CONSULTATION
Lessons Learned From Litigation

Not only is consultation ***mandated by the collective agreements, it is also mandated by various legislations*** including the Employment Equity Act and health and safety legislation. The Collective Agreement mandates consultation in areas such as: jurisdiction of employee representatives, grievance procedures, changes in working conditions, technological change, health and safety, hours of work and so forth.

What follows, are exceprts from arbitration and adjudication decisions taken in an attempt to define consultation for the parties (***bold italics are added***).

... "the word "consultation" must be used in its common, everyday context which includes ***conferring*** about, ***deliberating*** upon, ***debating, discussing***, and ***considering.***"

Lakeland College Faculty Association v. Lakeland College (1995), 35 Alta. L.R. (3d) 95 (Q.B.), pb. 104.

"Consultation and discussion ***does not*** mean agreement or that permission from the union is required."

Associated Toronto Taxi-Cab Co-operative Ltd. and Steelworkers of America (Retail, Wholesale and Department Store Division) (56 L.A.C. (4th) 289) page 313

"In my view, these procedural requirements of notice and of opportunity for discussion are not merely directory, but are mandatory, being intended to confer substantial rights on the union. They should be regarded as conditions precedent to any change of practice provided for in the article...This must be so even though it might appear that the giving of notice and the

holding of discussions would not affect the ultimate outcome of the matter."

Eldorado Nuclear Ltd. And Public Service Alliance of Canada, Eldorado Group (5 L.A.C. (2d)94)

"In simple terms, the word "consult" means the ***seeking of views***. Within a collective bargaining context, the word "consult" means the **full disclosure in communications** with the representatives of the other party to the formulations of decisions with a view to ascertaining ***the full implications of the contemplated actions*** upon the vested interests represented through the other party".

Council of Postal Unions and Treasury Board, PSRB File 169-2-1, 1969 (Martin).

"Of course, consultation is not the same thing as negotiation. There was no requirement that the Employer should negotiate and await mutual agreement... Many misunderstandings about the employment relationship could be avoided **if *adequate advance notice*** were given and the reasons for contemplated changes ***discussed fully and frankly***, not only between the Employer and the Bargaining Agent but also between the Bargaining Agent and the employees. ...If consultation is to be "meaningful", this kind of notice should be given well in advance and the other party ***afforded an opportunity to make representations which might or might not lead to review or reconsideration by the Employer***".

International Brotherhood of Electrical Workers, Local 2228 and Treasury Board, PSSRB file 169-2-11, (1971).

..."Although an employer has the right to communicate directly with its employees on many issues, it must do so very carefully. Such ***communications must not undermine the bargaining***

agent's ability to represent its members.....I conclude that the respondents' deliberate exclusion of PIPSC representatives from the LTSO focus groups, where bargaining issues were at times discussed, interfered with the bargaining agent's ability to represent its members. The focus groups were set up to discuss directly with employees and without union participation, ***issues of common interest***."

Professional Institute of the Public Service of Canada and Treasury Board, PSSRB files 161-2-1104 and 169-2-620, 2000, (Tarte).

"...In the normal course of labour-management relations, there are, and should be, numerous informal contacts between representatives of management and the bargaining agent at various levels. Indeed, one expects that these sorts of contacts would take place on virtually a daily basis. However, I ***doubt that either party would envisage that all such contacts, or requests for meetings, constitute a formal request to consult*** as contemplated in Article M-36....***a request to consult has legal consequences and must be viewed as an important matter by both parties***. Accordingly, there should be no ambiguity or serious doubt as to the intention to trigger requirement to consult."

Public Service Alliance and Treasury Board, PSSRB file 69-2-503, 1991 (Chodos).

"Negotiations or consultation do not necessarily change opinions or produce agreement. It would be illogical to conclude that ***because one party failed to get its way in consultation, the other failed to "consult"*** in the true sense. Consultation has its place in the collective bargaining relationship, but it is wrong to expect too much of the process. Matters of real substance should be resolved in bargaining and not shelved for future discussion."

Professional Institute of the Public Service of Canada and Treasury Board. PSSRB file 169-2-59, 1975, (Jolliffe).