STRIKES & PICKETING

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Your business will be seriously disrupted if a labour dispute develops into a strike or a lockout and picketing occurs. You need to know if and how the effects of picketing can be minimized and if any relief is possible and, if it is, how to remedy the situation quickly and decisively. This document briefly outlines some of the major concerns and issues with regards to picketing and injunctions. Our goal is to increase your basic knowledge on these topics, in order to facilitate a more productive working relationship with our firm. It should be noted, however, that no two labour disputes are exactly the same and any specific questions should be directed to a member of the Fasken Martineau DuMoulin Employment, Labour and Human Rights Department.

This discussion deals with businesses governed by B.C. provincial legislation. Those in federal jurisdiction are governed by the Canada Labour Code and different provisions apply.

I. STRIKES AND PICKETING

Strikes and picketing are only lawful when there is no Collective Agreement in force between a union which represents employees and the employer. There may be no strike to gain recognition nor may a union declare a strike or authorize picketing while a Collective Agreement is in force.

A strike or a lockout and picketing are only lawful when used to apply economic pressure to settle a collective bargaining dispute.

A. Minimal Collective Bargaining

The Labour Relations Board (the “Board”) does not generally supervise the propriety of the demands of either party. It will not allow demands over the right to represent, the scope of the bargaining unit and some other issues to be taken to impasse. The Board does require that the parties have at least presented their demands and engaged in some bargaining before a strike or strike vote is held or a lockout takes place.

II. THE BARGAINING PROCESS - PRECONDITIONS TO LAWFUL STRIKES AND LOCKOUTS

There are a number of requirements that must be satisfied before a strike or a lockout may lawfully begin:

(i) The union and employer must first have engaged in collective bargaining and discussed the major issues in dispute;

(ii) A vote must have been held to determine if the majority of employees who vote favour a strike, or, in the case of an accredited employer’s
organization, if the majority of the employers in the organization favour a lockout;

(iii) Strike or lockout notice of 72 hours must have been given to both the opposing party and to the Board; and,

(iv) If a mediation officer has been appointed by the Board, a strike or lockout may not commence until 48 hours after the appointment is over.

(v) If one party has engaged in a lawful strike or lockout then provided it does so within 72 hours of the cessation of such strike or lockout, the other may strike or lockout without giving any notice.

Any failure to meet these general conditions outlined above renders a strike or lockout unlawful and remedies may be available.

III. VOTING FOR A STRIKE OR A LOCKOUT AND NOTICE REQUIREMENTS

The rules for strike and lockout votes are outlined in the Labour Relations Code (the “Code”). A strike may not lawfully occur until a vote has taken place in accordance with the Regulations. The Regulations specify a standard ballot which reads: “Are you in favour of a strike/lockout? Yes/ No.” A majority of those who vote must vote in favour of a strike in order for it to be legal. There are similar requirements for lockout votes. A strike may only commence within three months following the date of the vote and after the employer and the Board has been served with proper notice. The requisite 72 hour waiting period must have elapsed after written notice has been both filed with the Board and served on the employer. The required notice period may be extended by the Board due to the specific circumstances for the business affected. For example, if the struck location deals in perishable property which may spoil. If the services provided by the employees are deemed essential by the Board (as discussed below), then, on application, notice periods may be changed.

IV. PICKETING

A union which meets the legal requirements has the right to picket in a peaceful and orderly fashion on the public property at or near an employer’s place of business. The right to picket is tempered by the common law of tort including trespass, assault and intimidation and criminal laws which provide remedies and sanctions against a union or an employer engaging in illegal acts while a strike or a lockout is occurring. If illegal acts are committed by any party relief may be sought.

At common law, a union has a right to peacefully picket at an employer’s place of business during a lawful strike or lockout even if such picketing adversely affects an innocent third party. This right to picket is not absolute. Picketers may not trespass on private property, nor may they engage in intimidation, violence or other illegal acts on the picket line. Such picketing constitutes tortious conduct and the courts may grant an injunction to stop such activity.
Picketing is also disallowed by the Code if it occurs at the premises of an employer who is not the employer of the individuals doing the picketing. This is characterized as secondary picketing.

Because picketing is such an integral part of labour relations, the legislature has enacted quite elaborate limits and restrictions on the right of unions to picket employers. This legislation covers the location and timing of a strike and picketing. The Board has exclusive jurisdiction to deal with these issues.

In a labour dispute involving a provincial employer in B.C. the Code, and thus the Board, regulates where, when and, in part, why employees may picket. The courts retain jurisdiction only to regulate the “how”. This means in general terms the courts have no involvement unless the behaviour of the pickets amounts to a blockade, assaults, intimidation or actual damage. It has been stated this way:

“If the complaint concerns the picketing itself (i.e. the rights of the persons to picket at that time or at that location) the LRB retains normal jurisdiction. If the complaint concerns the conduct of persons on the picket line other than the picketing itself (i.e. tortious conduct such as blockading, nuisance, assault, trespass, intimidation, etc.) that can be adjudicated upon irrespective of the Labour Relations Code, the Courts retain jurisdiction. More colloquially, the LRB governs the ‘where’ and ‘when’ of picketing and the Courts governs the ‘how’.”

V. WHAT IS THE EMPLOYER’S PLACE OF BUSINESS?

Picketing may take place at an employer’s place of business. Many employers have numerous locations and sites where activities related to the business in question are carried on. A review of decisions indicates that where a site is clearly an important part of the employer’s business that site will be deemed as an appropriate place for picketing. However, a mere association with the business in question at a related site will not make that place susceptible to lawful picketing.

VI. SECONDARY PICKETING

The effects of a labour dispute are not always confined to the parties who are directly involved. Labour unions will often try to exert pressure on parties who are not directly involved in the dispute, such as customers, but who do continue to have close business relations with the employer. Secondary picketing has been defined as:

“... exertion of economic pressure, either through picketing or some other medium, on another employer or other person, to induce him in turn to use his influence, usually of an economic kind (for instance, the maintenance or severance of trade relationships, contractual or otherwise), on the employer with whom the union is engaged in a labour dispute.”
The provisions of the Code are designed to limit secondary picketing. Picketing may be permitted at the premises of an “ally”. An ally is a person who assists an employer in a lockout or in resisting a lawful strike.

VII. SEEKING RELIEF FROM UNLAWFUL STRIKES AND PICKETING

A. The Courts

In situations where the Code does not apply, the B.C. Supreme Court has jurisdiction. There are situations where this might happen:

(i) Where the conduct at issue while subject to provincial legislation, does not fall under the Code.

This involves disputes over “non-labour issues” usually tortious activity. These are situations which fall in provincial jurisdiction but which are not governed by the Code and include those where tortious conduct is alleged.

(ii) Another situation where the Board will not have jurisdiction is where picketing is occurring in relation to a dispute that does not involve labour relations such as a consumer boycott. There are various scenarios that fall outside or on the “fringe” of labour that may not be considered an actual labour dispute. Usually, and apart from tortious behaviour, the Board will have jurisdiction in all matters that involve a dispute between an employer and the union representing its employees.

(iii) Where the issue involves federal jurisdiction.

(iv) Where the issue involves a labour dispute from outside the province.

B. Labour Relations Board

Usually the first approach is to see if the strike and picketing is lawful or may be restricted by the Code. As outlined in the Code there are a number of complaints and issues over which the Board will have jurisdiction, such as:

- Illegal strikes or lockouts
- Hot “declarations and boycotts”
- Secondary Picketing
- Common site picketing

The Board has the power to order remedies when any of the above topics are involved and either side of a labour dispute contravenes the Code.
C. Definitions

- Picketing - is defined in the Code. It means attending at or near a person’s place of business, operations or employment for the purpose of persuading anyone not to:
  
  (a) enter;
  (b) deal in or handle products;
  (c) do business with that person;

  and similar acts with equivalent purpose. The Supreme Court of Canada in the K-Mart case has decided this definition is too broad because it unduly restricts freedom of speech. The legislation has not been amended. Thus at present the LRB issues orders which state that the restriction on picketing “… does not include consumer leafleting”.

- Leafleting - as a result of the decision in K-Mart passing out leaflets at other than the place of the labour dispute is permitted provided the leafleting is directed to the public including customers and is not a call to employees at that site to cease working and is not otherwise tortious as being intimidating, a blockade or impeding passage or interfering with the contracts of suppliers to the site.

- Hot Declarations - a Hot Declaration refers to a declaration, usually by the BC Federation of Labour, that an employer is unfair and calling on the members of all unions affiliated to boycott the product or service.

- Secondary Boycotts - refers to a request by a trade union that union members and supporters not deal in the product or service and sometimes involves the picketing of a party unrelated to the dispute in an effort to indirectly put pressure on the employer to settle. The typical targets of a secondary boycott are suppliers, customers and landlords of the employer engaged in the dispute with the trade union.

VIII. CONSEQUENCES OF AN UNLAWFUL STRIKE OR LOCKOUT

An application to the Board regarding an unlawful strike, picketing or a lockout may be made quickly. The Board will usually schedule a hearing the next day unless the disruption is critical and then a hearing may be held in a few hours. The Board has the power to order stopped any strike or lockout which is unlawful under the Code. The Board can make other orders to remedy any losses suffered by either side in a labour dispute.

IX. THE ROLE OF THE POLICE IN ENFORCING ORDERS

The law enforcement authorities have the jurisdiction and obligation to enforce court orders to their full extent. However, both the RCMP and the Vancouver Police have policies which
require that, as much as possible, officers be seen as neutral in these disputes. Policing authorities are reluctant to act in situations where a court order is being contravened and generally look for a specific court direction to them to enforce the order although they may act where there is a breach of public peace and/or the destruction of property.

**X. MATERIALS REQUIRED FOR AN INJUNCTION**

When seeking an injunction, a client may be required to provide some of or all of the following information for evidence in an affidavit

(i) The name, address and position of the deponent;
(ii) The nature of the Plaintiff’s business as relevant to the application;
(iii) Location of the picketing, including maps, diagrams or photos of the area;
(iv) The identity of the picketers and any other party involved;
(v) A description of the number of picketers and the nature of the picketing, which may include information such as:
   a) whether any persons have been prevented from entering or leaving the premises, and the identities of those persons, if known;
   b) any conversations with the picketers where they have acknowledged on whose instructions they are acting on, or have stated the purpose of the picketing by the union;
   c) any violence on the picket line;
   d) any damage to property caused by the picketers; and
   e) the effects of the picketing on the Plaintiff’s business.

or

(vi) Any other special or relevant information.

It will be useful to have any and all of this information available from a witness who has “first hand” knowledge so that injunctive relief may be sought. Hearsay information may be used but is not as effective.

**XI. REPLACEMENT WORKERS**

During a legal strike or lockout, an employer is restricted in many cases from replacing the employees who are striking. The Code restricts the use of replacement workers in a number of ways. An employer may not use the services of a person who:
• is hired or transferred after the earlier of notice to begin collective bargaining has been given or collective bargaining has started;

• ordinarily works at another of the employer’s places of operation;

• is employed or supplied to the employer by another person;

to perform the work of:

• an employee who is on strike, or

• ordinarily done by a person who is performing the work of a person who is on strike or locked out.

This does not mean that other work cannot be done by any replacement workers. For example, a person can be transferred into a different job at the location where the strike is occurring. However, such a transfer cannot be used to “free up” another person to do struck work. A non-striking employee may not be disciplined for refusing to perform struck work.

XII. ESSENTIAL SERVICES

A designation of essential services may be made on application where a dispute arising out of collective bargaining poses a threat to the health, safety or welfare of residents. If the Minister of Labour designates a service as essential, the Board will decide the overall level of service that must be maintained, if any, during a strike or lockout. The determination of which services and what level of service are essential is made after mediation and, if necessary, a formal hearing. An Order will include a full description of the types of services which must be provided and a detailed description of the excluded and bargaining unit personnel which must be available in order that services may be maintained. A review of the ability of those deemed essential to provide the required level of services may be made as the labour dispute continues. If the union has served strike notice before the essential services determination, then the union must re-serve its 72-hour strike notice before beginning a strike.

XIII. CONCLUSION

This informational paper outlines some of the major concepts and concerns of labour disputes that may result in picketing and the need for a cease and desist order or an injunction. The specifics of any labour dispute will affect the application of the matters discussed. As with any complicated legal topic, you are best to seek the advice of competent legal advisors as early as possible and preferably long before a labour dispute arises.

XIV. FEDERAL SECTION

The picketing which involves federal jurisdiction is not regulated by any provision in the Canada Labour Code and the BCLRB has no jurisdiction. This means such picketing is regulated by the
common law. At common law employees lawfully on strike against their employer may picket at the employer’s place of business. Common law tort principles apply. At common law, the Courts have very recently concluded that secondary picketing is permissible provided it is not done in a way which is otherwise tortious. The Courts have found that the right of an unrelated employer to perform business activities is less important than a union’s right to picket and communicate information about its dispute.

Disputes in the federal jurisdiction include three separate situations. The first includes employers in British Columbia who have their labour relations regulated by the Canada Labour Code. The second and third type of scenarios that will fall in the federal jurisdiction are those disputes which involve either employers who are federally regulated in a dispute with employees that are provincially regulated or employers that are provincially regulated in a dispute with employees that are federally regulated. The result of all these scenarios is that when a labour dispute involves a connection to a federal jurisdiction, the courts will be used to adjudicate over any picketing issues.

The determination of whether picketing is secondary often depends on the court’s characterization of the parties involved, the work being performed and the work sites which are under scrutiny. The courts jurisdiction to grant an injunction is discretionary thus, where it can be shown that there is a close corporate connection between two business entities or work which is normally performed by employees of a struck employer is being performed by another party, an injunction may be withheld and Secondary Picketing allowed. Even in cases where two unrelated employers share business or office space, the courts have been unwilling to enforce the rights of the employers over the rights of a union to picket lawfully as long as there is no damage or threat to people and/or their property. If it can be shown that the union can effectively picket without harming the non-involved employer, the court may conclude the union’s purpose is improper and prohibit the picketing.

There are a number of other remedies available from the courts which do not involve prohibiting the picketing. For example, a court may order that the picketing is allowable, however, the number of picketers may be restricted. The court may limit the location of the picketing, i.e. no closer than 10’ from the driveway. These orders might be granted where earlier picketing has resulted in tortious acts to people using the driveway to gain access to the employer’s premises.

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This paper is intended to be an explanation of the process not legal advice. For more detailed information or legal advice about any aspect or a specific case, please contact a member of the Employment, Labour and Human Rights Department at Fasken Martineau DuMoulin LLP.