Mediator Deborah Howes'

Guidelines for Enhanced Mediation

The Process

Section 65 of the Code does not provide any additional guidance to a mediator conducting enhanced mediation. The Code guides the mediator and the parties by the usual provisions:

> (3) The mediator shall, in any manner that the mediator considers fit, inquire into the dispute and endeavour to effect a settlement.
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> (4) During the mediator's inquiry the mediator shall
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> > (a) hear any representations made to the mediator by the parties to the dispute,
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> > (b) mediate between the parties to the dispute, and
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> > (c) encourage the parties to the dispute to effect a settlement.

One of the first things the parties and I had to do was determine how enhanced mediation differed from the normal section 65 mediation and what process the enhanced mediation would follow. We started from the conditions set out by the Board and built a process acceptable to all.

We set the schedule for meetings based on the estimates of the parties and the suggested timelines from the Board.

The meeting dates were scheduled strategically to escalate the content and process and to provide increasing pressure on the parties. We were prepared to use the first two days to give the parties an opportunity to voluntarily compromise. This also gave me the opportunity to get acquainted with the parties and their approach to the issues. During the second set of dates, the parties were expected to make significant progress on articles. The third set of dates was reserved for any final resolutions, or if required, oral presentations on the factors affecting the outstanding items.

At least 30 days before the first meeting, the parties exchanged and provided to me:

- initial opening briefs describing the parties, the workplace, the dispute and the history
- outline of positions on outstanding items
- in-going proposals
- copies of any signed off articles
- copies of any articles agreed to date but not signed off
- latest proposal on each outstanding article for the last date of mediation
- any revisions to the latest proposal as a starting point for enhanced mediation
- copy of any mediator's recommendation previously issued on file
- comparators
- any economic brief.

For this process, I expected the parties to respond more robustly and quickly, within set timelines, which meant using the scheduled meetings for progress and time between meetings for caucus. I expected them to have an informed position on outstanding items, considerate of comparators and economic conditions, not just a wish list of items. They already knew that their respective opening positions or modified positions were not mutually acceptable. I expected them to be ready to provide evidence and rationale to support their positions. I expected them to participate with an open mind and be receptive to creative suggestions and to engage fully, not just wait for the other party to initiate something. I expected them to seek my input and my feedback and recommendations during the process. I expected the parties to tailor any final oral presentations to what was relevant to the outstanding items only.

I prepared significantly to be able to influence the agenda for the mediation, determining what topics to discuss when and when to move to other topics. I reviewed interest arbitration decisions and asked the parties to inform me of what the case law revealed concerning how an interest arbitrator would approach this dispute. I particularly focused on what previous arbitrators on first agreement arbitration had awarded. I was prepared to and did bring reality checks to the discussions and persisted to identify problems, goals and interests to match proposals to real situations, not hypothetical ones. I proposed alternative language where the proposals were unclear or would present difficulties in interpretation or application. I had to be supportive and directive at the same time.

The Applicable Principles

On the question of what enhanced mediation involved or was guided by, the parties took differing views. AUPE suggested enhanced mediation should follow a process and approach similar to a Disputes Inquiry Board or an interest arbitration board. The Employer saw this as another opportunity to bargain.

Although I expect every enhanced mediation will have its own character and style, I was guided by the following key principles. I introduced these principles to the parties at the first meeting and consistently used them during the mediation process. In my view, the parties responded to these principles in reaching agreement on the majority of items in the collective agreement. I urge them to continue to consider these principles when reviewing my recommendations.

- The goal has not changed

The goal of enhanced mediation is to assist the parties to reach a first collective agreement.

I understood the Board's Directive to reinforce the parties' mutual obligation to bargain in good faith and make reasonable efforts to reach an agreement. I also understood it to give significant guidance that the new first collective agreement arbitration process would not be a default process or easy to access. This reinforced for me several principles in the preamble to the Code:

i. mutually effective relationships between employees and employers are critical to the capacity of Albertans to prosper in the competitive worldwide market economy,
ii. legislative supportive of free collective bargaining is an important component of Alberta's social and economic well-being, and
iii. the public interest is served by encouraging harmonious, mutually beneficial relations between employers and employees through balanced, fair and constructive collective bargaining.

The parties are in the best position to determine the content and language of their first agreement. They retain the right to settle.

- Enhanced mediation is not normal mediation, either for the parties or the mediator.

In a normal mediation, the mediator manages the process and discussion, but the parties determine the content and the pace. Both the content and pace can be affected by the experiences of the parties, their commitments to their principals, the style of the negotiator, any sense of urgency or persistence, any competing agendas, and their perceptions about what a successful mediation looks like.

In this enhanced mediation, the parties and I saw a sense of urgency and accountability that was different from the normal mediation process. The parties and I had the Directive of the Board compelling us to start on a given date with a short timeline to conclude. The Board was in the shadows, able to intervene if required but expecting results. We understood that the Board would hold both parties accountable for their response to any recommendations from the mediator. A party who rejected the enhanced mediator's recommendations would expect to be asked to provide extensive reasons to the Board. This makes the recommendations and the consequences of a vote on the recommendations more sobering.

The parties also expected that a first agreement interest arbitrator could defer to the recommendations of the enhanced mediator or at least consider those recommendations to be extremely persuasive because the enhanced mediator had the benefit of lengthy, intensive and informed sessions with the parties that would test their limits of compromise in bargaining. This would make the recommendations from the enhance mediator more persuasive to the parties. In addition, the enhanced mediation would occur on the doorstep of interest arbitration and the parties and mediator would have likely considered all the same factors that the interest arbitrator would consider.

In normal mediation under section 65, the mediator determines whether to issue recommended terms of settlement. In many cases, the mediator's recommendations are persuasive on the parties and result in a collective agreement. Sometimes the mediator issues recommendations, even while expecting one party to reject the recommendations, as a tool to encourage the parties in future bargaining meetings. Rarely do these mediator's recommendations contain rationale for the parties to consider.

In enhanced mediation directed by the Board, the Board requires the mediator to issue a report with recommendations; the mediator's choice is overridden. The mediator's report has to include some rationale that would be informative and persuasive to the parties, reflecting what the mediator has expressed during the mediation sessions. This gives the Board an informed

insight into the enhanced mediation process and allows the Board to hold the parties accountable to the process.

- Bargaining for a first collective agreement is different than bargaining for a renewal agreement

In first agreement bargaining, the parties have no joint history of administering a collective agreement. They have had little or no opportunity to experience and share joint successes.

Their short relationship may be influenced by experiences during the certification process or in the prior bargaining process or with related bargaining at other worksites. For example, AUPE experienced a long strike at the sister facility in Calgary (Monterey Place) when bargaining that first collective agreement.

The first agreement is the opportunity to solidify and improve the terms and conditions of employment existing at the time of certification. Employees naturally expect some improvements after exercising their rights of association.

The legislation now allows unions or employers one unique opportunity to access interest arbitration at this point or perhaps to attempt to impose interest arbitration on an entrenched opposition. Once the first agreement is reached, that vehicle is replaced by other dispute resolution mechanisms under the Code, most commonly the strike or lockout option.

Some unions would welcome this arbitration option because bargaining unit employees are not yet secure in their relationship with the union or with their rights under the Code or with their employment with their employer. Some unions or employers may see first agreement arbitration as a chance to make significant breakthroughs or aggressive moves at this stage of the bargaining relationship. However, the Code suggests that arbitration is a last resort, not a replacement for free and vigorous collective bargaining. This approach has been commonly adopted by interest arbitrators.

First agreement bargaining, in the context of interest arbitration, should not create windfalls for either party or ignore market conditions or justify proposals for less than what exists in a spectrum or range of terms and conditions that similarly placed unions and employers would negotiate in similar locations and industries. The range of terms and conditions does not just mirror what the most sophisticated and long-term bargaining agreements contain. But it will not be so minimal as to be contrary to employee rights in legislation or contrary to economic principles.

Within a range of terms and conditions, the parties will have to compromise individual proposals

as part of a package of total compensation and language knowing that it is a starting point for future negotiations. They will then build on that base in the future. Some improvements may take time to acquire, even extending over the life the collective agreement or into future agreements.

Both parties will have considered these factors when preparing their proposals. In enhanced mediation, the mediator may more forcefully remind the parties of these principles to remove barriers to compromise. Parties must be able to effectively manage expectations and the mediator can play a role in assisting them with managing extreme expectations.

If the dispute does not resolve and the Board must determine if arbitration is appropriate, the Board is obliged to consider whether any extreme bargaining positions have been taken by one of the parties. This legislative criteria enables the enhanced mediator to persuade a party to modify extreme positions.

- The principles guiding Dispute Inquiry Boards, Voluntary Interest Arbitration Boards and Compulsory Interest Arbitration Boards are useful tools in enhanced mediation

For the Board to hold the parties accountable in the enhanced mediation process, the mediator's report has to be based on credible criteria and principles. The parties shared eight cases from interest arbitrators and disputes inquiry boards. The case law contains consistent expressions of the principles used by dispute inquiry boards and interest arbitrators, voluntary and compulsory, under a variety of legislation.

The principles and criteria I applied and communicated during this mediation and those that inform my recommendations are as follows:

1) The parties retain control of the process and content to the extent they wish to exercise that control.
2) The mediator will respect and build on any proposals already agreed to by the parties. Under section 92.4(4) of the Code, an arbitrator cannot alter any previously agreed articles, without consent of the parties. Articles that were already signed off were important starting points. Any articles agreed in principle, but not yet signed were identified and concluded.
3) The mediator will recognize and build on any comparators already identified by the parties as being relevant and appropriate. I examined the briefs and signed off articles for clues about comparables.

4) The mediator will examine individual proposals to disclose commonalities between the parties. Those commonalities pointed out topics where resolution could be reached more quickly.
5) The mediator will examine individual proposals to reveal comparators and where those comparators align, point out topics where the mediator could influence a settlement.
6) The mediator should create, as much as possible, a wide scope of agreed items so as to enable the mediator to influence the parties to compromise on outstanding items and to advance the purposes of the legislation.
7) Enhanced mediation, like interest arbitration, is not a scientific process and has no magic formula. There is an art to balancing the competing interests of the parties.
8) The party advancing a position has the obligation to present cogent evidence to support it.
9) The mediator should use and advance objective criteria, and not give preference to the subjective self-imposed limitations of the parties.
10) The mediator's influence includes consistently and forcefully reminding the parties of what the interest arbitrator would do, which has been stated as: "... simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an effort to obtain demands ... and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.[1] In arbitration, this is called the principle of replication. An arbitrator attempts replication, within the context of the law, by:
    a. by looking at the parties' proposals compared to "what has been achieved by others through the collective bargaining process". Comparability is the best guide in assessing replication.
    b. not ignoring the trade offs that may have been given to achieve the comparable provisions, and
    c. looking at proposals as a part of a total compensation package, rather than as individual proposals,[2] and
    d. focusing on achieving "a fair and reasonable result, which is a function of the economic and social climate as much as it is the weighing of the merits of individual proposals"[3]

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[1] *Re Board of School Trustees, School District 1 (Fernie) and Fernie District Teachers' Association* (1982), 8 L.A.C. (3d) 157 (Dorsey) at page 159

[2] *Board of Governors of the Southern Alberta Institute of Technology v Alberta Union of Provincial Employees, Local 39*, 2012 CanLII 51077 (AB GAA)(Smith) at page 11 citing Sims, *NAIT v. AUPE, p. 6 -7,* who cites *Colchester South Police Association and Colchester South Township Police Committee*

Here, bargaining occurs within the essential services framework. The parties have not yet finalized an essential services agreement.

The law may also require a mediator or arbitrator to consider mandatory or discretionary criteria applicable to the sector, such as those in section 101. Under section 101 an arbitrator:

- must consider the *"wages and benefits in private and public, and unionized and non-unionized employment; the continuity and stability of private and public employment, including employment levels and incident of layoffs, incidence of employment at less than normal working hours and opportunity for employment; and the general economic conditions in Alberta"*, and
- may consider *"the terms and conditions of employment in similar occupations"* (taking into account specified criteria),*"the need to maintain appropriate relationships in terms and conditions of employment"* among various groups in the employer's workplace,*"the need to establish terms and conditions that are fair and reasonable"* (having regard to certain factors identified in the section), and any other factor the arbitrator considers relevant.

11) The most relevant comparables are those negotiated by similarly placed parties for a similar timeframe and in a similar industry and within the same or similar locations[4]. In this regard, the most relevant comparable was the Monterey Place collective agreement negotiated as a first collective agreement between these parties after a lengthy strike. That collective agreement was nearing its term end when this bargaining dispute arose.

12) Total compensation or the total package prevails over individual proposals; bargaining involves choices between desirable benefits, and agreements are settled on a package basis:

> ... we should have regard to the total compensation package rather than viewing each of its elements in isolation. We also accept that in collective bargaining it is legitimate for parties to make choices as to how total compensation is to be allocated in terms of salary, benefits and other forms of compensatory remuneration.[5]

13) Reasonable comparators can be identified

    i. from previous interest arbitration awards

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[3] *Living Waters Regional Division No. 42 v. AUPE,* (2015) unreported (Smith)
[4] *Crane Canada Inc. and Teamsters Local Union 419*, unreported decision, September 9, 1988 (Michel Picher) at p. 9
[5] *University of Toronto and University of Toronto Faculty Assn.* (2006) L.A.C. (4th) 193 (Winkler)

ii. through a process of examining comparables to determine in what collective agreement the most similar, if not identical provisions, occur

iii. by examining comparables within the appropriate market and industry such as those within a similar geographic location

but must consider the specific circumstances of the parties to those comparables and cannot merely extract only favourable positions "without regard to the compromises that may have occurred to achieve those favourable results".[6]

b. The timing of negotiations and breadth of comparators with a similar profile can make comparison difficult.

c. Exact comparability is not achievable because trade-offs in bargaining are not easily identifiable and can result from history of bargaining over several bargaining periods – the arbitrator's approach is often more blunt and focused on compensatory items.

14) In health care:

a. professional services are highly regulated,
b. the labour market is molded by the broader industry,
c. centralization has resulted in fewer separate employers and more homogeneous wages and working conditions,
d. centralization has reduced the diversity of unions, causing unions to seek improved but uniform terms and conditions and to be more sensitive to the impact that smaller units have on the bargaining for larger units,
e. for profit and not for profit employers have distinct differences that need to be recognized, and
f. standardization of terms and conditions may be compelling but does not mean that "complete standardization needs to be achieved in one round of collective bargaining or that there may not be justification for some variations among different facilities".[7]

15) The following additional principles drawn from various arbitration awards may be used where required:

a. New or significant changes to the agreement or LOU's (breakthrough provisions) should be negotiated not compelled – "there should be reluctance to adopt changes that have not been tested in the crucible of negotiation by the parties knowledgeable of the issues and concerns that may arise as a result of the proposed changes"[8] but "does not automatically disqualify those proposals from

[6] *Board of Governors of the Southern Alberta Institute of Technology v Alberta Union of Provincial Employees, Local 39*, 2012 CanLII 51077 (AB GAA)(Smith) at page 19-20
[7] *Extendicare Canada Inc. v. AUPE* (2013) Kanee (DIB) at page 8
[8] *Alberta Health Services and AUPE* 2016 CarswellAlta 1367, 127 C.L.A.S. 281 (Smith) at para 29

consideration … if they are otherwise justifiable and reasonable in the context of the workplace which reasonable negotiators would have agreed to at the table"[9].

b. Proposals that are "submitted without adequate analysis and explanation, such as a demonstration of necessity, and without sufficient discussion of the impacts, intended or otherwise, of such proposals are best left to the bargaining table"[10]

    i. reasonable term or length of the agreement can be influenced by the length of the bargaining process and the ability to explore the impact of changes at the next round of bargaining[11]

c. Language in a proposal should not be adopted if it is imprecise and would create significant implementation, interpretation and practical application issues[12]

d. Adjudication of salary levels requires a balancing of criteria to achieve a result which falls within an equitable range; equitable in terms of those who must live with the result and those who must pay for it.[13]

e. Compensatory items are affected by the competitiveness of the labour market, by patterns of settlement, and by factors other than wages which impact an employee's choice of employment[14]

f. Replicating what the parties would have achieved through free collective bargaining means recognizing that[15]:

    i. the general economic factors are "the same factors the parties negotiating freely would consider in the bargaining process".
    ii. economic uncertainty could lead to a shorter length.
    iii. economic uncertainty could make an employer less likely to commit to increases that significantly exceed anticipated inflationary increases.
    iv. there may other reasons that would lead to one party rejecting a proposal at bargaining, especially on monetary items.
    v. bargaining involves an element of forecasting rather than hind sighting, therefore exercise care when considering economic data that was not available to the parties at the time bargaining was conducted.
    vi. delay (to reach arbitration) ought not to work to the benefit of any party.

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[9] *Alberta Health Services* at para 80
[10] *Alberta Health Services* at para 80
[11] *Alberta Health Services and AUPE* 2016 CarswellAlta 1367, 127 C.L.A.S. 281 (Smith) at para 87
[12] *Alberta Health Services* at para 99
[13] *Mount Royal Staff Association and the Board of Governors of Mount Royal University*, (2015) unreported (Beattie) at p 9-13
[14] *Living Waters Regional Division No. 42* at page 13 - 15
[15] *Board of Governors of the Southern Alberta Institute of Technology v Alberta Union of Provincial Employees, Local 39*, 2012 CanLII 51077 (AB GAA)(Smith)

vii. by the time the parties reach interest arbitration, proposals should be refined and narrowed, from 'wish list' items to "important" items. In the strike lockout context, the proposals should be ones the parties are prepared to back with work stoppage tools.

viii. proposals should not be the result of "cherry picking" the best from other agreements that might not represent a fair and reasonable achievement as a package in free collective bargaining; the totality of the package must be reasonable.

ix. the prior bargaining history of the parties or lack of it is relevant – during the current bargaining and in prior bargaining as a tool to assess what the parties have and would reasonably reach as compromises. It can also disclose what comparators they have expressly or impliedly used. In first agreement bargaining, there is no history.

x. an arbitrator would not impose a term or condition or clause that has not been the subject of debate or discussion by the parties.

xi. a proposal may already be satisfactorily dealt with in other portions of the agreement.

xii. proposals to amend current language must be compatible with the other language; it is not an arbitrator's job to redraft language other than in accordance with the agreements reached by the parties during the process.

xiii. retroactivity for current or former employees is a matter to be bargained each round.

xiv. issues of equity may be relevant, such as access to provisions by part time employees.

xv. legislative changes may prompt the parties to amend provisions in the agreement.

xvi. the collective agreement should reflect reality; language should reflect current situations and archaic language should be updated.

xvii. leaves that are incorporated in employer policies may be appropriate additions to the agreement, for the purpose of clarity and certainty of availability, but not extended beyond what is already provided in policy.

xviii. leaves that are prescribed in legislation are not necessary to add to the agreement.