to negotiate the terms and conditions for drops and MXU employees and communicated to employees that these technicians were not part of the bargaining unit. This was the subject of findings in the ULP decision.

[290] The Board notes that in the ULP decision it found that the employer had taken a "tit for tat" approach which is in essence a game that the employer played at that time. This is discussed further at paragraph 312 to 315 below. The Board further notes that it was the employer that put forward a myriad of excuses for not meeting and bargaining with the union following its September 2019 offer.

[291] The Board also notes that a wedge has developed between the union and the MXU employees.

[292] Since the strike, there has been a layoff of the I&R technicians who previously provided a large proportion of the union's support base within the bargaining unit. The Board determined in the ULP decision that these layoffs were not motivated by anti-union animus. Nevertheless, there has been an erosion of the bargaining unit and a shifting of the composition of the bargaining unit from those employees who supported the union to those employees who do not support it.

b. Negotiating Conduct on the Union Recognition Clause

[293] Under sections 36(1)(a) and (d) of the *Code*, once certified, the union is the bargaining agent and has exclusive authority to bargain collectively on behalf of employees. These sections read as follows:

> **36 (1)** Where a trade union is certified as the bargaining agent for a bargaining unit,

> **(a)** the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;
>
> …
>
> **(d)** the trade union so certified is deemed to be the bargaining agent for the purposes of paragraph 50(b).

[294] At a bargaining session on July 12, 2019, more than 21 months after the Board granted the certification, the employer submitted a proposal for the union recognition clause (clause 2.01) that removed the word "exclusive" from the description. The employer's proposal read as follows:

> 2.01 **Bargaining Agent**
>
> The Company recognizes the Union as the sole ~~and exclusive~~ bargaining agent for those employees governed by the Union's certification.

[295] LTS restored the word exclusive in its proposal of June 13, 2019.

[296] The Board notes that one of the union's complaints is that inordinate time was spent bargaining on issues that should not have been in dispute. This is but one example of time wasted on non-productive issues.

c. Asserting Collective Bargaining Should Be Delayed Pending the Outcome of a Revocation Application

[297] As a result of its review of the July 2020 communications the Board finds that the employer was hoping that its problem of negotiating a CA would disappear through a revocation application and the employer refused to meet to bargain a CA with the union in furtherance of that hope.

[298] On July 27, 2020, Mr. Howell, an MXU employee who was crossing the picket line, filed a revocation application with the Board. On July 31, 2020, the employer used the revocation application as a reason to refuse to meet with the union. The Board has issued a bottom-line decision in *Howell*. The Board notes that there is no evidence that the employer was involved in Mr. Howell's application, but the employer made submissions supporting it.

[299] The employer's refusal to meet until the revocation matter was resolved was a denial of the union's bargaining rights granted by the Board. The union has the exclusive right to bargain on

behalf of members of the bargaining unit. Further, when an employer communicates that any terms have to be consistent with what the dissenters wish, it is unlawful interference in the union's internal affairs for the purposes of section 94(1)(a) of the *Code*.

d. Employer Communications

[300] The union has submitted that the employer's communications to bargaining unit members have discredited it and eroded confidence in it. The union points to employer communications with employees immediately following the issuance of the certification order, as well as the employer's handling of the union's request for contact information. Further, the employer provided some information to employees immediately following the first bargaining session, and the Board found this communication to be a ULP and breach of the duty to bargain in good faith. The union also points to communications before and after the strike commenced.

[301] The employer argues that even if the Board could adjudicate issues about communications at this stage of the proceeding, LTS is entitled to communicate with its employees and inform them of its positions.

[302] The union alleges that there are similarities to other cases where the Board intervened because the employer had engaged in communications misconduct. Conduct that has discredited the union in the eyes of the employees or eroded confidence in it has been one of the bases for intervention under section 80 of the *Code*.

[303] The employer states that the union took no exception to any employer communications, other than those about the inclusion of MXU and drops employees in the bargaining unit. The employer argues that the communications do not establish that it is unwilling to enter into a CA. The employer says that the communications show that it has been consistent about what is necessary to reach an agreement on more significant and substantive terms.

[304] Communications can be important and can form the basis for a ULP complaint. The Board notes that the bargaining protocol that the parties agreed to on November 7, 2017, permits employer communications.

[305] The union has not alleged a violation of section 94(1)(a) of the *Code*. Section 94(1)(a) reads as follows:

> **94 (1)** No employer or person acting on behalf of an employer shall
>
> **(a)** participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[306] Section 94(2)(c) of the *Code* reads as follows:

> **94 (2)** An employer is deemed not to contravene subsection (1) by reason only that they
>
> …
>
> **(c)** express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

[307] The leading CLRB and Board cases on this subject are *Saskatchewan Wheat Pool* (1996), 101 di 127 (CLRB no. 1167); *Sedpex Inc.* (1988), 72 di 148 (CLRB no. 667); and *TELUS Communications Inc.*, 2005 CIRB 317, a reconsideration decision. There is a balance to be struck between the union's right to administer itself and represent employees and the employer's right to make truthful and accurate statements.

[308] In *Saskatchewan Wheat Pool*, the CLRB held that the employer must take care that its communication does not subvert, circumvent or replace the union in its role as the exclusive bargaining agent.

[309] The Board summarized the case law that relates to employer communications in *TELUS Communications Inc.* In that case, the Board found that the employer's written communications which suggested that the union was misleading its members fell outside the scope of exceptions listed in 94(2)(c) of the *Code* (see *TELUS Communications Inc.*, at paragraph 133). The Board noted the following:

> [115] The Board has consistently held that section 94(1)(a) of the *Code* does not prohibit all communications between employers and employees. **Instead, it is aimed at protecting unions and employees against employer communications that may undermine the union's role as the sole bargaining agent for the employees, as entrenched in section 36(1)(a) of the *Code*.**
>
> (emphasis added)

[310] The Board notes that the employer vigorously communicated with its employees about the union and its certification in a very negative way at critical times after the certification was granted and during the bargaining process. One example of negative and misleading communication was Mr. Richard Hoy's communication about the certification. The Board's usual approach in certification matters is to issue a certification order without issuing separate detailed reasons for decision (see *Coastal Shipping Limited*, 2005 CIRB 309). On September 1, 2017, Mr. Hoy communicated to LTS's employees that the Board had issued a certification order without providing reasons or an explanation, the implication being that something improper had occurred.

[311] On September 7, 2017, Mr. Hoy notified employees that the union had requested their contact information, and he solicited objections from employees with privacy concerns about providing contact information. Employee contact information is essential, necessary and normal information required for collective bargaining. The failure to provide such information can be the basis of a bad faith bargaining complaint under section 50(a) of the *Code* (see *Bank of Canada*, 2007 CIRB 387).

[312] On November 11, 2017, Mr. Hoy communicated to employees that the IBEW was attempting to enlarge the bargaining unit. The Board notes that in a bargaining update in August 2019, issued before the union's proposed strike vote, the employer did not fully disclose its misconduct in taking a "tit for tat" approach about drops and MXU employees. Mr. Geheran stated:

> Bargaining began in November 2017 and stopped in February 2018 when the IBEW tried, unsuccessfully to increase the scope of their representation to include employees on the core infrastructure side of our business. The IBEW told the Labour Board that bargaining couldn't continue until that issue was resolved.

[313] The Board notes that LTS's communication of July 27, 2021, which appears to be in response to the Board's remedial order in the ULP case, does not fully reflect the Board's findings. LTS stated:

> The Board did make one finding against LTS, namely, that LTS was incorrect in our communication to employees on November 11, 2017, that the drops and MXU employees were not part of the bargaining unit. LTS respectfully accepts the CIRB's finding in that regard.

[314] The Board actually found as follows in the ULP decision:

> [246] The employer has argued that there was mutual confusion between the parties about the scope of the bargaining unit. The Board finds that this was not the case.
>
> [247] Section 36 of the *Code* recognizes the certified bargaining agent as having exclusive authority to bargain collectively on behalf of employees in the bargaining unit. This provision codifies the effect of the union's certification but does not impose an obligation on the employer that can give rise to a complaint filed pursuant to section 97 of the *Code*.
>
> [248] However, in the past case law, the Board has found that a concerted strategy aimed at reducing the size of the bargaining unit, including the refusal to recognize the union as bargaining agent, is a violation of section 94(1) of the *Code* (see *Verspeeten Cartage Ltd.*, 2000 CIRB 58; and *Verspeeten Cartage Ltd.*, *supra*). In addition, the Board has stated that the employer cannot evade its obligations under the *Code* by refusing to recognize the certified union as the bargaining agent for all or part of the employees in the unit and that such attempt may result in a breach of section 50(a) of the *Code* (see *British Columbia Telephone Company*, *supra*). A union cannot be required to conclude a CA for a smaller subset of employees than is set out in a certification.
>
> [249] In the circumstances of this case, the Board finds that the employer violated both section 50(a) and section 94(1) of the *Code*. The employer knew that the drops and MXU employees were part of the scope of the bargaining unit from the moment of the certification application at the Board. These employees were included in the list of employees as part of the certification application. The employer only started taking a stance on the drops and MXU employees when the union sought to include splicers and linemen in the scope of the bargaining unit, thus knowingly attempting to exclude a group of employees who were included in the scope. In addition, the employer communicated directly with the employees about this issue in an attempt to undermine the exclusive authority of the union, which therefore constitutes interference with the representation of employees by the union.

[315] In essence, the Board found in the ULP case, that the employer's conduct was not simply an error but was a bargaining strategy or trick. The Board notes that this misinformation persisted for some time and was not fully corrected by LTS, even after the ULP decision.

[316] On May 30, 2019, Mr. Morris communicated to I&R technicians that the union had refused to give a "required guarantee" of no strike action between June and October 2019, which "puts [the employer's] future work with TELUS in jeopardy." The Board notes that there was no required guarantee; there was a requested guarantee and no obligation for the union to give up its right to strike. The Board notes that the right to strike is constitutionally protected. Further, as mentioned, strikes or lockouts are the methods set out in the *Code* for resolving bargaining impasses.

[317] While the employer is entitled to communicate with employees, the Board's concern is that by doing this, the employer reinforced its message that members could not rely on what the union was telling them.

[318] Much of the employer's communications did not violate section 94(2)(c) of the *Code*, as there was no coercion, intimidation, threats, promises or undue influence. However, the continued drip of the negative messaging would tend to erode support within the bargaining unit and members' confidence in the union, particularly where the parties' negotiations were protracted, there was a lack of progress on key issues, the employer was stuck on proposals that no union could possibly accept and the employer refused to meet with the union for an extended period.

H. Summary

[319] Under section 50(a)(ii) of the *Code*, the parties are obliged to make every reasonable effort to enter into a CA. As mentioned, that means that irrespective of whether a strike has been declared, the fact that the employer does not like union conduct during the strike, including media communications or conduct directed at specific individuals, the fact that the union sought intervention under section 80 and the fact that certain employees wish to decertify the union, the employer is obliged to meet with the union and bargain the terms of a CA.

[320] In the Board's view, LTS has failed in that duty by:

(a) creating an impasse by insisting on unusual CA terms that were not industry standards for technicians, particularly the wage rates, which gave the employer the unilateral right to reduce or change the wage rates;
(b) refusing to meet with the union to bargain the terms of the CA for many months after it tendered its September 2019 offer; and
(c) focusing on attempts to have the union concede the reasonableness of employer bargaining objectives, rather than exchanging bargaining proposals that might have allowed the parties to reach an agreement on the terms of a CA.

[321] Further, the Board notes that in the ULP decision, it found that LTS had breached its duty to bargain in good faith by refusing to recognize drops and MXU technicians as members of the bargaining unit. The Board found that LTS's communications had driven a wedge between the MXU employees and other members of the bargaining unit. The Board reiterates that a revocation application was brought by Mr. Howell, a former MXU technician.

[322] Overall, the Board finds that despite its dismissal of the majority of the ULP allegations made by the union, the employer’s actions resulted in the denial of the representational rights granted in the certification and constituted a refusal to recognize the union. The employer’s actions have neutralized the union’s ability to participate in a meaningful way in collective bargaining.

[323] The Board is not satisfied that the employer engaged in negotiations for the purpose of ridding itself of the union. However, the employer’s actions would result in an average employee thinking that the union was of little or no assistance in negotiating the terms and conditions of employment. This could result in a revocation application. In fact, a revocation application was filed.

[324] The Board finds that these are exceptional circumstances and, for these reasons, has decided to settle the terms and conditions of the first CA under section 80 of the *Code*. In making this order, the Board is not re-balancing bargaining power or interfering in free collective bargaining but is making a required correction because the employer did not bargain in good faith and make every reasonable effort to enter into a CA. The Board is intervening because, in this case, there was a failure of the collective bargaining process as a result of the employer’s conduct.

I. Positions of the Parties on Remedy

[325] In a CMT on November 18, 2021, the Board asked that the parties provide, as part of their closing submissions, their proposals for step two of the process, should the Board be persuaded to intervene and impose the terms of the first CA.

1. The Union

[326] At this point, the union is not seeking that the Board impose the terms of the CA filed as Exhibit 10. The union says that there was bargaining on five occasions in 2021 and that the Board has not heard evidence about what was discussed or agreed to. The union suggests an order that the parties continue to bargain and then reconvene to impose an agreement if necessary. If the parties are unable to reach an agreement within 90 days, the Board will provide a mediator to assist the parties in resolving issues and, if this is unsuccessful after 60 days, the panel will reconvene and hold a hearing to impose a CA on the remaining issues.

2. The Employer

[327] The employer submits that there is little point in a further negotiation or mediation process as the parties are not going to make the movement necessary to reach an agreement. The employer says that its objections still stand, based on principles of cost neutrality, operational flexibility and the need to preserve a merit-based culture. The question for the employer is whether it will simply leave the province, as Telecon Inc. did. The employer submits that a sufficient number of hearing days needs to be set aside for the parties to lead evidence so that the Board can make an informed and responsible decision, bearing in mind the nature of the industry and the economic risks that LTS faces and to ensure that the Board does not impose an agreement that would effectively ensure that LTS is unable to operate in the industry.

3. The Remedy

[328] The Board has considered the possibility of simply remitting the matter back to the parties, with a direction that the employer make a new offer on wages and other matters in dispute, like the Board did in *Intek*. The Board has determined that this is unlikely to bear fruit. It notes, in particular, that it views LTS's conduct as an outright refusal to bargain.

[329] The Board directs the parties to meet with Ms. Foley, the IRO, to permit her to update her report of June 9, 2020, about what issues are agreed to and which remain in dispute. Ms. Foley will also assist the parties in developing a back-to-work protocol. The parties will have seven days following the receipt of the report to provide comments on her report.

[330] If the parties express an interest in attempting to resolve the remaining disputes, Ms. Foley may assist them, in her capacity as a mediator, with such discussions taking place on a without-prejudice basis.

[331] Once Ms. Foley reports to the Board and the parties have had an opportunity to comment on her report, the Board will schedule a case management conference to discuss the next steps to fix the terms of the CA that remain outstanding. The parties appear to agree that a further hearing is necessary. However, the Board reminds the parties that it may decide any matter without holding an oral hearing (see section 16.1 of the *Code*).

[332] Before leaving this matter, the Board wishes to encourage the parties to make one last effort to bargain the terms of the CA.

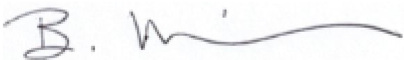
[333] The Board also intends to issue a back-to-work protocol after the parties have had an opportunity to provide input to the IRO or agree on such a protocol. The Board hopes that during the term of the CA, the parties will develop a more productive and trusting working relationship.

V. Conclusion

[334] This is a unanimous decision of the Board.

Paul Love
Vice-Chairperson

Gaétan Ménard
Member



Barbara Mittleman
Member