

Collective Bargaining and the Making of a Collective Agreement

LEARNING OBJECTIVES

After reading this chapter, students will be able to:

- Describe the effects of union certification.
- Explain the process of collective bargaining and strategies used by employers and unions.
- Describe the purpose and scope of the statutory freeze provisions in collective bargaining legislation.
- Explain the scope and content of the “duty to bargain in good faith” and to “make reasonable efforts to conclude a collective agreement.”

CHAPTER OUTLINE

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I. Introduction

We have seen in preceding chapters that Canadian workers have struggled to access collective bargaining for over a century. In the first half of the 20th century, these struggles occasionally turned violent in the face of employer and government opposition. The Canadian collective bargaining model began to emerge in the mid-1940s. This model borrowed key concepts from the 1935 American *Wagner Act*—including majoritarianism, exclusivity, and union certification. Once a union gained majority employee support within this model, it could obtain a government-issued licence to bargain (a “certification”) on behalf of workers. After union certification, a novel legal obligation kicked in: both the union representing employees and the employer were legally required to “bargain in good faith” with the objective of reaching a collective agreement. This chapter examines the content of this duty to bargain.¹

II. The Effects of Union Certification

The certification of a union marks a transition for employers and employees from the *common law regime* to the *collective bargaining regime*. From this point onward, employers are no longer permitted to negotiate terms and conditions of employment directly with employees. A new actor, the union, has entered the scene, and our laws require the employer to recognize and bargain with the union as the official, exclusive representative of employees in the bargaining unit.² Once a collective agreement comes into effect, all of the common law rules that are applicable to individual employment contracts fall by the wayside and are replaced by a new set of laws governing collective bargaining and collective agreements. The Supreme Court of Canada explained this point in the case of *McGavin Toastmaster Ltd. v. Ainscough*:

The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which ... deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.³

This fundamental shift in legal models marks a transformative moment for both the newly unionized employer and the employees.

One of the most dramatic changes involves the rules regulating the negotiation of contracts. In the common law (non-union) regime, both the employer and employee are free to walk away from a negotiation if they dislike the terms being offered, just as you may walk out of a car dealership if you don't like the price of a car being offered by the salesperson. In the collective bargaining regime, there is a legal obligation imposed on the employer and union to bargain with each other, even if one of them would prefer to walk away or ignore the other party altogether. The imposition on employers of a government-backed "duty to bargain" was a trade-off in the Wagner model, necessary to persuade unions to agree to a model that channelled union recognition disputes into a tightly controlled legal regime. The Wagner model, introduced to Canada in Order in Council PC 1003 (1944) (see Chapter 6) put an end to **recognition strikes** by offering unions a means to force employers to the bargaining table. The duty to bargain was central to this statutory scheme.

Canadian governments developed a legal model that was intended to provide a procedural framework through which collective bargaining between unions and employers would produce collective agreements—without work stoppages. Nowadays, the vast majority of collective bargaining (about 95 percent) results in a collective agreement without a work stoppage. Many people are surprised by this statistic, because the media tend to report on collective bargaining only when there is a work stoppage, which can lead to a skewed and mistaken perception that work stoppages in unionized workplaces are common.

III. How Collective Bargaining Works

Canadian collective bargaining is described as being "decentralized," because most bargaining takes place at the level of individual workplaces. Typically, a union is certified to represent employees at a particular location (factory, store, etc.) of a single employer, and the union and employer then bargain a collective agreement that is applicable only to employees who work at that location. This "single employer–single union–single location" **bargaining structure** is by far the most common collective bargaining structure in Canada, but other structures exist.⁴ For example, the United Food and Commercial Workers union bargains a single collective agreement with Loblaw that covers multiple unionized stores in a province (single union–single employer–multiple locations). In the construction industry, in some provinces, a union representing a specific trade (e.g., carpenters or bricklayers) may bargain a single collective agreement with multiple employers covering the entire province (single union–multiple employers–multiple locations). In the public sector, it is common for a union to bargain a collective agreement that covers categories of workers (e.g., administrative services or outside workers) who work in a variety of locations.

The collective bargaining process is initiated when one party sends the other a **notice to bargain**. A notice to bargain is a letter that says, essentially, "we would like to begin collective

recognition strike: A strike by workers with the aim of pressuring an employer to recognize and bargain with a union on behalf of the employees.

bargaining structure: A term used to describe the identity and number of parties involved in collective bargaining, and the scope of employees covered by that bargaining.

notice to bargain: A letter from a union or employer to the other party that formally begins the process of collective bargaining.

bargaining.” Collective bargaining statutes regulate when a notice to bargain can be sent. In the case of the renewal of an expiring collective agreement, that period varies from two to four months before the end of the expiring agreement. Both the union and the employer select a **chief negotiator** who does the talking on behalf of the party in bargaining. The employer may hire a lawyer or appoint a manager, such as the human resources or labour relations manager, to be their negotiator. Unions are less likely to retain lawyers to do their bargaining, although lawyers may provide advice on contract language. Typically, a professional negotiator employed by the union (known as a **business representative** or **staff representative**) acts as the union’s chief negotiator. However, in larger bargaining units, workers may select their own bargaining committee and chief negotiator from among their own ranks. For example, the **local union president** or an elected chair of the union’s bargaining committee may assume the task.

Often the union presents its proposals first. However, doing so is not a rule nor is it always the case. It is common practice for the parties to agree on a bargaining protocol. For example, a bargaining protocol may provide that **monetary issues** (wages, benefits, pensions) will be left until after the **non-monetary issues** have been resolved. The protocol might also explain whether the parties will sign off on collective agreement clauses one by one as they are agreed, or whether every clause remains negotiable until agreement is reached on the entire contract. In Ontario and Manitoba, the law requires that collective agreements be **ratified** by a majority of bargaining unit employees before they become legal.⁵ Therefore, the parties know that any agreement reached by the negotiating teams is a “tentative” deal only and subject to employee ratification. In other jurisdictions, it is common for the parties to agree at the outset whether agreements are subject to approval by employees or, in the case of the employer, senior executives or a corporate board of directors.

We can think of collective bargaining as having three basic stages:

1. Pre-negotiation stage.
2. Negotiation stage.
3. Settlement stage.

In terms of bargaining strategy, both parties will come to the bargaining table with a list of items they hope to obtain through negotiations. Those items are identified and compiled during a *pre-negotiation stage* of collective bargaining. Unions often compile their bargaining “wish list” by taking a survey of the employees in the bargaining unit, asking them to identify those issues that they most want the union to try to win in negotiations.⁶ It is important in collective bargaining for the parties to leave room to make **bargaining concessions**. Therefore, negotiating teams for both parties typically identify their “opening positions,” their “preferred outcomes,” and their

chief negotiator: The lead spokesperson representing a party in negotiations.

business representative or staff representative: An employee of a union whose job is to negotiate and administer collective agreements.

local union president: A person who leads a subunit of a union, known as a local union. A local union may represent a single workplace or a group of workplaces within a defined geographical area or sector. Local union presidents are usually elected by union members and are (or were) employees of a unionized employer.

monetary issues: Subjects in collective bargaining that impose direct costs on employers, such as wages, benefits, and pensions.

non-monetary issues: Subjects in collective bargaining that relate to contract language, such as the text of a grievance procedure or management rights clause.

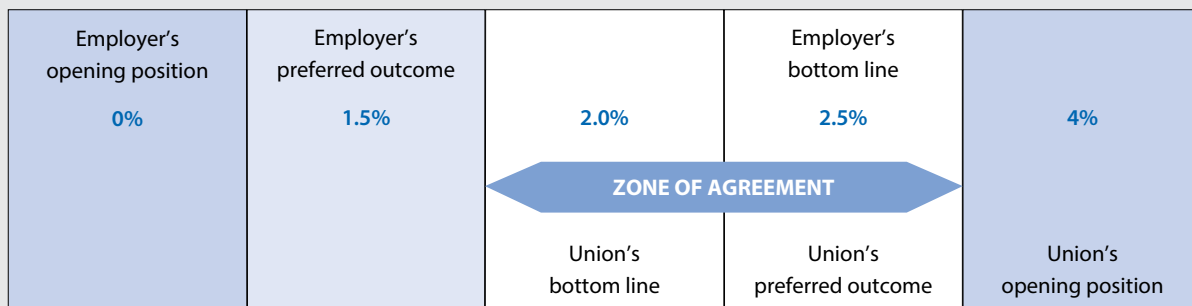
ratification (of a collective agreement): A vote by unionized employees in favour of accepting a proposed collective agreement.

bargaining concessions: When a party agrees to accept less in negotiations than they initially proposed.

“bottom line” positions. The bottom line position is that point beyond which the party will not move and would accept industrial conflict (strike or lockout) on **interest arbitration** rather than concede more at the bargaining table.

During the *negotiation stage*, the parties will have meetings and attempt to identify and reach agreement on some matters, and they will search for a “zone of agreement” on more contentious issues.⁷ For example, an employer may be prepared, if pushed, to give a 2.5 percent pay raise (employer’s bottom line), but may hope to bargain only a 1.5 percent raise (employer’s preferred outcome). In that case, the employer’s opening position may be a 0 percent raise, and it will argue that it cannot afford a raise. The union may be prepared to accept a 2 percent raise (union’s bottom line), but may hope for at least a 2.5 percent raise (union’s preferred outcome). The union’s opening position may be a 4 percent raise. This scenario is illustrated in Figure 10.1. It shows a potential “zone of agreement” on the issue of wages between 2 and 2.5 percent. That is the range of pay raise that both parties are ultimately prepared to accept.

FIGURE 10.1 The Potential Zone of Agreement on Wages in Collective Bargaining



Source: Adapted from R. Walton & R McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (New York: McGraw-Hill, 1965).

The fact that a zone of agreement exists does not guarantee a settlement. In real collective bargaining, a lot of issues are negotiated at once. An agreement on wages may not happen if negotiation is held up on other issues. Personalities and agendas can impede settlement. Moreover, as we discussed in Chapter 2, collective bargaining outcomes are heavily influenced by the relative *power* of the parties.⁸ Power is influenced by a large number of factors that act upon the collective bargaining parties at any given time. A union’s primary source of power in collective bargaining is the threat of a work stoppage, but the extent of that threat is affected by a range of forces emanating from within the collective bargaining regime and from outside that regime (*external inputs*). For example, the level of employee support for a strike; the size of the bargaining unit relative to the employer’s total workforce; the ability of the employer to operate during a work stoppage; union density in the employer’s industry; the state of labour markets and unemployment levels; the level of product competition in the employer’s industry; public opinion; and of course the laws that regulate collective bargaining and industrial conflict can all affect relative bargaining power. The *negotiation stage* may reach an impasse that is resolved

interest arbitration: An arbitration process in which a neutral arbitrator (or arbitration board) imposes a final collective agreement after the parties were unable to reach an agreement in negotiations.

only through one or both parties resorting to industrial conflict of the types described in Chapter 11.

The final stage is the *settlement stage*, which requires the bargaining committees to write up the agreed-upon collective agreement terms and often to take them back to be approved (or “ratified”) by employees or other stakeholders (see discussion below). If an agreement is subject to approval, and that approval is not forthcoming, the bargaining teams may be required to return to the negotiation stage to try again.

IV. Types of Legal Rules Regulating Collective Bargaining

Three types of legal rules govern the collective bargaining process in Canada (see Figure 10.2). First, statutory freeze provisions “freeze” the terms and conditions of employment during the collective bargaining process. Second, the law imposes on the parties in collective bargaining a “duty to bargain in good faith” and to “make reasonable efforts to conclude a collective agreement,” as we will explore below. Third, extensive rules regulate what happens when negotiations reach an impasse, as well as strikes and lockouts. We will explore the rules of industrial conflict in Chapter 11.



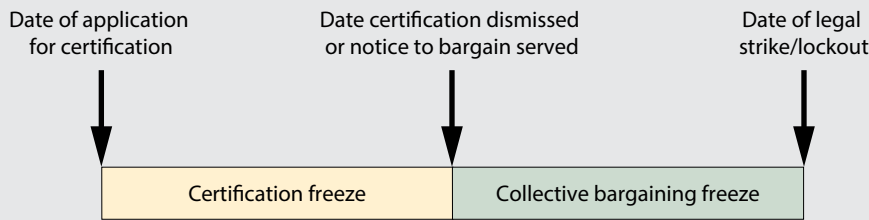
A. Statutory Freeze Provisions

The statutory freeze provisions are intended to “maintain the prior pattern of the employment relationship in its entirety.”⁹ During a statutory freeze period, the employer is prohibited from altering terms and conditions of employment of bargaining unit employees without the union’s consent, unless the alteration is consistent with past practice. The legal test is usually referred to as “business as before.” Therefore, if an employer has always given employees a holiday bonus or a raise at a specific time, then it could not refuse the bonus or raise because the statutory freeze is in effect. However, if the employer has not given a holiday bonus in the past, then the employer could not do so if a freeze is in effect.¹⁰

There are two types of statutory freeze: (1) the **certification freeze** and (2) the **collective bargaining freeze**. The two freezes kick in at different times and serve different policy purposes. The details of when the two freezes end vary slightly across jurisdictions. Figure 10.3 depicts how the statutory freeze provisions work in Ontario (see s. 86 of the Ontario *Labour Relations Act, 1995*).

certification freeze: A rule found in collective bargaining legislation that prohibits an employer from altering terms of employment without the union’s consent during the processing of an application for certification.

collective bargaining freeze: A rule found in collective bargaining legislation that prohibits an employer from altering terms of employment without the union’s consent during the period of collective bargaining.

FIGURE 10.3 The Statutory Freeze Process in Ontario

The certification freeze applies from the moment the union serves the application for certification on the employer. It lasts until either (1) the labour relations board dismisses the union's application because the union's organizing attempt failed, or (2) the union wins certification and then serves the employer with a "notice to bargain." That notice triggers both the end of the certification freeze and the beginning of the collective bargaining freeze. In this way, the two freezes blend into each other to create an extended period during which employers must not alter terms of employment without the union's consent that runs from the date of application for certification until the date that the parties are in a legal strike or lockout position (or in some jurisdictions, the date of an actual strike or lockout).¹¹

The purpose of the certification freeze is to restrict any advantage the employer might have to start playing around with working conditions to influence employees' decisions about whether to support or reject unionization. The purpose of the collective bargaining freeze is slightly different. It is to prevent the employer from using its authority to change working conditions during negotiations and thereby undermine the union's authority to bargain, thus poisoning the bargaining climate.¹² The certification freeze applies only during the initial certification process, but the collective bargaining freeze applies during each new round of collective bargaining, for as long as the union represents the workers. It is triggered each time either the employer or the union tells the other party it would like to begin bargaining toward a new collective agreement—each time a new notice to bargain is served.

B. The Duty to Bargain in Good Faith and Make Reasonable Efforts to Conclude a Collective Agreement

How does the law force parties and people to bargain when they have no desire to do so? Take a look at section 17 of the Ontario *Labour Relations Act, 1995*, which essentially mirrors other duty to bargain provisions in Canada:

The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.¹³

Forty words. And most of those words are about when the first meeting takes place. The core of the legal obligation to bargain in Canada is found in the final 14 words requiring the parties to "bargain in good faith" and "make every reasonable effort to make a collective agreement."¹⁴ What meaning to give to those words has been left to labour relations boards and to the courts reviewing the decisions of those boards. Therefore, in order to understand the substance of the duty to bargain in Canadian collective bargaining law, we need to know how those words have

been interpreted. The Supreme Court of Canada has provided some guidance. In the case of *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, the Supreme Court of Canada explained that the duty to bargain contains both a “subjective” and an “objective” component:

Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule *the duty to enter into bargaining in good faith must be measured on a subjective standard*, while the *making of a reasonable effort to bargain should be measured by an objective standard* which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.¹⁵ [Emphasis added]

The *subjective standard* requires labour boards to assess the party’s motive—is the party making an honest attempt to reach a collective agreement? The *objective standard* compares the party’s behaviour to that of others in the industry. If a party’s behaviour substantially veers from the industry norm in a way that impedes the conclusion of a collective agreement, then a labour relations board may determine that the party is not making reasonable efforts to conclude a collective agreement.¹⁶

We can separate the legal rules that comprise the duty to bargain in good faith into rules that apply to the process of collective bargaining (*how* collective bargaining takes place) and rules that regulate the substance of collective bargaining (*what* is proposed during collective bargaining).

1. The Procedural Duty to Bargain: The *How* of Collective Bargaining

The duty to bargain is primarily concerned with the process of collective bargaining, and labour relations boards have developed rules intended to encourage the parties to engage in a rational and informed discussion about each other’s proposals.

a. The Duty to Meet and Be Prepared to Negotiate

We can think of this first requirement as the “don’t waste the other party’s time” rule. The mission of the duty to bargain is to force the parties to come together and engage in a rational, professional discussion about each other’s bargaining proposals.¹⁷ With this mission in mind, labour relations boards have imposed a basic requirement on the parties to make themselves available to meet within a reasonable time period. If one party continuously stalls by saying their negotiators are on vacation or too busy with other matters, then they are not “making reasonable efforts to conclude a collective agreement.” The parties must also send a person to the bargaining table who is prepared and able to negotiate on behalf of the party. It is a waste of time, and unlawful, for a party to send a junior employee with no authority to the bargaining table merely to sit there and take notes on the other party’s submission.

b. The Duty to Provide Information and Respect the Union’s Role as the Employees’ Exclusive Representative

An employer must provide the union with the information it requires to perform its job as the legal bargaining representative of the employees. In the case of a newly certified union, this includes the names, contact information, and terms and conditions of employment of the bargaining unit employees. A failure to provide this information is a violation of the duty to bargain (and perhaps also the prohibition discussed in Chapter 9 on employer interference with the

administration of a union).¹⁸ An employer must also not attempt to undermine the union in the minds of employees by, for example, communicating directly with employees about bargaining proposals that have not been discussed first with the union or in a manner that misrepresents the union's bargaining position or that paints the union in a negative light.¹⁹

c. The Duty to Be Honest and to Disclose Plans That Will Affect Bargaining Unit Employees

The duty to bargain requires honesty. Lying to the other party is a violation of the duty to bargain. Therefore, if a party is asked a direct question during negotiations, that party must answer truthfully.²⁰ An interesting and related issue is whether the duty to bargain requires a party to disclose information that would be of interest to the other party even if it has not been asked directly about that information. Does the duty to bargain require "unsolicited disclosure" of relevant information? For example, imagine an employer is considering closing the workplace and firing the workers, but it has not made a final decision yet. Is the employer under an obligation to give the union this information, even if the union does not ask about a possible closure?

It is easy to see why a union would want to know about a possible closure. If the employees are likely to be fired during the term of the collective agreement, then the union's bargaining strategy will change. There would be no point trying to bargain a raise or a new dental plan, for example, if no one will have a job two years later. The union would focus entirely on trying to stop the closure, bargaining higher severance packages or a right to vacant jobs at other locations of the employer if they exist. The employer may not want the union to know its plans, to avoid having to negotiate closure-related issues. Or, the employer's plans may be only hypothetical during negotiations; the closure may never happen. Therefore, the employer may wish to avoid bogging down the negotiations with a hypothetical scenario. Labour relations boards have wrestled with the issue of how much, and when, an employer is obligated to disclose information to the union about its future plans. Box 10.1 describes a leading decision that explores this issue.²¹

BOX 10.1 » CASE LAW HIGHLIGHT

The Duty to Disclose Information in Collective Bargaining

International Woodworkers of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.

1983 CanLII 970 (Ont. LRB)

Key Facts: The International Woodworkers of America and Consolidated Bathurst Packaging concluded a renewal collective agreement in early 1983 covering employees working at the employer's Hamilton location. In negotiations, the union proposed language that would give employees greater benefits in the case of a plant closure, but eventually dropped that proposal. The employer never mentioned that it was considering or expecting to close the plant. However, soon after the agreement came into effect, the employer announced that it would be closing the Hamilton plant in April 1983. The employer claimed that a decision to close the plant was not made until after the agreement had been concluded. The union filed a bad-faith bargaining complaint, arguing that the employer had decided during the negotiation period to close the plant and had failed to disclose that information to the union.

Issue: Did the employer violate the duty to bargain in good faith by failing to disclose its intention to close the Hamilton plant to the union during collective bargaining?

Decision: Yes. The labour relations board summarized the employer's legal duty to disclose as follows. First, an employer must answer union questions truthfully. Second, an employer must disclose on its own initiative decisions that have already been made and that "will have a significant impact on terms of employment," such as a discontinuance of the workplace. The timing of the announcement on the closure of the plant was an important factor. The board concluded:

where a decision to close is announced "on the heels" of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persua-

sively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between “proposals” and “decisions” at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *de facto* decision doctrine should be expanded to include “highly probable decisions” or “effective recommendations” when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case the failure to disclose such matters may also be tantamount to a misrepresentation.

Here, the board found that the employer had not presented evidence sufficient to “rebut” the presumption that the decision to close the Hamilton plant had ripened during the negotiations, and therefore the employer was under a legal duty to disclose to the union that it was at least contemplating the closure. In terms of remedy, the board declined to order the employer to reopen the plant because the employer had already sold the equipment and instead ordered that monetary damages be paid to the union and employees calculated based on an assessment of the additional severance amounts the union would likely have bargained had it been aware during negotiations that the factory was closing.*

* The decision of the Ontario Labour Relations Board on the remedy is found at *International Woodworkers of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1984 CanLII 929 (Ont. LRB).

2. The Duty to Bargain and the Substance of Bargaining Proposals: The *What* of Collective Bargaining

Generally speaking, the parties in collective bargaining are left alone to bargain about whatever they like.²² However, there are exceptions to this “hands off” approach. Sometimes the content of a bargaining proposal put to the other party can run afoul of the duty to bargain in good faith and make reasonable efforts to conclude a collective agreement.

a. Bargaining Illegal Terms

Neither party can propose an illegal term, such as one that would violate human rights, occupational health and safety, or employment standards legislation.²³ Collective bargaining legislation in Canada also requires that some terms be included in every collective agreement (see Chapter 12), and it is a violation of the duty to bargain for a party to refuse to include such terms. For example, every jurisdiction in Canada requires that collective agreements include a provision providing that all disputes arising under the collective agreement be resolved by final and binding arbitration without a work stoppage (**mandatory arbitration clause**), a requirement that dates back to the 1940s. If a union or employer refuses to agree to a mandatory arbitration clause, then it would be engaging in bad-faith bargaining.

b. Terms That Can Be Proposed, but Not “Bargained to Impasse”

Some types of collective agreement terms may be proposed and discussed in negotiations, but cannot be “bargained to impasse.” This means that parties who are unable to agree on a particular term must drop the term from their proposals and cannot use the term as the basis for a strike or lockout. It is up to the labour relations board to determine whether a proposed term has in fact been “bargained to impasse.” Bargaining to impasse occurs when the proposed term in dispute holds up a settlement.²⁴ As an example, changes to the scope of a bargaining unit (the definition of the group of employees covered by a collective agreement) can be proposed, but not bargained to an impasse.²⁵ A union may propose to expand a bargaining unit to include more jobs than it was originally certified to represent, or an employer may attempt to bargain a smaller bargaining unit. However, if agreement is not reached on the proposed change, neither side can provoke a strike or lockout over the issue. The status quo must prevail.

mandatory arbitration clause: A clause in a collective agreement that requires all disputes arising under the collective agreement to be referred to binding labour arbitration to be resolved.

c. Hard Bargaining Versus Surface Bargaining

A key distinction in collective bargaining law is between lawful **hard bargaining** and unlawful **surface bargaining**. A party engages in “hard bargaining” when it uses its superior bargaining power to insist on a collective agreement that is favourable to its own interests.²⁶ Hard bargaining is not a violation of the duty to bargain, because the legal model anticipates that collective bargaining is shaped by underlying power relations. The Ontario Labour Relations Board (OLRB) summarized this point: “For whatever else it is, collective bargaining is ... a contest of economic power (perhaps only partially masked by polite manners and voluminous statistics).”²⁷ Collective bargaining legislation grants the parties a means to pressure the other side to offer more favourable terms, including strikes and lockouts (Chapter 11). The duty to bargain is not intended to aid the weaker party by guaranteeing bargaining outcomes more favourable than that party could obtain on its own.²⁸

“Surface bargaining,” on the other hand, is a violation of the duty to bargain in good faith. Surface bargaining occurs when a party goes through the motions of collective bargaining without any intention of ever reaching a collective agreement.²⁹ For example, the party agrees to meet the other party and to engage in a cursory discussion of proposals, but the real plan is to avoid the union and a collective agreement.

Distinguishing between hard bargaining and surface bargaining is difficult. In many cases, where labour boards have found that the employer engaged in unlawful surface bargaining, there was also a history of employer unfair labour practices, particularly during the organizing campaign. The earlier unfair labour practices can taint the employer’s later behaviour in collective bargaining and lead the labour relations board to conclude that the employer has no intention of reaching an agreement with the union.³⁰

A proposal that includes contract clauses that the proposing party knows the other side will never accept or the refusal to accept clauses that are standard throughout the industry can sometimes lead a labour board to conclude that a party has no intention to conclude a collective agreement.³¹ That was the scenario in the decision described in Box 10.2.

BOX 10.2 » CASE LAW HIGHLIGHT

Proposing Untenable Contract Terms

Royal Oak Mines Inc. v. Canada (Labour Relations Board)
[1996] 1 SCR 369

Key Facts: For 18 months, a bitter strike took place at Royal Oak Mines’s Giant Mine in Yellowknife. The employer used replacement workers and hired a security company to deal with violence on the picket line. During the strike, the employer terminated the employment of 49 strikers for alleged picket line misconduct. Four months into the strike, an explosion at the mine killed nine miners. Following this event, the government assigned senior mediators to help the parties settle their dispute. However, the mediators were unable to produce an agreement. The main stumbling block was the employer’s insistence that under no circumstances would it agree to a grievance or arbitration pro-

cess that would permit the employees who were fired during the strike to challenge their dismissal. The union filed a bad-faith bargaining complaint. The Canada Labour Relations Board ruled that the employer had bargained in bad faith. That decision was reviewed up to the Supreme Court of Canada.

Issue: Did the employer violate the duty to bargain in good faith and to make reasonable efforts to conclude a collective agreement by refusing to agree to a grievance and arbitration process for fired workers?

Decision: Yes. The employer was engaged in unlawful surface bargaining. The requirement to make a “reasonable effort to enter into a collective agreement” is an objective standard,

hard bargaining: A lawful strategy in collective bargaining that involves a party using its superior bargaining power to insist upon collective agreement terms that favour its own interests.

surface bargaining: A strategy in collective bargaining that involves a party going through the motions of bargaining but having no intention of ever concluding a collective agreement. Surface bargaining is a violation of the duty to bargain in good faith.

requiring the labour relations board to consider comparable standards and practices in the mining industry. A bargaining position can be “so far from the accepted norms of the industry that they must be unreasonable.” That was the case here. The Supreme Court wrote:

If a party proposes a clause in a collective agreement, or conversely, refuses even to discuss a basic or standard term, that is acceptable and included in other collective agreements in comparable industries throughout the country, it is appropriate for a

labour board to find that the party is not making a “reasonable effort to enter into a collective agreement.” ... For an employer to refuse an employee a grievance procedure or some form of due process, by which the employee can challenge his or her dismissal on the ground that it was not for just cause, is to deny that employee a fundamental right.

Since no union would accept a collective agreement without the arbitration clause, the refusal of the employer to negotiate that clause indicated a lack of good faith.

When a party has engaged in bad-faith bargaining, the usual remedy is to order the party to go back and engage in bargaining and to send a statement to employees advising them of the unlawful conduct.³² Labour boards can also order that damages be paid to the other party for the wasted cost of negotiation or to employees if they suffered financial losses due to the bad-faith bargaining (e.g., lost wages if the unlawful conduct extended the length of a strike or lockout).³³ In the *Royal Oak Mines* case, the labour board ordered the employer to re-table terms that it had offered the union months earlier (which employees had rejected) that included a grievance and arbitration provision applicable to the fired employees.

In *Royal Oak Mines*, the employer’s refusal to agree to an arbitration provision that applied to employees terminated during the strike was found to constitute bad-faith bargaining. However, it is not always unlawful for an employer to use its superior bargaining power to insist on collective agreement terms favourable to its interests. The decision summarized in Box 10.3 describes a famous example of lawful “hard bargaining.”

BOX 10.3 » CASE LAW HIGHLIGHT

Lawful Hard Bargaining

Retail, Wholesale & Department Store Union v. Eaton Company Limited

1985 CanLII 933 (Ont. LRB)

Key Facts: Eaton’s was a large Canadian retailer that had operated mostly non-union for decades prior to an organizing blitz by the Retail, Wholesale & Department Store Union (RWDSU) in the 1980s. That campaign resulted in RWDSU being certified to represent employees at a handful of Eaton’s stores around the Greater Toronto Area (GTA). In each of the stores, the OLRB certified separate bargaining units for full-time and part-time employees, as was the practice in the 1980s. That meant that there were over a dozen bargaining units certified to represent Eaton’s employees at six GTA stores. The union proposed that the parties negotiate one “master collective agreement” that would apply to all the stores, but the employer insisted on conducting separate negotiations for each bargaining unit and on a process that involved extended discussions of each one of the union’s proposals. This meant bargaining would drag on for months, since both employer and union were using the same lead negotiators. The employer took the position that it would not agree to pay the unionized employees any more than what it paid employees in the non-union stores. In Nov-

ember 1984, the union struck at all six GTA stores. Eaton’s stayed open during the strike, using non-striking personnel to run the store. The RWDSU then filed a complaint alleging that the employer had bargained in bad faith.

Issue: Did Eaton’s violate the duty to bargain in good faith by, among other actions, insisting on bargaining separate agreements for each of more than a dozen bargaining units and by refusing to offer a raise beyond what non-union workers receive?

Decision: No. The OLRB explained that this was a case of “hard bargaining” by Eaton’s. There was nothing improper in Eaton’s use of its bargaining power to insist on a collective bargaining process and collective agreement terms that benefit the employer’s interests, provided that it was prepared to meet and engage in extended discussions about the union’s proposals and that it was prepared to sign a collective agreement. The OLRB’s discussion of the issues provides a useful summary of the duty to bargain in Canada:

[A] major function of the ... duty [to bargain] is to oblige the parties to enter into serious negotiations with the shared intent of entering into a collective

agreement. This requires that the parties explain their positions to the other side, so as to allow for rational, informed discussions. ... An employer cannot enter into negotiations with the intent of ridding itself of the trade union. Neither can it simply engage in "surface bargaining," whereby it "goes through the motions" of bargaining without any real intent of signing a collective agreement. ... [The duty to bargain] does not, however, require that an employer agree to the terms of a collective agreement proposed by a trade union. Neither does it prohibit an employer acting in its own self-interest from engaging in "hard bargaining" so as to obtain an agreement with terms favourable to it. ... The fact that the company has not made any major concessions in bargaining relates directly to the type of agreement management is seeking to negotiate. [The duty to bargain] does not ... preclude a party from taking a firm position in bargaining.

On the issue of the employer's refusal to offer wages and benefits above what it gives non-union workers, the OLRB wrote:

Nothing in the *Labour Relations Act* requires an employer to agree to wages and employee benefits for unionized employees that are superior to those being received by non-unionized employees. ... Neither is there any provision which prohibits an employer when formulating its bargaining position to take into account the likelihood that improvements in the terms of employment for one group of employees will likely impact on other groups. Indeed, logic suggests that this is a consideration frequently taken into account by employers, since an improvement in the employment conditions of one group of employees will logically lead to calls for similar improvements from other employees of the same employer, whether they be unorganized or included in a different bargaining unit.

Eaton's did violate the duty to bargain in one respect. It had insisted on a clause prohibiting workers from discussing union matters on employer property, even during non-working time. That prohibition is unlawful interference with the right of workers to engage in union activities, so insisting on it in bargaining violated the duty to bargain. The union's other arguments were dismissed.

V. Broader-Based Collective Bargaining?

The Eaton's case is important for what it tells us about the difficulties unions have had in penetrating the service sector, including retail and banking.³⁴ While unions are often able to obtain majority support and to organize one or more stores of giant corporations, they have great difficulty bargaining strong collective agreements for those units. RWDSU represented approximately 1 percent of Eaton's 30,000 employees, employed in only six stores. Eaton's was not prepared to give the unionized workers any benefit above what non-union employees receive for the obvious reason that to do so would encourage other workers to join the union. Therefore, the only way that the unionized workers could pressure Eaton's to improve its offer was to strike. They timed the strike for the Christmas shopping rush, hoping to inflict the greatest economic damage. However, the strike had little effect. The stores remained open during the strike and, in any event, the strike affected a small proportion of the company. Eaton's was prepared and able to withstand a strike at a few stores to ensure unionization did not spread. Unable to win noticeable improvements, the workers decertified the union within a few years.³⁵

This basic scenario has played out time and again throughout Canada in industries characterized by large corporations that operate through many scattered stores or branches.³⁶ The difficulty for workers seeking collective bargaining in these workplaces is that the Wagner model Canada adopted in the mid-1940s was never designed to facilitate collective bargaining in industries that use this business structure.³⁷ The Wagner model targeted large industrial workplaces, factories, and mines, where hundreds of employees worked regular full-time hours at the same location. The power dynamic (see Chapter 2) is very different when 1,000 General Motors employees threaten to strike at a single factory compared with when a handful of employees threaten to strike at a few Eaton's, Walmart, Starbucks, or Scotiabank locations.

Occasionally, governments have sought to address this dynamic by adopting different models of collective bargaining. For example, in Ontario in the 1990s and again briefly in 2018 until the law was repealed in 2019, the labour board was empowered to “consolidate” multiple bargaining units of the same employer if organized by the same union.³⁸ That law would have given the union in the Eaton’s case the ability to combine the various bargaining units and to thereafter bargain its desired “master” collective agreement. Each new Eaton’s store organized by the union would then have been swept into the combined bargaining unit, allowing the union to grow over time. In both British Columbia and, more recently, Ontario, government-commissioned studies considered the idea of **broader-based bargaining** structures that would enable a union to be certified for sectors of the economy, such as “all employees in the fast-food industry,” in a particular city.³⁹ Industry- or sector-level bargaining like this exists in various forms in some European countries, but would require a fundamental reordering of the Wagner model to take hold in Canada and the United States.

The Ontario government summarized the arguments for broader-based collective bargaining structures in their 2016 *Changing Workplace Review: Special Advisors’ Interim Report*:

Many commentators have criticized the current industrial relations model ... It is said that the current system, based on the 1940s United States *Wagner Act* model, is unable to respond to the modern labour market, characterized by growing employment in small workplaces and non-standard work. It is said that the *Wagner Act* model limits access to collective bargaining to many thousands of workers because there is no practical way for collective bargaining to operate in much of the present economy. This is seen to affect vulnerable workers in precarious work, especially in industries where such workers feature prominently, such as in restaurants (particularly fast-food), accommodation, retail, and other service industries. While this is generally seen as a private sector problem, it is said to also to occur in the public sector (e.g., in home care).

“Broader-based bargaining” (also referred to as “sectoral bargaining”) is advocated as a necessary alternative or addition to the old industrial relations model. ... Generally, labour relations in Canada are highly decentralized ... [T]he default arrangement in our system is for collective bargaining to take place between a union representing a group of employees at a particular workplace and their employer, particularly in the private sector ...

Unions assert that bargaining separate individual agreements with many small employers, or separate agreements for each small location of a larger employer, is inefficient, uneconomic and burdensome. The costs of organizing (including costs of legal proceedings) and representing small units one-by-one are too high and effectively deter organization.

In the context of the *Wagner Act* model, workers have found it difficult to organize into unions in sectors characterized by small workplaces (typically also associated with high rates of part-time, temporary and contract jobs). The union coverage rate in the private sector is approximately 24% among workplaces with more than 500 employees, but below 7% in workplaces with fewer than 20 employees.⁴⁰

Ultimately, neither the Ontario nor the BC government moved forward with reforms to introduce broader-based bargaining in the service or manufacturing sectors. While the argument for broader-based bargaining is gaining steam, to date it exists only sporadically in industries such as construction and the arts. However, expect ongoing debates in the years to come about whether the Canadian collective bargaining model should be restructured to enable broader-based bargaining in some format.

broader-based bargaining: A term used to describe collective bargaining structures that involve a broader scope than the one union—one employer—single location structure that dominates Canadian collective bargaining.

VI. Chapter Summary

This chapter examined the process and law of collective bargaining in Canada. It demonstrated that the manner of negotiation and the laws that govern the process are dramatically different in the *collective bargaining regime* than in the non-union common law regime. Collective bargaining law, through a duty to bargain in good faith and to make reasonable efforts to conclude a collective agreement, plays a central role in the collective bargaining process. This law is concerned mostly with limiting industrial conflict by encouraging rational and professional discussions between representatives of unions and employers in the hope that collective agreements can be reached without work stoppages. That usually happens. However, sometimes the parties fail to reach a collective agreement. Therefore, a different set of rules is needed to deal with bargaining impasses. Those rules are the subject of the next chapter.

QUESTIONS AND ISSUES FOR DISCUSSION

1. What is the difference between monetary and non-monetary issues in collective bargaining? For each type of issue, provide an example of a proposal that might be raised in collective bargaining by either a union or an employer.
2. Describe the three basic stages of collective bargaining and what is involved at each stage.
3. Identify and explain the two “statutory freezes” found in Canadian collective bargaining legislation. What are the policy reasons that explain the two freezes?
4. The duty to bargain includes both a “subjective” and an “objective” component. Explain the meaning of each component.
5. Describe the scope of the “procedural duty to bargain.”
6. What is the difference between “hard bargaining” and “surface bargaining”?

APPLYING THE LAW: COLLECTIVE BARGAINING SIMULATION

Note to Instructors:

Role-playing exercises and instructions for a collective bargaining simulation are available in the appendix to this book, immediately following Chapter 24.

APPLYING THE LAW

1. The Brewery Workers Union was successful in its campaign to organize employees of the County Beer Company. The union sent a “notice to bargain” to the company, providing dates to meet and begin bargaining and also requesting a full list of employees in the bargaining unit, with their wage levels, benefits, home addresses, and phone numbers. The employer provided the wage and benefits information but refused to supply the union with the contact information. The union filed a bad-faith bargaining proposal. Will it be successful?
2. The parties begin negotiations. The union proposes a 4 percent wage increase, but the employer informs the union that it cannot afford any raise. After several negotiation sessions, the employer refuses to budge. The employer tells the union that it is happy to keep negotiating and to talk about other issues, but says that the workers are already well paid and that a raise could threaten the profitability of the company. The employees become angry and encourage the union to file a bad-faith bargaining complaint. Do you think the complaint would be successful?

NOTES AND REFERENCES

1. For an extensive review of the duty to bargain law in Canada, see G. Adams, *Canadian Labour Law*, 2nd ed (Aurora, ON: Canada Law Book, 1993) at chapters 10 and 11; and Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials, and Commentary*, 8th ed (Toronto, ON: Irwin Law, 2011) at chapter 6.
2. See, for example, Ontario *Labour Relations Act*, 1995, SO 1995, c. 1, Sched. A, s. 17 (duty to bargain in good faith), s. 73 (1) (unfair labour practice for unionized employer to bargain directly with employee) [Ontario LRA].
3. *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 SCR 718.
4. See the discussion in R. Chaykowski, “Collective Bargaining: Structure, Process, and Innovation” in M. Gunderson & D. Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto, ON: Pearson Education, 2009) at chapter 10.
5. Ontario LRA, supra note 2, s. 44; and Manitoba *Labour Relations Act*, CCSM c. L10, s. 69.
6. There is an extensive industrial relations literature studying the conduct and processes of collective bargaining: R. Walton & R. McKersie, *A Behavioural Theory of Labor Negotiations: An Analysis of a Social Interaction System* (New York: McGraw-Hill, 1965). See also Chaykowski, supra note 4; F. McQuarrie, *Industrial Relations in Canada* (Toronto, ON: Wiley, 2003) at 269; and J. Godard, *Industrial Relations, the Economy, and Society*, 4th ed (Concord, ON: Captus Press, 2011) at 301.
7. Walton & McKersie, supra note 6.
8. See Chaykowski, supra note 4 at 260-64.
9. *Spar Professional and Allied Technical Employees’ Association v. Spar Aerospace Products Ltd.*, 1979 CanLII 870 (Ont. LRB). See also *D.H.L. International Express Limited*, 2001 CIRB 129.
10. *CUPE, Local 3010 v. Children’s Aid Society of Cape Breton*, 2009 NSLRB 11.
11. For example, in Ontario, the bargaining freeze ends on the date a strike or lockout would be legal. See Ontario LRA, supra note 2, s. 86 (1). In British Columbia, the bargaining freeze lasts until the parties actually engage in a strike or lockout or the union is decertified: see *BC Labour Relations Code*, RSBC 1996, c. 244, s. 45(2).
12. *Air Canada* (1977), 24 di 203 (CLRBR). See also *D.H.L. International Express Limited*, supra note 9.
13. Ontario LRA, supra note 2, s. 17.
14. Some provinces’ legislation does not include the part about making reasonable efforts to make a collective agreement, but the labour relations boards have nevertheless interpreted the duty to bargain as including that obligation.
15. *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 SCR 369.
16. *Ibid.*
17. *DeVilbiss (Canada) Ltd.* (1976), 76 CLLC at para 16009; *Buhler Versatile Inc.*, [2001] MLBD 9 (MLRB); and *Halifax Regional Municipality v. Halifax Professional Firefighters, Local 268*, 2011 NSLB 65.
18. *Michelle Taschner v. UFCW Canada 175 & 633*, 2018 CanLII 11112 (Ont. LRB); *Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2008 PSLRB 13; *OPSEU v. Alcohol and Gaming Commission of Ontario*, 2002 CanLII 40611 (Ont. LRB); *CAW-Canada v. The Millcroft Inn Ltd.*, 2000 CanLII 12207 (Ont. LRB); and *USWA, Local 7292 v. Buhler Manufacturing*, 2007 CanLII 81861 (Man. LB).
19. *Operative Plasterers’ and Cement Masons’ International Association, Local Union No. 172 v. A.N. Shaw Restoration Ltd.*, 1978 CanLII 554 (Ont. LRB); *British Columbia Automobile Association*, BCLRB No. B498/99; *Cypress (Regional Health Authority) v. Service Employees’ International Union-West*, 2016 SKCA 161; and *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, Local 849 v. Egg Films, Inc.*, 2015 NSLB 213.
20. *USWA, Local 4487 v. Inglis Limited*, 1977 CanLII 490 (Ont. LRB); and *International Woodworkers of America Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, 1983 CanLII 970 (Ont. LRB).
21. See also *OPSEU v. Ontario (Management Board Secretariat)*, 2005 CanLII 8247 (Ont. LRB); *Canadian Federal Pilots Association v. Treasury Board (Department of Transport)*, 2014 PSLRB 64; *CUPE, Local 1251 v. New Brunswick*, 2009 CanLII 74885 (NBLEB); and *United Electrical, Radio & Machine Workers of America v. Westinghouse Canada Limited*, 1980 CanLII 893 (Ont. LRB).
22. *Catholic Independent Schools Diocese of Prince George v. BCGSEU*, 2001 CanLII 32940 (BCLRB) at 26-27.
23. *MacDonalds Consolidated Ltd.*, BCLRB No. 51/76, [1976] 2 CLRBR 292.
24. *Nanaimo Golf & Country Club v. Unite Here, Local 40*, 2015 CanLII 44718 (BCLRB).
25. *Northwood Pulp and Timber Limited* (1994), 23 CLRBR (2d) 298 (BCLRB); *United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency v. United Brotherhood of Carpenters & Joiners of America*, 1978 CanLII 434 (Ont. LRB); *RWDSU v. T. Eaton Company Limited*, 1985 CanLII 933 (Ont. LRB); *Southam Inc.*, [2000] Alta. LRBR 177; *Coca-Cola Bottling Ltd.* (1999), 52 CLRBR (2d) 203 (BCLRB); and *Brantford Expositor*, [1988] OLRB Rep. July 653. See also *V.I. Care*

- Management* (1993), 19 CLRBR (2d) 153 (employer cannot bargain to impasse a clause that relates to the application of a union's constitution).
26. See, for example, *Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local No. 304 v. Canada Trustco Mortgage*, 1984 CanLII 1106 (Ont. LRB); *T. Eaton Company Limited*, supra note 25; *Egg Films, Inc.*, supra note 19; *Professional Institute of the Public Service of Canada v. Treasury Board*, 2009 PSLRB 102; *Canadian Federal Pilots Association v. Department of Transport, Transportation Safety Board, and Treasury Board Secretariat*, 2018 FPSLRB 91; and *Toronto Typographical Union No. 91 v. Daily Times*, 1978 CanLII 507 (Ont. LRB).
 27. *USWA, Local 1005 v. Stelco Inc. (Hilton Works)*, 2000 CanLII 11075 (Ont. LRB).
 28. *Noranda Metal Industries*, [1975] 1 Can. LRBR 145.
 29. *Daily Times*, supra note 26.
 30. *USWA v. Radio Shack*, 1979 CanLII 817 (Ont. LRB).
 31. *Ibid.*; and *Royal Oak Mines*, supra note 15.
 32. See *Radio Shack*, supra note 30 for a discussion of remedies in bad-faith bargaining cases.
 33. *Buhler Versatile*, supra note 17.
 34. See D. Doorey, "Why Unions Can't Organize Retail Workers," online, *Law of Work* (blog): <<http://lawofwork.ca/?p=7061>>.
 35. See the discussion in A. Forrest, "Organizing Eaton's: Do the Old Laws Still Work?" (1988) 8 Windsor YB Access Just 190.
 36. The story of attempts to organize bank branches is recounted in E. Lennon, "Organizing the Unorganized: Unionization in the Chartered Banks of Canada" (1980) 18:2 Osgoode Hall LJ 178.
 37. J. Fudge, "The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-Based Bargaining" in L. Brisken & P. McDermott, eds, *Women Challenging Feminism, Democracy, and Militancy* (Toronto, ON: University of Toronto Press, 1993); and K. Andrias, "The New Labor Law" (2016) 126 Yale LJ, online: <<https://www.yalelawjournal.org/article/the-new-labor-law>>.
 38. The ability to consolidate bargaining units was found in s. 15.1 of the Ontario *Labour Relations Act, 1995* between January 1, 2018, and May 7, 2018; see <<http://canlii.ca/t/532g5>>.
 39. Ontario Ministry of Labour, *Changing Workplaces Review: Special Advisors' Interim Report* (Toronto, ON: Queen's Printer for Ontario, 2016) at part 4.6.1, online: <https://www.labour.gov.on.ca/english/about/cwr_interim/chapter_4_6.php>. For a summary of the model proposed in British Columbia in 1992, see D. Doorey, "The Model of Sectoral Bargaining Everyone Is Whispering About," online, *Law of Work* (blog): <<http://lawofwork.ca/?p=8574>>.
 40. Ontario Ministry of Labour, supra note 39 at part 4.6.1.