



## INFORMATION CIRCULAR

*The following is one in a series of information circulars prepared by the administration staff of the CIRB. The circulars are designed to provide employees, trade unions and employers with general information and a clearer understanding of Board processes. This information circular is an informal tool and is not binding on the Board.*

### **No. 07–Applications for Certification**

Section 8(1) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) states:

**8 (1)** Every employee is free to join the trade union of their choice and to participate in its lawful activities.

Employees may join together and seek representation by a trade union to have a “collective” voice in determining their wages and other terms and conditions of employment with their employers. This is the essence of collective bargaining.

The trade union may then apply to the Canada Industrial Relations Board (the Board) to be certified as the bargaining agent to represent the employees in collective bargaining with their employer. Once certified as bargaining agent, the trade union enjoys the exclusive right to represent the employees and may serve notice to bargain on the employer to start the collective bargaining process. The employer must then meet with the union, and both parties must bargain in good faith with a view to entering into a collective agreement.

This information circular describes the certification process under the *Code*. For more information on the requirements for making an application for certification, please consult *Rules of Procedure No. 1–Applications for Certification*.

### **The Certification Process Simplified**

#### **Basic Questions**

In considering an application for certification, the Board asks itself five basic questions:

- (1) Does the Board have jurisdiction?
- (2) Is the application timely?
- (3) Is the employee organization that filed the application a trade union within the meaning of the *Code*?

(4) Is the proposed bargaining unit appropriate for collective bargaining?

(5) Does the trade union have the support of the majority of the employees in the bargaining unit deemed appropriate by the Board?

### **Jurisdiction**

The Board must be satisfied that the employees for whom certification is sought are employed on or in connection with a federal work, undertaking or business, and therefore fall under the Board's jurisdiction. The definition of federal work, undertaking or business is set out in section 2 of the *Code*.

### **When Can an Application be Filed?**

The *Code* is very specific about the time period during which an application for certification can be filed.

Where no collective agreement applicable to the bargaining unit is in force:

- at any time, where a trade union has not already been certified to represent the employees concerned by the application.
- where a trade union has been certified, another union may file an application for certification after the expiration of twelve months from the date of the initial certification order.

Where a collective agreement is in force:

- an application for certification may only be made during the "open period" in that collective agreement, even if the incumbent union is not certified:
  - if a collective agreement is for a **term of three years or fewer**, the "open period" is the last three months of the collective agreement (or any time after the date the collective agreement expired until a new collective agreement is signed);
  - if a collective agreement is for a **term greater than three years**, the agreement is "open" during the last three months of the third year, that is, during the 34th, 35th or 36th month of its operation, or during the last three months of any year thereafter;
  - a collective agreement remains "open" after its termination date, until a new agreement is reached (an application for certification may be filed during that period).

Where there is a legal strike or lockout:

- an application for certification cannot be filed during a legal strike or lockout, except in very limited circumstances with the consent of the Board.

## **Trade Union Status**

A trade union is defined in the *Code* as “any organization of employees, or any branch or local thereof, the purposes of which include the regulation of relations between employers and employees.”

A trade union could be an international or national union, or a local union, a council of unions, or an “in-house” employee association.

To establish its status as a trade union, an applicant organization must provide the Board with, among other things, a copy of its constitution, by-laws and charter. A key element in the Board’s consideration as to whether or not an employee organization “meets the test” of a trade union is its independence from the employer: it must be free of influence from the employer and able to represent the employees “at arm’s length” in collective bargaining with the employer.

## **What is an Appropriate Bargaining Unit?**

When a trade union applies to the Board for certification, it must describe the group of employees it wishes to represent. The group identified in the description is known as the proposed bargaining unit.

The Board has the responsibility to determine a bargaining unit that is appropriate for collective bargaining purposes, and it exercises a considerable amount of discretion in making that determination. The Board does not always agree with the bargaining unit proposed by the union in its application, nor does it necessarily agree with any bargaining unit that may be suggested by an employer, or to which both parties may agree. In the interests of consistency, the Board makes its own determination of “a unit appropriate for collective bargaining” based on the facts and circumstances present in each case, and on past decisions issued in similar cases.

In arriving at a determination, the Board takes many factors into consideration. These include, among others:

- the nature of the industry;
- the history of collective bargaining in the industry;
- the geographical distribution of the employer’s operation;
- the community of interest of the employees;
- the viability of the bargaining unit;
- the potential for industrial peace and labour relations stability;
- the wishes of the employees;
- the submissions of the parties; and
- the various types of employees sought to be included in or excluded from the bargaining unit.

The Board has found nation-wide bargaining units to be appropriate in some cases, such as in the railway and airline industries and at Canada Post, and regional bargaining units in other cases, such as in the trucking industry. Geographical bargaining units comprised of employees of more than one employer have been found appropriate in the longshoring industry. Individual,

site-specific bargaining units, such as a mine, a radio station or a branch of a chartered bank, have also been determined appropriate.

In some industries, craft- or occupational-based bargaining units have been found to be appropriate. Examples are pilots, flight attendants, ships' officers, and construction industry trades, such as carpenters and pipe fitters.

The Board has also found bargaining units comprised of supervisors, professional employees and private constables to be appropriate.

That said, while the Board generally favours broad-based all-employee bargaining units, it must respect the intention of Parliament, as expressed in the preamble to the *Code*, to encourage free collective bargaining and facilitate the acquisition of bargaining rights by employees.

In addition to the general considerations discussed above, some more specific factors pertaining to the issues of "who is an employee" enter into the Board's thinking in determining bargaining units.

### **Who is an Employee?**

The *Code* defines an employee as "any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations."

In keeping with its responsibility to promote collective bargaining and extend the *Code's* provisions to as many employees as possible, the Board takes the approach that it must not exclude persons from a bargaining unit unless it is satisfied that they perform management functions or are employed in a confidential capacity in matters relating to industrial relations, or that it would be inappropriate to include them.

To what extent must these elements be present in a person's job for the Board to conclude there is a conflict of loyalty sufficient to exclude the position from the bargaining unit? The Board has held that the criteria most indicative of **management functions** are the authority to make the original or final decision in situations of dismissal, promotion and demotion. Other criteria used by the Board include hiring, planning and decision-making, policy making, participating in collective bargaining negotiations and in the grievance procedure, and establishing and administering budgets.

The Board takes a similar restrictive view of what comprises **confidential capacity** in matters relating to industrial relations. The confidential matters must relate to industrial relations, and the disclosure of such industrial relations information must adversely affect the employer. The work of those persons must involve that type of information as a regular part of their duties.

Based on the facts of each case, the Board has found dispatchers, forepersons, supervisors and mid-level managers to be employees within the meaning of the *Code*. Depending on the circumstances, they have been included in a bargaining unit with other employees, or placed in a separate bargaining unit.

In considering proposed exclusions, the Board looks beyond the titles of the job and examines the actual duties of the persons concerned.

The onus for establishing that a person is not an employee within the meaning of the *Code* is upon the party proposing the exclusion from the bargaining unit.

**Professionals** are employees within the meaning of the *Code*, as are dependent contractors and private constables. The *Code* suggests that professionals should belong to a bargaining unit with other professionals, and prohibits private constables from being included in a bargaining unit with any other employees.

The Board views **part-time** employment as consisting of two categories, i.e. regular part-time employees and casual employees. To distinguish between the two categories, the Board applies the test of regularity of employment rather than the number of hours worked per week. Regularly scheduled part-time employees who work some hours every week over a period of several months—even though the number of hours per week may be low—may be considered regular employees and may be included in the bargaining unit with the other regular employees who work more often. Other part-time employees, typically those who are “on call” to replace regular employees who are on vacation or who are ill, are often referred to as “casual” employees. The Board considers the status of casual employees on a case-by-case basis, and may or may not include them in the bargaining unit.

In organizing a group of employees and proposing a bargaining unit to the Board, a trade union should be mindful of these considerations, as should an employer when it formulates a response to an application for certification.

### **Representative Character of the Union**

In making a determination concerning the application for certification of a trade union, the Board will consider employee support as of the date the application for certification was filed or of any other date that it considers appropriate. The Board may allow an application and certify a trade union if that trade union has a majority of employee support (that is, more than 50%) without holding a representation vote, or it will dismiss an application if a trade union has less than 35% of employee support. The *Code* requires that the Board order a representation vote if a trade union has between 35 and 50% of employee support.

### **Access to Employees**

In some parts of Canada, employees work in locations that are remote and inaccessible to union representatives. Fly-in mines and offshore drilling operations are but two examples. On application, the Board may, pursuant to section 109(1) of the *Code*, authorize union representatives to have access to the work site for purposes of organizing employees.

### **Evidence of Membership in a Trade Union**

In support of an application for certification, a trade union must provide the Board with evidence that employees want the trade union to represent them as their bargaining agent. According to the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*), the Board may

accept as evidence of membership in a trade union proof that a person has signed an application for membership in the trade union and has paid at least \$5 to the union for or within the six-month period preceding the date of filing of the application.

The Board requires the union to provide, at the time the application is filed, the original applications for membership, proof of payment of the \$5 membership fee and a separate and confidential statement of the number of employees in the proposed bargaining unit it claims to represent as members of the trade union or of the council of trade unions. The responsible union official will also be required to sign a statement attesting to the accuracy of the documents provided to the Board.

### **Confidentiality of Evidence of Membership**

The Board's *Regulations* also provide that the information regarding the membership of any employee in the union is regarded as confidential, and is neither made known to the employer, nor made public in any way.

### **Where Can an Application for Certification be Filed?**

An application may be filed at any of the [Board's regional offices](#). The application for certification form is available on the Board's [website](#).

The application must be filed in person, sent by mail or by courier and must be accompanied by the membership evidence as described above, the confidential statement and the union representative's signed statement attesting to the accuracy of the documents.

The date of filing of an application is the date it is received at the Board's office with the membership evidence, and both statements referred to above. The original membership applications will be returned after the Board makes a determination.

### **What Happens Next?**

The Board will acknowledge receipt of the application and send the employer and any incumbent bargaining agent a notice of the application in writing. The parties will be provided with a Schedule for Processing. The employer will be given an opportunity to file a written response and will be required to provide certain information and documentation, including a list of the employees who were employed as of the date of filing of the application, to the Board and to the other parties involved.

The employer will also be required to post a Notice to Employees in the workplace to advise them of the application. This notice will be included with the Board's notice of the application.

To ensure the timely processing of applications for certification and in furtherance of the objectives of the *Code*, the Board's practice is not to grant any extensions of the time limits provided in the Schedule for Processing given to the parties, except in exceptional circumstances.

Upon receipt of the notice of the application, the employer is prohibited, by virtue of the *Code*, from changing the terms or the conditions of employment of the affected employees, unless the Board gives its consent in writing. So as not to influence the wishes of its employees, an employer must conduct “business as before” while the application is before the Board.

The Board will appoint one of its industrial relations officers to complete an investigation and oversee the conduct of the file. The industrial relations officer may contact certain employees concerned by the application to verify their application for membership in the trade union. The employee list and organizational chart provided by the employer will be disclosed to the union over the course of the investigation. The industrial relations officer contacts the parties to discuss any matter that may arise during the investigation and then sends a letter to the parties advising that the file is being referred to the Board for consideration. The letter sets out, among other things, the description and composition of the bargaining unit concerned, any position in dispute, as well as the list of relevant documents filed with the Board. The parties will then have 24 hours following the receipt of the letter to provide written comments to the industrial relations officer.

The industrial relations officer submits a separate confidential report to the Board setting out the wishes of the employees, that is, whether or not employees are members of the trade union, oppose the certification of the trade union or wish to be represented by the trade union. All information related to employees’ wishes is kept confidential and is reported privately to the Board. It is not disclosed to the parties.

### **Determination by the Board**

When the Board has received the industrial relations officer’s letter setting out his or her understanding of the matter, as well as the parties’ comments, if applicable, the file is ready for consideration by the Board.

In most cases, the Board can make a decision on the basis of the documents on file, without holding a hearing.

The Board will make all required determinations, including the composition of the bargaining unit it considers appropriate for collective bargaining. If the Board is satisfied that the union has the support of the majority (that is, more than 50%) of the employees in the bargaining unit at the date of the filing of the application, or at any other date it considers appropriate, it will grant the application. However, in any case, the Board may order that a representation vote be taken.

Where it is not able to determine the appropriate unit on the basis of the parties’ submissions, the Board may ask the parties to provide further information or additional submissions, or it may schedule a hearing.

Where the application for certification is an application to displace an incumbent bargaining agent, the applicant union must demonstrate that it has the support of more than 50% of the employees in the proposed bargaining unit. The Board may order a representation vote to determine which trade union the employees wish to have represent them.

If the Board rejects an application for certification, no other application for certification can be filed for the same group of employees, for a period of six months from the date of the Board's decision.

### **Holding of a Representation Vote**

Where the Board orders a vote to determine whether the employees want, or do not want, the union to represent them (or to determine which trade union the employees wish to have represent them (in displacement applications)), it will specify who is eligible to vote and will designate a returning officer to the matter. The returning officer is usually the industrial relations officer who completed the investigation.

The returning officer will consult with the parties regarding the arrangements for the conduct of the vote, and will require the employer to post in the workplace a Notice of Vote, which is prepared by the Board. Representation votes are usually conducted in person (by ballot box) at the employees' place of work during, before or after normal working hours.

Parties are entitled to be represented by scrutineers, whose responsibilities are to assist the returning officer in identifying voters and to help ensure that the vote is conducted in a fair and impartial manner. It is a secret ballot. The vote is usually counted immediately following the closing of the polls. The result is determined on the basis of the majority of those who vote.

If the employer's operation is geographically spread out, or if the bargaining unit is regional or national, the vote may be conducted by electronic means or by mail, or by combining any other voting method.

Once the vote is counted, the Board determines if the application for certification is granted or not. The Board usually issues its written decision to the parties shortly after the vote.

### **Prohibited Conduct**

The *Code* sets out certain prohibited conduct for both trade unions and employers, much of which applies while an organizing campaign is underway, and while an application for certification is pending before the Board.

Pursuant to section 94 of the *Code*, an **employer or person acting on behalf of an employer** shall not interfere with the formation or administration of a trade union, take disciplinary action against an employee, or otherwise discriminate against an employee for seeking to join a trade union or participate in the formation of a trade union.

Section 95 of the *Code* sets out certain prohibited conduct for **trade unions**. For example, unless an employer consents, a trade union's representatives are not permitted to campaign or attempt to organize workers at their place of employment during their working hours.

In addition, section 96 of the *Code* contains a general prohibition: no person can use intimidation or coercion to solicit union membership or to compel someone not to join a union.



A breach of these provisions of the *Code* may be the subject of a complaint of unfair labour practice filed by a trade union, an employer or an individual. The Board is empowered by the *Code* to hear and determine complaints of this kind and provide appropriate remedies. Complaints of unfair labour practice are discussed in *Information Circular No. 5—Filing an Unfair Labour Practice Complaint*, which is available on the [Board's website](#).

### **Obligation to Bargain Collectively**

If the Board certifies a trade union to represent a group of employees, the trade union or the employer may, by notice, require the other party to commence collective bargaining.