Bargaining and strike planning in the age of social media

By Michael J. Kennedy

Introduction
There can be no doubt our world has changed with the advent of Internet-based social media. One only has to look to the changes in the Middle East to see its power. Social media is now changing how employers need to prepare for bargaining, and how they conduct their bargaining and strike communications. With over 16 million Canadians reportedly having Facebook accounts, and with the proliferation of other social media technologies like Twitter and Foursquare, employers need to address how social media will form part of their bargaining strategy.

The “power” of social media is immense and has to be reckoned with: the recent Oasis Juice consumer backlash on Twitter is an example of how a successful lawsuit turned into a media nightmare.¹ Our new social media reality is a world where employees, like consumers, now make decisions based on social media “opinion,” often without regard for truth or confidentiality. Moreover, if you, the employer, choose not to communicate, the social media world will fill the void for you, whether you want it to or not.

What happens in the workplace no longer has any realistic possibility of staying in the workplace, or even within the local community. Traditional water cooler gossip has gone “2.0.” In this paper, we examine the ways in which social media technology has impacted communications in the labour relations context, and discuss the ways in which game changer communication strategies and programs can help employers achieve desired business outcomes, be they

¹ Quebec-based juice maker Lassonde Industries Inc. recently settled a long-standing legal battle over the use of its Oasis brand name after a social media campaign threatened a boycott of its products. See: http://www.cbc.ca/news/canada/montreal/story/2012/04/09/oasis-quebec-trademark-battle-settlement.html?cmp=rss
through collective bargaining, or in the day-to-day administration of human resources policies and collective agreement provisions.

The Law Concerning Collective Bargaining Communications

There have been no cases in Ontario dealing with social media communications to employees during collective bargaining. The jurisprudence continues to rest on the long-standing principles of not communicating for the purpose of disparaging the trade union or undermining its right to represent the employees in the bargaining unit, and not circumventing the bargaining process by bargaining directly with employees. These prohibitions are balanced against the recognition of the right of an employer to communicate facts and its positions (and the reasons for the positions) as long as it does not use “coercion, intimidation, threats, promises or undue influence.” This determination is fact-specific; the Ontario Labour Relations Board (“Board”) will always examine “the context, content, accuracy and timing of employer communications in discerning their purpose and effect.”

Bargaining communications become illegal only when they represent, in reality, an attempt to bargain directly with employees, thus encroaching upon the union’s exclusive right. In deciding whether this is the case, the Board examines not only the nature of the particular communications complained of, but also the particular and “full bargaining context” in which those communications occur. Of key importance is the timing of the communications, for example whether they occur early or late in the negotiations, as well as their content. It is established that an employer is free to explain to its employees its position with respect to the negotiations after having engaged in collective bargaining with their bargaining agent on the matters that are the subject of the communications. Thus, for example, an employer communication of the details contained in a Final Offer to employees occurring late in the negotiations in the context of an imminent employee ratification meeting was found to be lawful, as it neither disparaged nor blamed the union, and merely asked the employees to give “serious consideration” to the proposals it bargained in good faith.

Because the Ontario Labour Relations Act, 1995 expressly authorizes employers to communicate with employees and simultaneously protects the right of the

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union to exclusively represent employees in collective bargaining, a balance of those two often competing rights must be established. ⁶

Communications during negotiations are an essential part of the process where there are contentious issues that may lead to a labour dispute. Whether through miscalculation, misunderstanding, inadvertence or intention, employees are too often left without information and incapable of making qualitative decisions about the offer and the reasons for its contents – and this absence of knowledge is one of the dominant reasons for strikes. It is important to note that collective bargaining is never just between two parties; frequently, the differences between the agenda of the local union and its international affiliate can cause a negotiator not to relay all relevant information to the membership and even to his or her own bargaining committee in the case of information obtained during the course of private meetings (often with a mediator or conciliator) away from the table. Communications keep the process honest and transparent, and enhance the employer’s credibility.

**Internet Anonymity**

Trade unions and disgruntled employees have used the anonymity of the Internet to spread false, libellous and malicious statements about a company or its management team.

In contentious labour dispute situations, local newspapers often publish their “story” about latest developments, as they “know” them, and invite readers to comment by posting their views on the newspaper’s website immediately following the story. Generally, responders use *a nom de plume*, and the comments, pro and con, are mostly within the bounds of fair comment. However, in some cases, these comments can be reprehensible, and downright illegal, giving rise to the need to take action to protect reputations. In almost every case, meetings with newspaper editors can solve the problem: editors either eliminate response opportunities (which is not always a good option because it does not allow an employer to gauge reactions to events and beliefs), or place a person in charge of editing out or moderating more extreme, inappropriate comments.

However, there are situations when you want to know the identity of a commenter either in a newspaper or a blog in order to shut it down or commence legal action against the individual. Through the use of an application for a so-called *Norwich order*, courts are willing to require Internet providers (Google, Bell, Rogers, Cogeco, etc.) to disclose the contact information of customers associated with particular email addresses. Usually the carriers will not oppose the application, but require the protection of a court order before disclosing. We

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recommend using the process quickly where inappropriate statements are being promulgated via the Internet and then broadly communicating the fact that this has been done with lawsuits for damages.⁷

Management also has to be aware that its “side” can be inappropriately using the Internet to criticize the union and its supporters. We recommend that the company publish an internal policy to address this.

**Practical Communications Advice**

As noted above, a communications plan related to bargaining is essential. That said, there are some general caveats that need to be followed. Every communication should be part of a well-planned communication strategy with a planned framework. Consider the following essential steps in planning communications, usually in this sequence:

- **Goals:** what bargaining outcomes do you want to achieve and how will your communication plan assist in getting there?

- **Buy-in:** in order for the campaign to have a chance at success there must be buy-in from senior management, in-house communications staff and operations staff.

- **Assessment:** Looking internally is not always pretty, but necessary. The employer must make an honest assessment of its internal and external strengths/weaknesses in planning its communications. For example, identifying the appropriate media spokesperson and whether you have internal expertise to address communications during bargaining.

- **Timing:** You cannot commence your bargaining communications plan on the cusp of a strike/lockout. Late timing will reduce the credibility of your message and will only lead to inevitable suspicions by affected employee groups. One only needs to look at the recent successful City of Toronto/CUPE bargaining to see the power of communicating your bargaining themes early on in the bargaining cycle. In the City’s case, it communicated its bargaining goals well in advance of the strike/lockout deadline. As a result, by the time the strike/lockout deadline was reached, public support for the City’s bargaining goals was well established and left the unions in a difficult position to rebut the City’s messaging.

⁷ See *York University*, 2009 CanLII 46447 (ON S.C.).
• Your audiences: Determine all your target audiences, the method of delivering the messages and the degree to which the plan is proactive, reactive, internal and external. The group you are bargaining with is not the only audience. The public, customers, the media, and all other employee groups need to understand the positions you are taking at the bargaining table and why they are “fair and reasonable.”

• Plan: The cornerstone of any successful communications strategy. It will outline the steps, messages, tools, tactics, timing, audiences (etc.) that are required. It should be understood from the outset that in the case of collective bargaining or strike communications, when the going gets tough (and it will), the internal team has to stick to the plan, subject to common sense adjustments. This means that every contingency needs to be thought through in advance and the communications prepared in advance of those events to be able to respond quickly.

• Sign-off: A clear understanding and protocol for who has to approve and give the final sign-off is vital. Timing is a critical factor that needs to be managed. A number of people will want input and egos have to be managed but speed is essential. For example, a company will want to respond immediately to events that occur unexpectedly through website postings, written communications to the press and internally, sometimes within minutes of critical events, to enhance credibility and support.

• Rollout: This is an important part of proper plan execution. Although most messaging will be planned in terms of timing, some cannot be and you will need to ensure that the physical capacity for getting out all messages is in place and ready to go without hitches, within minutes. This means you need consider the use of different media for different purposes. For example, a quick Twitter message to the media may be appropriate in some circumstances versus a general communication on a website or through the use of a blog to communicate to the public.

• Monitoring: You will want to be able to quickly assess reactions to your communications and having a dedicated, reliable people network in place for that purpose is a must. Similarly, you will want to monitor what the other parties are saying and doing (this includes the media, the union, employee groups, your first line supervisors, the neighbourhood talk, picket line chatter, local government, community groups, etc.) so that you can quickly respond to correct the record where necessary.

Conclusion
An effective communications plan that includes social media is now essential to achieve successful outcomes for employers in collective bargaining. Employers
need to adapt to this reality. No one wants to be compared with the management of Decca Records when in 1962 they said, “We don’t like their sound and guitar music is on the way out.” It seems the people differed when they embraced the Beatles.