Untangling management spin on arbitration

By Paddy Musson and Phil Cunnington

Like a woozy boxer swinging wildly just before his head hits the canvas, Ontario college management has been a little erratic about faculty bargaining in the last few days.

All faculty should know what really happened since last Wednesday.

On Wednesday, the OPSEU negotiating team decided that it had exhausted every means possible to get a settlement. Management was still refusing to bargain seriously about education quality. Hence, a negotiated settlement was impossible. Bargaining was, once again, at an impasse.

To break the logjam, the OPSEU team called on the employer to agree to "voluntary binding arbitration" as set out in the *Colleges Collective Bargaining Act*. The employer team said no. The employer offered a section option, also set out in the *Act*, called "final offer selection."

That's when Chris Bentley entered the fray. The Minister of Training, Colleges, and Universities told the news media that, since the parties had to agreed to settle the strike by arbitration, the picket lines should come down.

Trained as a lawyer, Bentley should have known better. If the OPSEU team had ended the strike before the method of arbitration was agreed to, the employer would have felt no pressure to settle anything. We'd be right back where we were on March 6.

There *was* a reason the strike didn't end Wednesday. The form of arbitration used to create a settlement matters. A lot.

Arbitration vs. final selection

The *Canada Labour Code Review* describes "binding arbitration" as "an extension of the collective bargaining process since it provides resolutions to issues that the parties could not agree upon."

In binding arbitration, the parties submit their outstanding issues to an arbitrator. Once the arbitrator is chosen, both parties have an opportunity to present their perspective, their evidence, and their arguments – much like a court proceeding. Each side hears what the others says; each side has a chance to rebut what the other says.

Binding arbitration relies on the arbitrator's ability to sort out the key issues and discard those that would have been eliminated if normal collective bargaining had occurred. It also depends on the arbitrator to make reasonable decisions and to fashion an agreement around what reasonably could have been achieved at the bargaining table.

The process provides the arbitrator(s) with information about the importance of each issue, a clear picture of the differences between the parties, and – perhaps – a pathway to an award which represents a compromise for both of the parties.

In crafting their decisions, arbitrators rely on empirical evidence wherever possible.

When binding arbitration is used to end a work stoppage, the strike or lockout ends and work resumes while the process moves forward. The final award, when it comes, is fashioned from the positions of both parties. Normally, neither side walks away with a sense of complete victory or complete defeat. The award usually reflects ideas from both parties.

Last Thursday, the employer wasn't interested in a resolution. Management tabled three options:

1. **Negotiate a settlement.** Our team had already tried this. Calling for negotiation could only be interpreted as a delaying tactic.
2. **Put management's offer to a vote.** This would also cause a delay. With no movement on education quality issues, though, there was no reason to think faculty wouldn't reject again the same offer (with minor tweaks) that we had rejected before.
3. **Agree to "final offer selection" (FOS).**

Please turn over

"The one-armed bandit of labour relations"

In final offer selection, the parties each put forward a final position to the selector. The selector then picks one position or the other. He or she cannot craft the settlement. There is a winner, and there is a loser.

FOS abandons the approach of trying to replicate the result that would have happened in bargaining. Instead, it holds out the hope that both sides will moderate their positions because of the fear of not being selected.

Both in theory and in practice, FOS is only recommended when there is a single, simple issue, such as wages. (This is why it is sometimes used when major league baseball teams are trying to set the salary of a ballplayer.) No one who practices or teaches labour relations would recommend it to resolve complex issues like faculty workload.

Canada Labour Code Review comments that:

> Selecting one offer creates a "winner" and a "loser." When FOS is part of a back-to-work package, the negative atmosphere which led to job action in the first place is reinforced by polarization and a "winner-take-all" resolution....
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> The "winner" and a "loser" approach becomes more acute when the issues separating the parties involve radical changes to work rules rather than money, a much more frequent occurrence recently. It is often impossible to offer part of a new work structure. The logic that FOS forces each side to minimize its demands simply fails to work effectively when the issues include complex work rules, seniority, pension or job security plans or similar difficulties....
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> Collective bargaining, in an increasingly competitive economy, generates many complex issues not easily amenable to win-or-lose answers. Applying FOS to such complex matters forces one side to say "yes" to a major change and the other side to say "no." If "yes" is imposed, employees feel that they have lost everything and may be unwilling to buy into the change being forced upon them, which in itself may doom the chances for real success. If the answer is "no," an employer may be unable to introduce change, perhaps realistically needed to meet competition, for the full term of the collective agreement. It is this effect that leads some to describe FOS as "the one-armed bandit of labour relations."

Late Friday night, logic prevailed. After much bluster and shilly-shallying (and long after the six o'clock news), college management agreed to OPSEU's proposal for binding arbitration. Stung by this defeat, though, they couldn't leave it alone.

On Saturday afternoon, ACAATO tried to pass off one of its own news releases as an OPSEU release, using the devious title of "Corrections to OPSEU news releases." (It actually fooled *Soo News*, a London radio station, and probably other outlets.)

In a feeble attempt to save face, management said that what had been agreed to was not binding arbitration, but "mediation/arbitration." This was an attempt to draw attention away from their failure on the FOS front. Mediation-arbitration, also known as "med-arb," is a process in which the parties negotiate with the help of a mediator; if no agreement is reached, the mediator turns into an arbitrator and crafts the settlement.

Make no mistake: College management and the union have agreed to binding arbitration. Arbitrator William Kaplan will, no doubt, encourage the parties to agree to as much as possible. However, given that faculty bargaining has already taken place with not one, not two, but three able mediators helping out, the distinction here between "mediation-arbitration" and "arbitration" is probably moot. Mr. Kaplan will impose binding arbitration on everything that is not agreed to.

As if one embarrassment weren't enough, management shot itself in the foot with a blunderbuss over the issue of return-to-work. After baying like hounds that students had to be back in school right away, only two colleges have full-time students back in class with full-time faculty today. Eighteen others start tomorrow; four won't even get rolling until Wednesday.

Our faculty bargaining team had its hands full in this round of bargaining with an employer team that was not interested in a settlement. Against the odds, our team found a way to keep quality education on the bargaining table. At arbitration, our proposals will be judged on their merits. It is all we have ever asked.

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