BRITISH COLUMBIA LABOUR RELATIONS BOARD

INSURANCE CORPORATION OF BRITISH COLUMBIA

(the "Employer")

-and-

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378

(the "Union")

PANEL:	Bruce R. Wilkins, Vice-Chair
APPEARANCES:	Scott McCann, for the Employer Allan E. Black, Q.C., for the Union
CASE NO.:	63484
DATE OF DECISION:	July 4, 2012

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union applies under Sections 11 and 47 of the *Labour Relations Code* (the "Code") alleging the Employer has failed to meet the requirement to bargain in good faith and has failed to make every reasonable effort to conclude a collective agreement.

II. BACKGROUND FACTS

2 The parties had a collective agreement which ran from July 1, 2006 to June 30, 2010. On September 24, 2010 the parties agreed to commence collective bargaining towards a new collective agreement in January 2011.

3 On January 12 and 13, 2011, the Union's Bargaining Committee met with the Employer's Bargaining Committee to exchange proposals and begin the process of negotiating a renewal of the expired Collective Agreement. Each party presented opening statements. The Employer proposed Management Proposal #M11 respecting a Memorandum of Understanding Re: Workforce Transition, and Management Proposal #M12 respecting Letter of Understanding #26 Re: Claims Hierarchy (together the "Claims Hierarchy Proposal"). The Employer had indicated at this early stage of bargaining that its Claims Hierarchy Proposal was a monetary item.

4 The Claims Hierarchy Proposal related directly to a transformation program adopted by the Employer's Board of Directors in 2009. It was anticipated by the Employer that the transformation program would be in place by 2014. The Employer indicated the transformation program could result in offices being closed, jobs being changed and fewer overall jobs by 2014.

5 On March 30, 2012, the Employer tabled a document entitled "Claims Transformation Overview & Claims Job Hierarchy". On the same day it also gave the Union notice under Section 54 that changes would take effect December 1, 2012. The Section 54 notice reads as follows:

> As you are aware, ICBC notified you in May 2011 that Claims would be introducing a new job hierarchy to support its business model.
>
> Today, we have given you a report entitled The Claims Transformation Overview, as well as an updated proposed Letter of Understanding re Claims Workforce Transition. Through these documents and today's discussions, we are providing the Union with detailed information about the Claims Transformation Program, its implementation and the impact of these changes on the Claims workforce. This letter constitutes formal notice of these changes under Section 54 of the *Labour Relations Code*.

> Employees will transition to the new Claims workforce hierarchy effective no later than December 1, 2012.
>
> Pursuant to Section 54, we have developed the enclosed Letter of Understanding re Claims Workforce Transition as our proposal for an adjustment plan to mitigate the effects of these changes on Claims employees. We ask that you consider our proposal as the basis for good faith discussions in compliance with the Code.
>
> We look forward to working with the Union to ensure that these changes are effected in a manner which minimizes disruption to affected employees.

6 On the same date the Employer also changed its position and informed the Union it considered the Claims Hierarchy Proposal to be a non-monetary item that it wished to bargain with the Union.

7 On April 24, 2012 the Employer informed the Union it was unable to obtain a monetary mandate from the Provincial Government (the "Government") until the Government completed its core review process for Crown Corporations. This was predicted to be complete in late August 2012. The Employer refused to discuss any monetary issues with the Union until this precondition was met. The Employer again stated its intention to proceed with the changes referenced in its Section 54 notice if they were unable to obtain a negotiated resolution of this matter during the course of collective bargaining.

8 On May 2, 2012 the Union sent a bargaining update to its members in which it described a meeting it had with the Government. The bargaining update reflects that the Union was informed the Government's core review process would not be complete until late summer 2012.

III. ARGUMENT

9 The Union says when the Employer provided notice to the Union pursuant to Section 54 during the course of collective bargaining, the Employer is telling the Union if the Collective Agreement cannot be modified in a way to accept the Claims Hierarchy Proposal introduced by the Employer, it will be implemented in the fall of this year. The Union says the tendering of notice pursuant to Section 54 of the Code during the course of collective bargaining between the parties, in these circumstances, is bargaining in bad faith. It argues the Employer is seeking to circumvent its obligation to bargain in good faith by the use of Section 54 of the Code.

10 The Union says Section 54 notice does not allow an employer to unilaterally alter or breach the terms and conditions of a collective agreement. The proper place to make such alterations is during collective bargaining. It says the Employer is saying that bargaining is in fact really irrelevant, or at the very most, really "surface bargaining" because whatever the outcome, if it is not favourable to themselves, they can get what they want through the Section 54 notice. The Union says the Employer is undermining

the Union in the eyes of its members. It says the Section 54 notice tells the employees that the Union cannot prevent the Employer from unilaterally implementing significant changes to the terms and conditions of their employment set by the Collective Agreement.

11 The Union argues the Employer's refusal to negotiate, or even consider and respond to any monetary proposals until it receives a mandate to do so from the Government following the core review of the Insurance Corporation of British Columbia, constitutes bargaining in bad faith. It says the Government is not a party to collective bargaining or the Collective Agreement between the Employer and the Union. It says the Employer's position that it requires fulfillment of a precondition before it agrees to bargain over any monetary proposals, contravenes its statutory obligation under the Code: *The Board of School Trustees of School District No. 44 (North Vancouver)*, IRC No. C103/92, reconsideration dismissed IRC No. C200/92; *Vancouver Symphony Society,* IRC No. C3/93, 17 C.L.R.B.R. (2d) 161.

12 The Employer says it is making every effort to reach a negotiated settlement with respect to the implementation of the changes it plans to make to its Claims Division. It says it has prepared a detailed Claims Hierarchy Proposal which contains both benefits and concessions for each party that do not currently exist in the Collective Agreement. The Employer asserts the Claims Hierarchy Proposal provides the parties with an opportunity to reach a negotiated agreement with respect to the implementation of the proposed changes.

13 The Employer asserts it currently has the right under the existing terms of the Collective Agreement to implement the necessary changes to the Claims Division. However, the Collective Agreement contains numerous provisions that will have an effect on the implementation of the proposed changes. Accordingly, the Employer says it is seeking, through the Claims Hierarchy Proposal, to negotiate a process that will streamline the implementation of the proposed changes. It says this is consistent with the purpose of bargaining under the Code.

14 The Employer says if the parties are unable to reach a negotiated agreement on a streamlined implementation process, it still intends to make the changes to the Claims Division in accordance with and within the confines of the existing Collective Agreement provisions. The Employer argues that as the parties are currently in bargaining, the Union has an opportunity to change the existing provisions of the Collective Agreement to achieve any limitations or benefits for its members that its members may desire in light of the changes.

15 The Employer says there is no limitation within the requirements of Section 54 that prevents an employer from providing notice and complying with the requirement to develop an adjustment plan during collective bargaining. The Union's claim that the timing of the notice somehow puts "improper pressure on the Union to negotiate" is incorrect and fails to appreciate the intent and purpose of Section 54.

16 The Employer says it has chosen to provide as much notice as possible in order to comply with its statutory duty under Section 54 and at the same time to provide the Union with a real and substantive opportunity to reach a negotiated agreement with respect to the implementation of the changes or to develop an adjustment plan in accordance with the Code. Accordingly, it says it is fully complying with its duty to bargain in good faith and to make every reasonable effort to conclude a collective agreement, while meeting its obligations pursuant to Section 54.

17 The Employer argues that given the significantly changed circumstances outside of its control, it cannot continue to bargain on monetary items until it receives a mandate from the Government. In the meantime, it says there are significant non-monetary items which need to be negotiated between the parties and it is willing to negotiate these non-monetary items.

18 The Employer says the Union's claim that it had never been advised by the Employer that its ability to negotiate any monetary matters were subject to the precondition, direction, and instruction of the Government is simply not true. It says the Union has been advised on numerous occasions and is fully aware that the Employer is subject to the Public Sector Employers' Council's guidance and the Government's approval of mandate. The Employer says it has been fully forthright with the Union.

19 The Employer says a subjective review of its actions on this issue clearly demonstrate a genuine desire to conclude a collective agreement. It is simply reacting to changed circumstances beyond its control. The Employer submits it is taking this opportunity to continue to negotiate important non-monetary items until it is in a position to negotiate monetary items. It says bargaining sessions are currently scheduled and it is fully committed to continuing to negotiate all non-monetary items, including the Claims Hierarchy Proposal which is significant for both parties. In fact, both parties agreed on May 10, 2012 to set aside two days to discuss this proposal. The Employer says it will immediately return to bargaining on all monetary items once the Government review is completed and it is provided with a monetary mandate by the Government.

20 The Employer says an objective analysis of its conduct does not reveal any tactic that, when looked at in the context of the entire bargaining process, unreasonably inhibits the conclusion of a collective agreement. It says it is temporarily in a position where it is no longer able to bargain monetary items due to circumstances beyond its control. The Employer asserts this is not a tactic aimed at inhibiting the conclusion of a collective agreement; it is simply a change in circumstances it is reacting to as best it can. In this regard the Employer says it is doing everything possible to continue to bargain with the Union on non-monetary items during this temporary period.

21 The Employer says if it had continued to negotiate monetary issues in light of the Government's core review process, this would have arguably been bargaining in bad faith: *The Board of School Trustees of School District No. 34 (Abbotsford)*, BCLRB No. B133/99 ("*Abbotsford School District No. 34*").

IV. ANALYSIS AND DECISION

22 The Employer's conduct consists of the tendering of Section 54 notice during collective bargaining; a change in position with respect to whether the Claims Hierarchy Proposal is a monetary item; and a refusal to bargain monetary issues until the Government's core review process is complete. The question before me is whether this conduct, in whole or in part, constitutes a violation of the requirement to bargain in good faith under the Code. The Union does not complain with respect to specific proposals, but only with respect to the bargaining tactics of the Employer.

23 Sections 11, 47 and 54 of the Code read as follows:

> **Requirement to bargain in good faith**
>
> 11 (1) A trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement.
>
> (2) If a trade union and the employer have concluded a collective agreement outside British Columbia, it is invalid in British Columbia until a majority of the employees in British Columbia covered by the agreement ratify it.
>
> **Collective bargaining**
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> 47 If notice to commence collective bargaining has been given
>
> (a) under section 45, the trade union and the employer, or
>
> (b) under section 46, the parties to the collective agreement
>
> must, within 10 days after the date of the notice, commence to bargain collectively in good faith, and make every reasonable effort to conclude a collective agreement or a renewal or revision of it.
>
> **Adjustment plan**
>
> 54 (1) If an employer introduces or intends to introduce a measure, policy, practice or change that affects the terms, conditions or security of employment of a significant number of employees to whom a collective agreement applies,
>
> (a) the employer must give notice to the trade union that is party to the collective agreement at least 60 days before the date on which the measure, policy, practice or change is to be effected, and

> (b) after notice has been given, the employer and trade union must meet, in good faith, and endeavour to develop an adjustment plan...

24 In *Noranda Metal Industries Limited***,** BCLRB No.151/74 ("*Noranda*") the Board made the following statements which have become accepted in the interpretation and application of Sections 11 and 47 of the Code:

> It would be inconsistent with the fundamental policy of the Code -- the fostering of free collective bargaining -- for the Board to evaluate the substantive positions of each party, to decide which is the more reasonable, and then to find the other party to be committing an unfair labour practice for not moving in that direction. That interpretation of Section 6 would amount to compulsory arbitration in disguise, and without the restrictions carefully placed around Section 70. The theory of the Code is that each side in collective bargaining is entitled to adopt the contract proposals which are in its own interest, to stick firmly to its bargaining positions, and then to rely on its economic strength in a strike to force the other side to make the concessions. ...
>
> * * *
>
> We are not able to accept this "minimum" interpretation of Section 6 (or of Section 63). First of all, it does not square with the language of the statute, which directs not only that a party "bargain collectively in good faith" but also that it "make every reasonable effort to conclude a collective agreement". Subjective motivation does seem to be the focus of the first clause, but the second places further limits on the objective means which each side is entitled to use in carrying out their intentions. The statute recognizes that a party, while waiting to secure a collective agreement, may adopt tactics which unreasonably inhibit the process of achieving agreement. ...While this Board must not appraise the reasonableness of the contract proposals by either side, it may assess the reasonableness of certain conduct adopted in an effort to achieve agreement.
>
> We believe it would be undesirable to go as far as was suggested by the Union in this case, to a point where any conduct the Board considered unfair and likely to disillusion the other side might be an unfair labour practice. ...
>
> * * *
>
> Accordingly, while we interpret Section 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement. (pp. 25-28, emphasis in original)

25 Section 54 places an obligation on an employer who plans on making the kinds of changes listed in Section 54 to give "at least" 60 days' notice. In this case, the Employer has given Section 54 notice during collective bargaining far in advance of the anticipated changes which require notice under Section 54. There is no specific statutory prohibition against giving Section 54 notice during collective bargaining. There will be situations where it will be unavoidable. While there is no dispute that the giving of Section 54 notice during collective bargaining is not contrary to the Code in itself, is it contrary to the Code in the context of the negotiations between the parties?

26 The giving of Section 54 notice during collective bargaining does not come without concerns. One concern is that Section 54 notice given during collective bargaining may distort and confuse the purpose of Section 54 and the requirement to bargain in good faith under Sections 11 and 47. It is my view these provisions can exist harmoniously, however, and may, by virtue of unavoidable circumstances, have to operate in a parallel manner. Indeed, due to timing and circumstances, parties in collective bargaining might agree to fold the negotiation of a Section 54 adjustment plan into collective bargaining.

27 There could, however, be cases where the use of Section 54 results in a violation of Sections 11 and 47. It is my view that it is not open to either party in collective bargaining to use Section 54 as a means to block or to impede efforts to conclude a collective agreement. In my view, however, this has not happened in the matter before me. The facts surrounding the tendering of Section 54 notice in this case do not convince me that I should depart from the general "hands off" approach to collective bargaining described in *Noranda*. The Board said in *Noranda* that it would be undesirable for the Board to declare an unfair labour practice in every case where the Board considered conduct unfair and likely to disillusion the other side. Thus far the mere giving of Section 54 notice during collective bargaining between the parties presents no objective impediment to concluding a collective agreement, nor do I accept it undermines the Union in its efforts to negotiate a collective agreement. Consequently the giving of Section 54 notice by the Employer is not in violation of Sections 11 and 47 of the Code.

28 In examining the Employer's overall conduct I have concluded, where the subjective aspect of Sections 11 and 47 is concerned, the Employer is attempting to come to a collective agreement within the context of a long standing and mature collective bargaining relationship. It is clear the Employer wishes to conclude a collective agreement which will take into account its concerns with the changes it anticipates making.

29 While I have determined the Employer has met the subjective element in the requirement to bargain in good faith, the issue which remains before me is whether the Employer's refusal to bargaining monetary issues until the Government completes its core review process is in keeping with the objective element of the requirement to bargain in good faith.

30 The Employer initially took the position in collective bargaining that the Claims Hierarchy Proposal was a monetary item. It then later changed its position in March 2012, claiming that it is non-monetary and could be negotiated under any mandate from the Government. It gave Section 54 notice at this time as well. In April 2012 it then took the position it would not bargain monetary issues because of the Government's core review process. I note that the Employer is not taking a "hard bargaining" position with respect to monetary issues, but is rather refusing to discuss monetary issues until the Government concludes its core review process.

31 It may be the case that parties to collective bargaining agree to wait for some condition to be met before commencing or finalizing collective bargaining. It is not, however, open to one side to refuse to bargain or to restrict the scope of bargaining until some third party to their collective agreement, in this case the Government, meets a condition. The fact that actions of third parties affect bargaining in substantial ways does not relieve the Employer from the obligation to make a reasonable effort to conclude a collective agreement. While the timing of the Government's core review process undoubtedly puts both the Employer and the Union in a difficult spot in reaching a collective agreement, the Code places a requirement on parties to make every reasonable effort to conclude a collective agreement without preconditions external to those stated in the Code. The requirement to bargain in good faith in the Code is otherwise unconditional.

32 The Employer says if it were to bargain monetary items before knowing the Government's monetary mandate it would run the risk of running afoul of the requirement to bargain in good faith. It refers to *Abbotsford School District No. 34* as authority for this proposition. What caused a violation of the Code in that case was the failure to disclose information which was pertinent to collective bargaining. I note in the case before me the Employer has kept the Union informed of the Government's core review process. In fact, the Union has met with Government itself. The case in front of me does not concern the failure to provide relevant information. Consequently, I find the facts in *Abbotsford School District No. 34* are distinguishable from the facts before me.

33 Objectively speaking, the Employer's refusal to bargain monetary issues until the Government finishes its core review process places a clear impediment to reaching a collective agreement, which is in violation of the requirement to bargain in good faith. The Employer has unilaterally placed a restriction on bargaining which is inconsistent with the requirement to bargain in good faith under the Code. In doing so it is not making every reasonable effort to conclude a collective agreement.

V. DECLARATION AND ORDER

34 I declare the Employer's refusal to bargain monetary items until the Government finishes its core review process is in violation of the requirement to bargain in good faith under Sections 11 and 47 of the Code. The Employer is ordered to withdraw its refusal to negotiate monetary items and is ordered to bargain towards a collective agreement with the Union on all issues.

35 The Union's application to order the Employer to withdraw its Section 54 notice is dismissed.

LABOUR RELATIONS BOARD

"***BRUCE R. WILKINS***"

BRUCE R. WILKINS
VICE-CHAIR