

## CHAPTER 6

### UNION ORGANIZING DRIVE AND CERTIFICATION

#### Preface

In this chapter, students will explore why employees join unions and the rules related to how union support is measured. The legal framework regarding unfair labour practices and remedies will also be reviewed. Finally, they will consider how a union can lose the right to represent employees and what happens if the employer sells the business that includes one or more bargaining units.

#### Learning Objectives

- 6.1 Explain reasons why employees may, or may not, want to join a union.
- 6.2 Outline how a union could obtain bargaining rights.
- 6.3 Outline the steps in a union organizing campaign and application for certification.
- 6.4 Outline the factors determining and the significance of the bargaining unit.
- 6.5 Outline the process to deal with unfair labour practices at certification and the remedies available.
- 6.7 Explain the grounds and procedure to terminate a union's bargaining rights.
- 6.8 Outline successor rights and the effect of a sale of a business on a union's bargaining rights.

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#### **I. Why Employees Decide to Unionize**

Unions are in the business of representing employees who at some point became so unhappy with their jobs and workplace conditions that they sought out an external advocate to represent them as a collective group to their employer. The reasons why employees join unions and maintain union membership are important to both unions and employers. The factors affecting an individual employee's decision whether to support a union are important to the union when it determines how to persuade employees to join. If the union addresses issues of greater interest to employees and is able to set aside employee concerns about unionization, it is more likely to be successful in an organizing campaign.

Canadian labour laws allow the individual employee to express their desire to, or not to, become a union member when a possible shift from non-union to union status is underway. Many of the affected employees are interested in what a union has to offer to improve their work lives. Others may be indifferent or are uninformed about the possibilities. Another segment of the workforce will be opposed to becoming a union member. This collection of personal viewpoints is shaped to a certain degree by one or more factors that motivate the choice that each employee makes in a proposed bargaining unit. Employers may have an ability to change internal factors such as wage rates or working conditions, however, external factors such as the state of the economy or community and family attitudes toward unions are beyond the employer's control.

**POOR SUPERVISION** Not all supervisors possess the desired level of skills, knowledge and abilities (KSAs) to direct others. Employees who encounter indifference or hostility from their manager become frustrated due to an inability to address concerns related to their jobs and working conditions. Some employees may perceive that they are being harassed or intimidated by their manager. Their experience with their manager, who may not have been adequately selected or trained, may lead them to believe that a union will help them resolve this issue.

**COMPENSATION** Many employees join a union to obtain improved wages and benefits. Statistics Canada reported an average weekly earnings of \$1308.47 for unionized employees compared to \$1219.70 for non-union employees. Further, the number of Canadians covered by a pension increased to approximately 6.5 million Canadians. More specifically, more than 70% of unionized employees have a pension compared to just 30% of non-unionized employees with a pension. <https://iupat.on.ca/blog/how-unions-help-workers-with-retirement-benefits-than-non-unionized-worker/>

**UNFAIRNESS AND INEQUITY** Non-union employees may experience unfair treatment by management. This may occur when some employee requests are denied while allowed for other employees. For example, job postings that are not available to internal employee applicants to apply to may also appear to be unfair treatment by the organization. In addition, the amount of compensation received by an employee may appear to be unfair relative to peers or similar jobs in the organization. If employees perceive that there is an inequity related to rewards for their effort, and have not received a response to their concerns in such matters, they may think that unionization is the way to achieve fairness.

**JOB SECURITY** Today's multi-generational workforce agrees on one thing: job security is a very important aspect of the work environment. Notably, this workforce is also concerned with ethical employers whose values align with their own along with job security. If employees are not unionized, the employer can terminate employees even though there is no employee misconduct, as long as reasonable notice is given. If a non-union employee is not provided with sufficient notice, they can seek monetary damages by filing a claim in civil court, but they may not seek reinstatement to their job. There is an exception in three jurisdictions: Canada (federal), Nova Scotia and Quebec. On the other hand, in a unionized workplace the collective agreement will provide that employees can only be terminated if there is just cause. A termination may be the subject of a grievance, and an arbitrator might eventually hear the matter and order reinstatement. The requirement for just cause to terminate a unionized employee and the possibility of reinstatement provides unionized employees with additional job security.

In the event of a loss of business, organizations may be forced to layoff employees. Without a union, the employer may layoff whomever it wishes. Although some non-union employers apply seniority rules, so that those with the longest service record are last to be laid off, there is no legal requirement that they do so. In a unionized workplace, although seniority is not the only consideration governing layoffs, employees who have more time on the job have more job security.

Technological changes and contracting out or outsourcing also pose threats to employees' job security. Contracting out refers to the employer arranging for work to be done by the employees of another organization or independent contractors. For example, an employer operating a hotel might eliminate the jobs of some of its housekeeping staff if it contracted out the cleaning of the common areas of the building. Although unions cannot guarantee that technological change or contracting out will not affect employees, collective agreements may contain terms that provide some protection against job loss.

**WORKING CONDITIONS** There are numerous working conditions that employees may perceive would be improved if a union represented them. Employees may pursue unionization to obtain greater notice for scheduled hours, to obtain a fairer distribution of shifts, or because of concerns with health and safety. This dissatisfaction is created when there is conflict or dissonance between the employee's expectations of work and the experiences of work. The mere belief that unions will be successful in closing this conflict between expectations and experiences regarding workplace conditions is known as instrumentality. Several of the remaining factors and conditions are related to this tension between employee expectations and experiences on the job.

Instrumentality is the perception that a union will be able to successfully help employees achieve desired terms and conditions in the workplace.

It is common for union organizers to promise that better working conditions come with joining a union. This was evident in New Brunswick when the nursing home employees unionized largely to improve working conditions according to the president of the New Brunswick Council of Nursing Homes Unions (NBCNHU). Survey respondents were asked to indicate the actions taken to resolve their most recent incident of harassment or violence—whom they notified about the incident, who helped resolve the issue, processes used to resolve the issue, as well as the outcome of the incident and satisfaction with the outcome. Around 75 percent of survey respondents who experienced harassment or violence took action—but 41 percent of them reported that no attempt was made to resolve the issue. Most respondents who acted to address their experience faced obstacles when trying to resolve the issues. Satisfaction with how incidents of harassment and violence were resolved was low. Online respondents stated they acted to address their experiences with harassment or violence; most discussed the matter with a co-worker (64%) or with their supervisor (58%). Relatively few respondents discussed the matter with a human resources management professional (22%) or with the workplace committee or health and safety representative (12%). About half of respondents who reported their incident indicated that the issue was not resolved. Those incidents that were resolved tended to be resolved by unions (21%), supervisors (20%) or co-workers (19%). Very few matters were

resolved by a workplace committee or health and safety representative (3%). Respondents were asked about the types of processes used to resolve their most recent incident. Just over 40 percent indicated that no attempt was made to resolve the issue.

**WORKLOAD** Economic pressures have forced employers in both the public and private sectors to try to do more with less. Many employees have likely encountered increased workloads including assembly line speedups or increased workloads after a downsizing. In the public sector, health care workers have been required to look after more patients, and teachers may have encountered larger class sizes. Employees may perceive that joining or maintaining their membership in a union will help them counter attempts by employers to increase their workload.

**INPUT IN ORGANIZATIONAL POLICYMAKING** Some employees may want input into policy decisions made by their employer. Teachers may want a voice in decisions made by school boards such as class sizes that affect students. The importance of employees' perspective upon policy decisions became evident during the COVID-19 pandemic when elementary school teachers were concerned about class sizes as larger class sizes made social distancing difficult to prevent further infections. Employees may find that their concerns are not addressed. Some employees may pursue or maintain unionization for the purpose of establishing a collective voice, which the employer is more likely to listen to.

**INEFFECTIVE COMPLAINT MECHANISM** There is no legal requirement for non-union employers to establish complaint mechanisms for employees to resolve workplace issues. Non-union employees may hear about employees filing grievances through their union representatives and winning disputes with employers. In the non-union workplace, there is no way to challenge legal management directives. Employees may perceive that the grievance and arbitration process found in collective agreements will provide them with a means to challenge some management decisions.

**EMPLOYER POLICIES** Some employers have adopted union substitution and avoidance strategies, which are aimed to reduce employees' desire to unionize. By establishing practices such as complaint mechanisms, employee involvement programs and providing compensation equivalent to unionized employers, the employer may be able to reduce the likelihood of employees seeking unionization.

## **II. Why Employees Do Not Join a Union**

In view of the fact that roughly one-in-three Canadian employees are union members, and not all union members have chosen union membership voluntarily, there must be reasons why employees do not unionize.

**UNION DUES** Some employees may object to joining a union because they do not want to pay union dues. They may think that they will not receive service from the union that is worth the dues they will have to pay.

**POLITICAL AND SOCIAL ACTIVITIES OF UNIONS** Unions have supported political parties and social causes that some employees do not agree with. Many unions have supported specific political parties at the federal, provincial, and territorial levels. Unions have also taken up social causes such as affordable housing, anti-bullying programs and protection of minority rights. Some individuals may not be willing to support or be associated with these political and social movements.

**STRIKES** Some employees may associate unions with strikes. Strikes present a time of lost earnings for the union member. Depending on the financial security of the employee and their family, the threat of not earning income from their job for an uncertain period of time may make the employee not want to join a union. Although strikes in Canada are rare events, employees may fear the economic hardship caused by a strike.

**LOYALTY TO THE EMPLOYER** In the age of downsizing and outsourcing, the notion of loyalty to one's employer seems to be a challenged sentiment. However, some employees may feel an obligation to their employer and that joining a union is a deliberate act of disloyalty to their manager or employer. Some employees also see unionization as limiting their ambitions to move into a management role, perceiving that if they support a union they may be harming their careers.

**CONFLICT** Many employees prefer to work in a cooperative setting. They may have observed or heard of the adversarial nature of some unionized workplaces, and they do not think that they would be comfortable in that type of setting, particularly if this adversarial tone is linked to the union's presence in the organization.

**MERIT** Some employees may perceive that if compensation, benefits, and promotion decisions are made on the basis of merit, or their KSAs and performance, they will succeed. They may fear that a uniform compensation system, which most collective agreements provide for, and the application of seniority rules in a unionized workplace, will not be to their advantage.

**PERCEPTIONS OF UNION MEMBER WORK HABITS AND ATTITUDES** Some employees may perceive that unions protect lazy and incompetent employees. Those sharing these sentiments would be reluctant to have to carry these unproductive employees yet still receive the same wage rates as their underperforming work colleagues.

**FLEXIBILITY** Employees may perceive that a collective agreement involves an inflexible set of rules and terms of work including set hours, start times and vacations. They would prefer to maintain their ability to negotiate their own terms and conditions of work with the employer.

**EMPLOYER RETALIATION** Some employees may wish to pursue unionization, but they fear that their employer may retaliate. During this period, employees may shy away from becoming directly involved in the organizing campaign, fearing their involvement may attract some form of sanction by the employer; for example, by less desirable shifts, job reassignments or loss of privileges due to their pro-union support.

**JOB LOSS** During the COVID-19 pandemic, small minority of truckers and none of their formal representatives and others formed the Freedom Convoy to content the pandemic restrictions in Canada. This protect blocked the Canada-US Ambassador bridge for a period of time, resulting in supply chain disruptions, lost auto sector revenue, and potential Canadian auto worker job losses. The concern for these Canadian auto jobs came as Americans were advocating to return the materials supplied to the auto sector back to the US to avoid such a future disruption.

**LACK OF OPPORTUNITY TO UNIONIZE** Some employees do not have an opportunity to pursue unionization even though they would like to do so. The history and culture of particular regions of Canada create a legislative environment that makes it more difficult to certify a new union local than in other parts of the country. Some industries, such as banking, have lower levels of unionization because of employer opposition, legal rules or other factors.

### III. External Factors Affecting Unionization

External factors such as cultural values or government policy may affect an employee's decision regarding unionization.

**ECONOMIC FACTORS** Employment trends in the first decades of the 21st century continue to challenge the conflict between employees' expectations of work and their actual experiences on the job. During periods of inflation, employees may perceive that a union may help them protect their real incomes. Employees may observe cost-of-living provisions that unions have been able to negotiate in some collective agreements during periods of inflation. In a recession, higher unemployment rates might prompt concerns regarding job security, causing employees to seek unionization.

**ATTITUDES TOWARD UNIONS** Some employees have attitudes toward unions shaped by news and social media as well as the attitudes and experiences of family members that influence their individual preference or dislike for union affiliation. It has been noted that a significant number of Canadians do not have positive attitudes toward unions. However, public opinion varies with the political and economic situation over time.

### IV. How Bargaining Rights Are Obtained and Their Significance

The acquisition and retention of bargaining rights by a union is critical to the labour relations system. A union can obtain bargaining rights in two ways: by being voluntarily recognized by the employer or by applying to a labour relations board and obtaining a certificate that grants the union the right to serve as the exclusive bargaining agent for employees.

A voluntary recognition agreement is an agreement between a union and an employer providing that the employer recognizes the union as the bargaining agent for a group of employees. As the name suggests, the employer cannot be forced to recognize the union. Voluntary recognition agreements are not common. Employees do not have to consent to the recognition, and there is a procedure available to employees to terminate the union's bargaining rights if they object to the recognition.

## Certification of a Union

To be certified, the union must conduct an organizing campaign to have employees join the union and then make an application for certification to the labour relations board.

Most unions gain bargaining rights by certification. Labour relations legislation provides a certification process whereby a union may obtain the right to represent a group of employees by applying to a labour relations board. If the union is successful, the board issues a certificate that affirms the union as the exclusive bargaining agent for the employees holding the jobs specified in the certificate. The term certification refers not only to the process through which a union applies to the board but also to the end result of the process; for example, there may be reference to the fact that there has been certification of a union. Once a union has been certified, it has the right to represent employees until the Board terminates that right.

The certification process is a way for a union to obtain bargaining rights for employees by applying to a labour relations board. When a union is certified, there are significant consequences for the employees and the employer. The union becomes the exclusive bargaining agent for the employees, who are no longer able to enter into, or retain, individual contracts of employment with the employer. For example, the employer could not make an individual agreement with the employee that they could be granted an additional week's vacation. When a union has been certified, there is also a duty to bargain in good faith—to honestly attempt to reach a collective agreement. Labour relations legislation in each jurisdiction governs the certification process, the conduct of the parties and how bargaining rights can be lost. Employers and unions should be familiar with the legislation that governs them. Although the basic principles relating to the establishment and termination of bargaining rights are the same across jurisdictions, there are some differences between jurisdictions.

## Organizing Campaign

An organizing campaign refers to the union's attempt to persuade employees that they should become union members. Such a campaign will typically start after employees contact the union and request its assistance. The union will assign a union organizer to the campaign, a person on the staff of the union who attempts to sign-up enough employees as members for an application for certification. Some unions attempt to use union organizers for the campaign who speak the language of the workplace and have similar work experiences and background. Unions have moved away from relying exclusively on full-time staff organizers toward using some organizers who are employees from another workplace on a temporary assignment. A union trains workers who take time off from their jobs to work as union organizers. It has been established that when the first contact between the union and the workplace being organized is made by a person from another workplace, the success rate of organizing drives is increased. An organizing committee will likely be established—a group of employees who support the union and work with the union organizer. Members of the organizing committee attempt to have their co-workers sign on as union members. The use of an organizing committee increases the chances of success in an organizing campaign. Organizing committees are more effective when they effectively communicate, educate the employees of their workplace rights, collect employee feedback, and build an organizing strategy. Importantly, the organizing committee must represent the diversity of the workforce.

Some campaigns are conducted openly. The union may advise the employer about the upcoming organizing campaign and the right of employees to join a union without interference from the employer. It is more common for the union to keep the campaign secret for as long as possible to avoid a negative response by the employer. The organizing campaign might involve distribution of paper and digital communication to employees outlining the advantages of unionization and hosting information meetings away from the workplace. In particular, it is important for unions to use websites and social media to provide information to employees to persuade them to become union members.

Members of the organizing committee will speak to employees at break times or after work hours and to have them to sign membership cards. Organizers or organizing committee members may visit employees at their homes. The union attempts to get as many employees as possible in the proposed bargaining unit to sign cards. Employees may have to make a small payment to become a member, depending on the jurisdiction. In five jurisdictions—British Columbia, Manitoba, Newfoundland and Labrador, Ontario and Saskatchewan—no fee or payment to join a union is required; in other jurisdictions, there is a nominal membership fee ranging from one to five dollars. In most jurisdictions, the membership evidence must have been signed within a prescribed time prior to the application for certification being submitted to the Board. This period ranges among jurisdictions from 90 days to 12 months.

### **Application for Certification to Labour Relations Board**

If the union signs up a sufficient percentage of employees as members, it will file an application for certification to the labour relations board at the federal, provincial, or territorial jurisdiction. Some boards provide guides or other useful information regarding certification. When the union applies to the board, it will have to establish that:

- it is a trade union as defined in labour relations legislation;
- the application is timely;
- the group of employees specified in the application is an appropriate bargaining unit;
- and
- the union has adequate support of employees in the proposed unit.

### **STATUS OF THE APPLICANT TRADE UNION**

Labour relations legislation provides that to apply for certification, an organization must be a trade union—an organization that has as one of its purposes the regulation of relations between employees and employers. The organization must not be dominated by, or influenced by, the employer and its management. A union will not have to re-establish itself as a union every time it makes an application for certification. Once it has established its union status, it will be deemed to be a union in subsequent applications unless it is proved otherwise.

Employees or a second union might oppose an application for certification on the grounds that the applicant is not a trade union because it is dominated by the employer or that it does not operate based on democratic principles that assure the right of members to exercise choice in key decision-making matters. All jurisdictions provide that an organization that discriminates on the basis of human rights cannot be certified.



## APPROPRIATENESS OF THE BARGAINING UNIT

A union cannot apply for certification for just any group of employees. The legislation requires that the application must relate to a group that is appropriate for collective bargaining. In the case of a hotel, the union could not submit an application for only some of the kitchen staff.

Bargaining units are often described by exception; that is, the description refers to a group of employees and then lists jobs that are not included in the unit. A bargaining unit composed of production workers might be described as follows: "All employees of [employer] save and except forepersons, persons above the rank of foreperson, office staff, security guards, and technical employees."

It is important to note that the bargaining unit is described in terms of jobs, not employees, meaning that the death, termination or retirement of employees does not affect the scope or composition of the bargaining unit. Labour relations legislation provides some rules regarding the appropriate bargaining unit; however, each labour relations board has developed its own guidelines. Standard approaches to the determination of the appropriate bargaining unit in particular industries have developed in each jurisdiction, with significant variations across jurisdictions. Managerial employees and employees engaged in a confidential capacity regarding labour relations matters cannot be included in a bargaining unit. In some jurisdictions there are additional restrictions on combining specified occupational groups, such as security guards, with other employees in one bargaining unit.

If some employees who should be included in the bargaining unit do not support unionization, the union cannot just omit them. The appropriate bargaining unit is ultimately determined by the labour board after allowing the employer and any interested employee(s) an opportunity to make representations to the board regarding the appropriateness of the proposed unit.

## EMPLOYEE STATUS AND EXCLUSIONS

To be eligible for unionization, a person must be an employee, not an independent contractor—someone engaged in their own business. In some cases, this may be difficult to determine.

**Independent contractor** is someone engaged in their own business. For example, someone who uses their own equipment to remove snow from residential driveways and charges each household an amount based on the size of the driveway is clearly an independent contractor. Someone who works for an organization and uses the organization's equipment to remove the snow from its parking lot as one of their duties is an employee. There will be situations where the status of an individual doing work is not clear. For example, in one case there was a dispute relating to an individual who was responsible for cleaning a library. The individual charged a monthly fee; anyone could do the work; there were no directions given regarding the work; and they were free to work for others. The union contended that the individual was an employee and the employer submitted that she was an independent contractor. Ultimately the labour relations board found that the individual was an independent contractor. If an employer challenges the employee status of an individual, the issue will be determined by the labour relations board.

**Dependent Contractors** It has been recognized that if labour relations boards only applied the common law tests to determine if an individual was an employee, some workers would be found

to be independent contractors, when in fact they are just as dependent upon a particular organization as an employee would be. This would mean that these individuals would not have access to unionization. For example, persons who own and drive their own taxis or delivery vehicles might be viewed as independent contractors. In five jurisdictions (Canada, British Columbia, Newfoundland and Labrador, Ontario, and Prince Edward Island), labour relations legislation provides for the concept of a dependent contractor. The definition of a dependent contractor is similar across these jurisdictions; an example from the British Columbia Labour Relations Code is as follows:

[A] person, whether or not employed by a contract of employment or furnishing their own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that they are in relation to that person in a position of economic dependence on, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

The definition of employee in the legislation provides that individuals who are dependent contractors are employees. This should be viewed as a statutory extension of the definition of employee for the purposes of labour relations. The result is that some workers who would otherwise be found to be independent contractors fall within the definition of an employee, and they can join or form a union.

Even in jurisdictions without a dependent contractor provision in the legislation, someone economically dependent upon a single organization might be found to be an employee. For example, although the Alberta legislation does not provide for dependent contractors, taxi drivers in that province who are dependent upon a single organization have been found to be employees. Each case dealing with the issue of employee versus independent contractor status must be considered on its own merits.

**Managerial Exclusion** All jurisdictions provide that managerial employees are excluded from unionization in order to avoid a conflict of interest. Managerial employees may be involved in the determination of how the employer will negotiate with the union or the settlement of disputes regarding the interpretation of the collective agreement. Accordingly, they should not be part of the union to avoid a conflict of interest. The application of the managerial exclusion varies between jurisdictions and in some jurisdictions more employees are classified as managers.

Labour relations legislation does not define manager or managerial functions. When a Labour relations board determines whether an employee is a manager, the employee's real job or actual duties are examined. A job title that refers to an employee as a manager does not decide the question. Similarly, a board will consider the job description to determine if it accurately reflects the authority exercised by the employee. If the job profile refers to duties including employee recruitment, selection, and performance management, but in reality the employee does not become involved in these tasks, they will not be recognized as a manager. The employee will be recognized as a manager if they have a direct impact on the terms of employment of others. By direct impact the labour board is looking for evidence of the authority to recruit, select, and compensate, or manage the employee performance. The job in question may also be viewed as

management if the employee makes effective recommendations regarding the terms of employment of other employees. In some jurisdictions, employees may be classified as a manager if they are involved in independent decision-making and have authority over matters of policy or the direction of the organization, even though they do not have employees reporting to them. A distinction must be drawn between supervisors and managers. If the supervisor does not exercise managerial functions they would be eligible for unionization. Any potential conflict between supervisory and non-supervisory employees can be alleviated by putting the supervisory employees in a separate bargaining unit, which is sometimes seen in unionized public-service unions.

**Exclusions of Employees Engaged in a Confidential Capacity Regarding Labour Relations**

All jurisdictions except Quebec exclude employees working in a confidential capacity relating to labour relations. This exclusion applies when employees have more than just access to information. They must actually be involved in the use of the information for the exclusion to apply. This exclusion is aimed at avoiding a conflict of interest. It would not be practical to have the administrative assistant to the director of labour relations, who prepares alternative contract proposals that will be presented to the union during collective bargaining, to be part of the union.

**Occupational Exclusions** In some jurisdictions, employees are excluded from unionization on the basis of their occupation. In Alberta, New Brunswick, Nova Scotia, Ontario and Prince Edward Island, specified professional employees such as members of the architectural and medical professions employed in their professional capacity are prevented from joining or forming a union. For example, members of the engineering profession are allowed to unionize in most jurisdictions, but not in Alberta, Nova Scotia or Prince Edward Island. The legislation in Alberta and Ontario prevents agricultural employees from unionizing. The policy reasons for these exclusions are not clear.

**DEFINITION OF AN EMPLOYER** When a union applies to be certified as the bargaining agent for a group of employees, it must name the employer. In some cases, a question might arise as to whether the organization named is in fact the employer. For example, when a temporary help agency provides workers to a unionized employer, are they employees of the agency or of the agency's client?

The Ontario Labour Relations Board has set out seven factors that may be referred to when determining which of two organizations is the true employer.

Labour board decisions have confirmed that where one organization is responsible for the compensation of the worker and another organization has the day-to-day control over the worker's activities, the organization exercising control will be found to be the true employer. Workers who have been engaged and paid by an employment agency and who are working under the control of a client of the agency have been found to be employees of the client for labour relations purposes.

**TIMELINES: WHEN CAN AN APPLICATION FOR CERTIFICATION BE MADE**

There are restrictions on when an application for certification can be filed that depend on whether employees are currently represented by a union. A key consideration here is the **open period**. This timeframe provides the employer with a stoppage in union certification drives until near the end of the collective agreement, typically the last three months of the current contract. This timeframe also allows a newly certified union a period of time to establish a relationship with a new employer and to demonstrate its effectiveness as an advocate for members of the bargaining unit.

Rules governing open periods vary by jurisdiction in Canada. Generally, if no union currently represents employees, the general rule is that an application for certification can be filed at any time. There is a different set of restrictions that could affect the timing of an application for certification when employees are currently represented by a union. The effect of the certification of a second or raiding union on any collective agreement that has not yet expired also varies across jurisdictions. Conciliation or mediation processes in contract negotiation, might delay an application for certification depending upon the jurisdiction. Also, a strike or lockout could delay an application for certification in some jurisdictions.

**SIGNIFICANCE OF NATURE AND SIZE OF THE BARGAINING UNIT** The determination of the appropriate bargaining unit is important to the union, the employer and the employees. The nature and size of the unit deemed appropriate can affect whether the union is certified and the subsequent negotiation of the collective agreement if the labour board does indeed certify the union.

At the time of the application, it may be easier for the union to apply to represent a smaller unit. However, when the union negotiates with the employer, it will be in a stronger position if the bargaining unit is larger in total membership. The banking industry illustrates this situation. Prior to 1977, the Canada Labour Relations Board refused to recognize the employees at a single bank branch as an appropriate bargaining unit, agreeing with the employer that the minimum size should be recognized in all the branches in a particular geographic area, such as a city. As a result, there were very few successful organizing drives. The Board realized that this policy was a barrier to establishing collective bargaining in the banking industry and changed the policy to allow a single branch to be an appropriate unit. This new policy made it easier for unions to be certified. Yet it also led to the establishment of small bargaining units that had to negotiate on their own with the employer. In some cases, the units were not large enough to successfully negotiate a collective agreement. If employees in the new bargaining unit who have more skills and expertise are not included, the union's bargaining power is reduced because a unit composed of a small number of unskilled employees could be easily replaced if there is a strike. The fact that there are still very few unionized bank employees demonstrates how setting an appropriate bargaining unit that is too large can prevent unionization, while setting a unit size that is too small can result in an inability to conclude a successful collective agreement because the employer is able to resist the economic power of the union. As is the case with many labour relations issues, determining the appropriate bargaining unit is a question of balancing competing concerns and issues.

**OTHER VARIABLES AFFECTING DETERMINATION OF THE BARGAINING UNIT**

In some situations, there may be several possible options in the formation of bargaining units at the time of certification, some of which may be more appropriate than others. The union does not generally have to establish that the unit it proposes is the most appropriate one. A labour board will certify a bargaining unit as long as it is appropriate for collective bargaining even though there could be other, more appropriate ones.

The key determinant of whether jobs or classifications should be included is the community of interest of the employees in the proposed unit although this concept is not exact. The British Columbia Labour Relations Board has referred to community of interest and the determination of the appropriate bargaining unit as follows: “community of interest is capable of spanning, at a single workplace, several different appropriate bargaining units.” There is an inherent flexibility or elasticity to the concept.

A key determination that will have to be made is whether part-time and full-time employees have a sufficient community of interest to put them in the same bargaining unit. Although there may be separate bargaining units certified for full-time and part-time employees, the units might negotiate collective agreements at the same time.

Generally, the union cannot carve out a particular department or a job classification as an appropriate bargaining unit. In a case where a union applied to be certified to represent registered nursing assistants at a hospital and did not include other service employees such as ward clerks and housekeeping aides, the Board found that the bargaining unit proposed was not appropriate. An exception to this general rule is found in the skilled trades—millwrights, electricians and other craft-based occupations have traditionally been represented by a craft union that have been permitted to be in a separate bargaining unit.

If the employer has more than one location in a municipality, province or territory, it must be determined if the bargaining unit should include multiple locations. If a board determines that the bargaining unit will include all locations in a municipality, province, or territory and the employer moves within the municipality, province or territory, the union continues to hold the right to represent employees. It also means that if the employer establishes a second location in the same municipality, province, or territory, the second location will be covered by the certification, and the union will represent the employees there.

Avoiding fragmentation is a major factor in the determination of the appropriate bargaining unit. If a board allowed several smaller bargaining units to be established, there might be conflict between different unions, and several negotiations and possible strikes. One of the goals of a labour relations board will be to prevent the situation of an employer having multiple unions and bargaining units to deal with—a situation that could cause major instability in the workplace, as unions contested with other unions for jurisdiction and the employer might be in constant negotiations with one or another of the unions.

Although the preferences of the union and the employer are a factor, they do not determine the appropriate bargaining unit. Some boards have established a unit different from the one agreed upon by the union and the employer. The preference of the union has more significance because

the union will set out a proposed bargaining unit in the application for certification, and the unit only has to be appropriate for bargaining, not the perfect unit. Boards carefully consider the possibility that the determination of the bargaining unit could cause labour relations problems for the employer. Boards do not want to establish bargaining units that would result in employees moving back and forth between two different bargaining units or between a bargaining unit and a group of unorganized employees.

### **Determination of Union Support**

**CERTIFICATION ON THE BASIS ON A REPRESENTATIVE VOTE** In order for a union to be certified, it must show that it has the support of a majority of employees. There is an important policy issue on the question of how support of employees is determined. In some jurisdictions, legislation provides that employee support must be determined by a representation vote. A representation vote is a secret ballot vote conducted by the labour relations board to determine if employees want a union to represent them. The vote is held shortly after the application for certification is filed in order to minimize the opportunity for employers to interfere. In some jurisdictions, the vote is held within five days of the application for certification being filed and the ballot box is sealed pending the resolution of issues such as the eligibility to vote. It has been shown that requiring a representation vote reduces the success rate of union organizing efforts.

In two jurisdictions—British Columbia and Saskatchewan—a representation vote is mandatory, regardless of the level of support for the union shown in the application. In a few jurisdictions, a minimum percentage of employees must vote for the election to be valid. In most jurisdictions, the results of the representation vote are determined by a majority of those who actually do vote; the union does not have to obtain the support of the majority of those eligible to vote. For example, if 100 employees in the bargaining unit are eligible to vote and 80 employees actually vote, the union would have to obtain 41 votes in support of joining the union to be certified in most jurisdictions. Accordingly, employees who do not want to see the union certified must actually vote against the union.

**CERTIFICATION ON THE BASIS OF MEMBERSHIP CARDS** As seen in Figure 6-6, there are eight jurisdictions—Canada, Alberta, Manitoba, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island and Quebec—where a union can be certified without a representation vote if the membership cards filed with the application establish the required support of a specified percentage of employees in the proposed bargaining unit. If the union does not have the level of support required for certification based on membership cards, but shows it has the minimum support required for a vote, the Board will order a representation vote. For example, in Manitoba the Board will certify the union without a vote if it establishes that it has the support of 65 percent or more employees and will order a vote if the union has the support of less than 65, but more than 40, percent of employees.

The question of whether support for the union should be determined on the basis of membership cards or a representation vote is a critical issue that has been extensively debated. Employers favour a system in which a vote is required; unions prefer reliance on membership cards without a vote. The requirement for a representation vote is based on the premise that the true wishes of

employees cannot be determined unless there is an opportunity for employees to secretly express their preference by voting. It is argued that without a secret ballot the union can exert pressure on members or that those signing membership cards may not fully appreciate the consequences of their actions. Proponents of mandatory voting go on to say that Canada uses a secret ballot system to choose political representatives and determine other issues, and therefore a similar process should also be used to resolve the question of union representation in the workplace. Proponents of a card system argue that the workplace is different from society as a whole because the authority and power are held by the employer. They maintain that if there is a vote, employees may be threatened or unduly influenced by the employer.

### **Conduct During Organizing and Certification Processes**

It is a basic principle of our labour relations system that employees have the right to join or decline to join a union, free of any intimidation or coercion by either the union or the employer. To protect this basic right, labour relations legislation prohibits certain employer and union conduct. An unfair labour practice is a contravention of the relevant labour relations legislation by an employer, union, or employee.

**Unfair labour practice** is a contravention of labour relations legislation by an employer, union or employee. Note that the term unfair is not a reference to a subjective opinion about whether certain conduct is fair. The issue is whether the conduct is prohibited by legislation. An employer might have a practice of providing wage increases to its non-union employees when a unionized competitor agrees to wage increases with its union. The purpose of this practice may be to avoid unionization. This conduct is not an unfair labour practice, because it is not prohibited by labour relations legislation. Even though the employer's practice is aimed at preventing unionization and may appear to be unfair to union supporters, it is not deemed an unfair labour practice because the legislation has not been violated. However, an employer who provides an out-of-the-ordinary wage increase at the time of a union organizing campaign is committing an unfair labour practice, because this conduct is prohibited by labour relations legislation.

Although Canadian labour relations statutes are similar, it is possible that conduct that is an unfair labour practice in one jurisdiction may not be an unfair labour practice in another jurisdiction. For example, soliciting union members during working hours is an unfair labour practice in most, but not all jurisdictions. Conduct that is an unfair labour practice at one point in time may not be an unfair labour practice at another point in time because of changes in the legislation. In most jurisdictions, there is a provision that the employer has the right to express an opinion or exercise free speech, provided it does not threaten or coerce employees. At one time, there was no free-speech provision in the Canada Labour Code. The Canada Industrial Relations Board held that this meant that employers were required to remain neutral during an organizing campaign. The employer was allowed to respond to union campaigning that was defamatory, but the reply could not go further and include statements that might be viewed as campaigning for a vote against the union. This was changed when the Code was amended to add a provision that employers could express their views.

Although most unfair labour practices arise during the organizing campaign and certification process, the term has broad meaning. An unfair labour practice might also occur during the negotiations of the collective agreement, or during the administration of the agreement, because one of the parties contravenes labour relations legislation. The legislation includes the duty to bargain in good faith, as well as the union's duty of fair representation in the course of administration of the contract.

### **Employer Unfair Labour Practices**

The legislation prevents two broad categories of employer behaviour: (1) threats, intimidation and coercion and (2) interference or influence by the employer. Most observers would agree that threats, intimidation and coercion by employers should not be allowed, including actions such as firing union supporters, interrogating employees regarding their possible support for a union, transferring union supporters and threatening to move or shut down operations if the employees unionize. It may be more difficult to understand why some employer conduct, such as a change in working conditions in the face of an organizing campaign, is an unfair labour practice.

**CHANGES IN WORKING CONDITIONS** Labour boards have held that employers who have changed working conditions in response to a union organizing campaign have committed an unfair labour practice. The basis for this is that the legislation prohibits employers from interfering with the employees' decision regarding unionization. This prohibition is not limited to changes in compensation, but includes any changes made for purposes of influencing the employees' decision.

Changes made by an employer in response to a union organizing campaign might be viewed as threatening because of the possible inference that future benefits or improvements depend upon the employees not supporting a union. Employers are not allowed to make promises tied to the defeat of the union. For example, a promise to provide longer vacations if the union is defeated would be an unfair labour practice.

**STATUTORY FREEZE** The legislation in all jurisdictions specifically prohibits the employer from making any changes in the terms of employment when an application for certification is filed with the board or the employer is notified of the application. This prohibition on changes is known as a statutory freeze. The freeze does not prevent the employer from making any changes; it prevents changes that are not business as usual. For example, if the employer has an established practice of providing wage increases at a particular time of the year, it would be required to provide the wage increase during the freeze. However, it would be a violation of the freeze to provide the wage increase earlier than was normally done. Employers who have changed the method of payment from cash to cheque, failed to schedule overtime in accordance with past practice and altered rules regarding access to and use of phones have been found guilty of violating the freeze provision.

The knowledge or expectations of employees are factors affecting whether the employer has violated the statutory freeze. Where the employer has decided to implement a change but has not communicated the change to employees before the freeze begins, that change would be a violation. In one case, the employer informed employees of a benefit plan that had been in



existence but employees had been unaware of. The Board found that this was a violation of the freeze. The reason for this was that in the eyes of employees, the plan was a change. When the employer brought the plan to the attention of employees during the freeze, the employer had in effect changed their terms of employment. The employer had claimed that advising the employees about the benefit plan was exercising free speech, which the legislation allows. This case illustrates that the free speech provisions of the statute are subject to the restrictions against changing the terms of employment. Furthermore, it illustrates that employers should ensure that all employees are fully aware of all of the rights, privileges and benefits they are entitled to.

In Alberta, New Brunswick, Ontario, Quebec and Saskatchewan, the employer is allowed to make changes in the terms of employment during the freeze if it obtains the consent of the union. The federal including Northwest Territories, Nunavut, and Yukon, British Columbia, Manitoba, Newfoundland and Labrador, Nova Scotia and Prince Edward Island legislation provides that the employer is allowed to make changes if the consent of the Board is obtained. Whether the consent must be obtained from the board or the union might be significant to the employer. In one case, the legislation required the consent of the union. The employer, in this case, a retailer, wanted to implement Sunday shopping hours in response to competition. When it requested the union's consent, the union refused. The employer sought volunteers to work the Sunday hours. Even though the employer had a valid business reason to open Sunday, the Board found that the change was a breach of the statutory freeze because the Sunday opening was not "business as usual" and the union had not consented to the change. In a jurisdiction where the employer can make changes with the approval of the Board, instead of obtaining permission from the union, the business case for the change could have led to the Board granting its approval.

### **What Employers Have Said in Response to a Union Organizing Campaign**

**COMMUNICATING WITH EMPLOYEES** Employers are allowed to communicate with employees and express an opinion regarding unionization of their employees provided they do not coerce or intimidate. In most jurisdictions, there is a provision similar to the one in the Canada Labour Code, which provides as follows: "An employer is deemed not to contravene [the Code] by reason only that they express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence." There are some differences between jurisdictions regarding limits on employer communication with employees.

**PROHIBITING ENTRY** Employers can prohibit individuals who are not employees, including union organizers, from coming into the workplace. It is also possible for employers to prohibit employees who are part of a union organizing committee from coming into the workplace during their non-working hours. However, if the employer has not previously had a rule preventing employees from returning to the workplace during their non-working hours and such a rule was introduced in response to a union organizing campaign, this might be viewed as interference with the organizing process.

**PROHIBITING SOLICITATION** Although employers in most jurisdictions cannot establish rules that prohibit the solicitation of union membership during non-working hours such as breaks and meal times, the employer could establish rules that prevent such solicitation during working hours. The situation appears to be different in Nova Scotia. A court decision in that province

indicates that an employer may be able to establish a blanket rule against solicitation of union membership on employer property covering both working and non-working hours. Enforcing such a rule would be difficult, and establishing the rule might backfire because the union could use it as an illustration of the employer being unfair.

Rules imposing restrictions against union activity may be subject to the condition that the employer has not allowed other non-work-related communication between employees in the past. In one case, the employer had allowed members of a staff association to use the employer's internal mail system to communicate with each other. Subsequently, after a union organizing campaign started, the employer prohibited use of the system for union-related communication. The Board held that the employer had committed an unfair labour practice by interfering with the organizing of the union.

## **V. Union Unfair Labour Practices**

There are two possible unfair labour practices unions must avoid at certification:

- intimidation, threats or coercion to compel a person to become or cease to be a member of a trade union.

All jurisdictions prohibit the union from using threats, intimidation or coercion to sign members. Statements made by individual employees during the course of an organizing campaign may not be violations of the legislation even though similar statements would be an unfair labour practice if made by union officials. For example, if employees make statements to their co-workers that their jobs could be at risk if they do not join the union, the statements are not unfair labour practices even though they would be if made by union officials.

- solicitation of union support during working hours.

All jurisdictions except Manitoba and Ontario expressly prohibit attempting to persuade an employee during working hours to become or refrain from becoming a union member. Accordingly, solicitation of membership during working hours is an unfair labour practice; however, solicitation during non-working hours is permitted. It has been established that working hours do not include breaks and lunch periods even if they are paid.

The provisions in Manitoba and Ontario regarding workplace solicitation are unique and may be widely misunderstood. Instead of prohibiting solicitation during work hours, the legislation provides that nothing in the Labour Relations Act authorizes any person to persuade an employee during working hours to become or refrain from becoming a union member. Accordingly, in Manitoba and Ontario, solicitation during working hours is not automatically an unfair labour practice, and the solicitation would only be prohibited if it disrupted the workplace.

## Remedies for Unfair Labour Practices

The rights and obligations provided in labour relations legislation, including the right to join a union, would be meaningless without an effective enforcement mechanism.

**PROCEDURE** If either the union or the employer thinks that an unfair labour practice has been committed, they may file a complaint with the labour relations board in their jurisdiction. Referring unfair labour practice complaints to boards instead of dealing with them in the court system has at least two advantages. Individuals with expertise in labour relations will consider the complaints, and they may be dealt with faster. In the federal jurisdiction, New Brunswick and Nova Scotia, a complaint must be filed within 90 days. In other jurisdictions, the Board may exercise its discretion to refuse to deal with the complaint when there has been an undue delay.

In most jurisdictions, there is a provision for a labour relations officer, who is a board employee, to attempt to settle the complaint so that a board hearing is not required. Most unfair labour practice complaints are settled, and many are withdrawn. If a complaint is not settled or withdrawn, the Board will hold a hearing to determine whether there was a violation of the legislation and the remedy that should be provided. A hearing might take a few hours or a few weeks, depending on the number and complexity of the issues. Each side has an opportunity to present witnesses and documents as evidence to determine whether the legislation was contravened, and, if so, to propose an appropriate remedy.

**BURDEN OF PROOF** Labour relations legislation in most jurisdictions (Canada including Northwest Territories, Nunavut, and Yukon, British Columbia, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan) provides that where a complaint alleges an employee has been threatened, coerced or dismissed because of union activity, the onus of proof is reversed and placed on the employer. The employer must establish there was no violation of the legislation. In the case of a dismissal, the employer will have to show there was a reason for the dismissal other than union activity. When a union supporter has been dismissed, the board will carefully determine if the explanation provided by the employer is credible.

**REMEDIES** If the labour relations board determines that unfair labour practices have been committed during the organizing campaign, it might order one or more of the remedies.

Most unfair labour practice complaints during the organizing campaign are allegations of employer misconduct such as threatening employees, interference with the union and the discharge of employees involved in union activity. The purpose of the remedy a board grants is to compensate the victim and deter future misconduct, not to punish the party who has violated the legislation.

**Cease and Desist Order** One of the most common board orders is a cease and desist order, which directs the employer to stop violating the legislation. For example, employers have been ordered to cease and desist from questioning employees about union involvement. Similarly, a Board could make an order that prohibits future unlawful conduct.

**Reinstatement of Discharged Employees** Where it is found that employees have been terminated because of their union activity, the Board will order them reinstated.

**Compensation or Damages** A labour board will order the innocent party to be compensated for any financial losses flowing from the unfair labour practice. This action, often referred to as making whole, attempts to put the innocent party in the position they would have been in if the legislation had not been violated. Employees who have been discharged for union activity will be awarded compensation equivalent to their lost earnings, in addition to reinstatement. However, discharged employees have a duty to mitigate or take reasonable steps to reduce their loss. Any monies an employee earned or could have earned after they were dismissed will be deducted from any damages awarded. Boards have also awarded compensation to unions when they have incurred additional costs in countering unfair labour practices of the employer. For example, unions have been awarded the costs of printing additional materials to respond to employer threats of moving the business in the face of an organizing campaign. If a board orders the employer to pay compensation for lost earnings for an earlier period, the board will also order that interest also be paid on the amount owing.

**Making whole** attempts to put the innocent party in the position they would have been in if the legislation had not been violated.

**Notice to Employees** Some boards have ordered employers to post or mail a notice to employees that admits they have violated the legislation and promises that they will not violate the Act again. The purpose of this order is to allay employee fears of retaliation by the employer for future union activity.

**Access** Where employers have threatened employees or provided false information, boards have ordered that the union have an opportunity to meet with employees on employer property during working hours. The purpose of this order is to allow the union to respond to employer claims and alleviate employee concerns about unionization. boards have also ordered employers to provide unions with the names and addresses of employees, and to allow the union to use bulletin boards and other communication tools in the workplace. Some boards have ordered the employer to provide the union with notice of any meetings of employees and an opportunity to attend and respond.

**Freeze on Working Conditions** Where employers have changed working conditions in violation of the legislation, boards have ordered a freeze on working conditions.

**New Representation Vote** When either the union or the employer has been guilty of intimidation or coercion so that employees would be afraid to vote as they wish, a board may order a new vote.

**Certification Without a Vote** In the federal jurisdiction including Northwest Territories, Nunavut, and Yukon, British Columbia, Manitoba, New Brunswick, Nova Scotia and Ontario, a board has the authority to certify the union without a vote or despite the fact that the union has lost the vote. The certification of the union without a vote (remedial certification) is one of the most contentious remedies a board may grant, and it is invoked only in exceptional circumstances where the employer has been guilty of serious misconduct.

**Prosecution** A contravention of the legislation or a board order is an offence for which the guilty party can be prosecuted. In most jurisdictions, prosecution is not allowed unless the consent of the board or the Minister of Labour is obtained. The consent to prosecute will only be granted in exceptional cases. The relationship between the union and the employer is ongoing, and a prosecution might harm the relationship.

### **Decertification**

Decertification is the process by which a labour relations board revokes the right granted to a union to represent employees and bargain on their behalf with the employer. Depending on the jurisdiction, the legislation will refer to decertification, termination, rescission or revocation of bargaining rights. Previously it was noted that the term certification might refer to either the process by which a union obtains bargaining rights or the end result of the application for such rights. Similarly, decertification or rescission may refer to either the process followed to revoke the union's bargaining rights or the Board's order terminating the rights.

Decertification allows employees to rid themselves of an ineffective union or to change unions. The possibility of decertification helps ensure union democracy and fair representation because of the threat of the union losing its bargaining rights if it fails to maintain the support of the majority of its members. However, the process poses a policy dilemma. If decertification is too difficult to obtain, employees will lose protection against union inefficiency and freedom of choice regarding their bargaining representative. If decertification is available without any restrictions, unions may be subject to attack by employers and the anti-union sentiments of employees. Accordingly, there are restrictions on the decertification process, including who can apply, the basis for the application and when the application can be made.

A union's bargaining rights can be terminated on different grounds, depending upon the jurisdiction. We will first consider the most common ways a union loses bargaining rights that apply in all jurisdictions—a decertification application by employees or the certification of a different union—and then consider additional grounds for decertification that vary across jurisdictions.

### **Decertification Application by Employees**

All jurisdictions in Canada provide that employees can apply to decertify the union on the basis that they no longer support or wish to be represented by the union.

**PROCEDURE** The process for decertification is very similar to that for certification. Employees in the bargaining unit sign a statement confirming that they do not want the union to represent them, and this evidence is filed with the labour board, together with an application to decertify the union. The key policy issues here are the minimum level of support required for an application, whether a vote is required, and how the results of any vote are determined. There is a minimum level of support that is required for the application in each jurisdiction.

Three jurisdictions—federal including Northwest Territories, Nunavut, and Yukon, Manitoba and Quebec—require a higher level of support for a decertification application than is the case for a certification application. Seven jurisdictions (Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island and Saskatchewan) require the same minimum level of support for a decertification application as a certification application. Nova Scotia is a special case in that the Trade Union Act (Section 29[a]) states the Board may order a decertification vote if a significant number of union members allege the union is not fulfilling its responsibilities.

The employer and the union are not given the names of the employees who apply for decertification. Figure 6-8 shows whether a vote is required. Most jurisdictions provide that a representation vote must be held if a specified minimum percentage of employees indicate that they no longer want the union to represent them. In the jurisdictions where a vote is not required, the board may still direct a vote to satisfy itself that the majority no longer wish to be represented by the union. The federal Board's policy is to require a vote if the union challenges the application. When a vote is held, there is variation across jurisdictions on how the results are determined. The vote is held within the same time frame as a representation vote on a certification application.

**WHEN AN APPLICATION FOR DECERTIFICATION CAN BE MADE** There are restrictions on when employees are allowed to make such an application. As in the case of an application for certification, the restrictions depend on whether a collective agreement has been negotiated. If no agreement has been negotiated, in all jurisdictions with one exception, the decertification application cannot be made until the time an application for certification by a second union is allowed. In British Columbia, the policy is to prohibit an application for decertification for a longer time. When there is no collective agreement in place, a second union can apply to be certified after six months in British Columbia, but an application for decertification cannot be made until 10 months after the union was certified.

When a collective agreement has been negotiated, generally an application for decertification can only be made during one of the open periods for a certification application. Three jurisdictions provide an exception where the union was voluntarily recognized instead of being certified. All jurisdictions except Quebec allow a union to obtain bargaining rights through voluntary recognition by the employer instead of certification by the Board. In the federal jurisdiction, New Brunswick and Ontario, there are special provisions allowing for the decertification of a union that has been voluntarily recognized. In these jurisdictions, an application for decertification can be made at any time in the first year of a collective agreement. The purpose of this provision is to protect against an employer entering into a voluntary recognition agreement and a collective agreement with a union that does not have the support of employees. An employer and a union in these jurisdictions who have concluded a collective agreement after entering into a voluntary recognition agreement face uncertainty in the first year of the agreement's operation that would not exist if the Board had certified the union. In Ontario and New Brunswick, the legislation also allows for the termination of the union's bargaining rights during the first year of a voluntary recognition agreement where no collective agreement is reached.

In summary, there are periods of time when employees cannot make an application for decertification. If there is no collective agreement negotiated, employees must wait 10 months to a year after certification to make an application to decertify, depending on the jurisdiction. If there is a collective agreement with the employer, the open period in which a decertification application can be made could be delayed even longer. In some jurisdictions, the first time an application could be made will be the open period that arises just prior to the expiration of the third year of an agreement.

In most jurisdictions, there is a provision to protect the union against repeated decertification applications. These provisions protect the union for 90 days to a year depending on the jurisdiction.

**RESTRICTIONS** An application for decertification must be a voluntary act by employees. If the employer assists the employees in making the application, or encourages it, the application will be rejected. Applications have been rejected when employers have allowed employees to collect signatures during working hours or paid the legal expenses of the employees making the application.

In Manitoba and the federal jurisdiction, there are some additional restrictions relating to whether the employer has failed to bargain in good faith, or the union has made reasonable efforts to reach an agreement.

### **Certification of a Different Union**

Employees who wish to change unions do not have to apply to decertify their current union before a second, or replacement, union is certified to represent them. A second union can apply to represent employees in the open period for a certification application. If the second union is certified, the first union loses its bargaining rights.

### **Additional Grounds for Decertification**

Some jurisdictions provide additional grounds to decertify the union that will be briefly referred to here.

**FAILURE TO GIVE NOTICE TO BARGAIN, OR TO BARGAIN** Labour relations legislation provides that after a union is certified, it must give the employer notice that it wishes to bargain to reach a collective agreement. Prior to the expiry of a collective agreement, either the union or the employer can give notice to the other to negotiate its renewal. Legislation in Ontario and New Brunswick provides that if a union fails to give notice to bargain, or fails to bargain, the union may be decertified. The purpose of this provision is to prevent the union from sleeping on its rights. An application to decertify the union because of its failure to bargain can be made by either the employer or the employees. The Board does not automatically decertify the union when it has failed to bargain. It will direct a representation vote, unless the union indicates that it no longer wishes to represent the employees.

**TERMINATION WHERE CERTIFICATE OBTAINED BY FRAUD** The federal jurisdiction including Northwest Territories, Nunavut, and Yukon Manitoba, New Brunswick, Ontario, and Saskatchewan provide for termination of the union's bargaining rights if the certification was obtained by fraud. Fraud refers to making false statements to the board and does not include false statements made to another party. Fraud would include such actions as forging signatures on union membership cards or deliberately falsifying the number of employees in the application for certification. A letter containing false information circulated among employees would not be covered by these provisions. An application for termination for fraud can be made at any time. There is variation across jurisdictions regarding who can make the application.

**FAILURE TO REACH AGREEMENT** In most jurisdictions, the failure to reach a collective agreement does not provide a basis for decertification; the union continues to hold bargaining rights for the employees. However, in Alberta there is a provision for decertification of the union where

### **Successor Rights**

When a union is certified, the certificate issued by the board provides that the union represents a bargaining unit of employees working for the employer named in the certificate. Similarly, any collective agreement negotiated will provide that the agreement is between the union and the employer named in the agreement. If the employer sold the business, the union's bargaining rights and any collective agreement with the first owner could be nullified unless labour relations legislation provided for the possibility of a sale of the business. **Successor rights** provisions in labour relations legislation deal with these issues.

**Successor Rights protect the rights of the union and any collective agreement if a business is sold.**

The purpose of successor rights is to protect the bargaining rights of the union and any collective agreement in the event that the business is sold. Generally, the successor rights provisions confirm that, subject to some exceptions, any previous certification and collective agreement bind the purchaser of the business. There is some variation in the provisions across jurisdictions, including how it is determined whether there has in fact been a sale of a business.

In all jurisdictions, a critical question will be whether there has been a sale of the business as defined in the legislation. *Sale* has been broadly interpreted and will likely include a business transfer that may not normally be viewed as a sale. The definition in the *Canada Labour Code* provides that a sale "includes the transfer or other disposition of the business. . . ."<sup>i</sup> In one case, a municipality had a contract with an organization to provide drivers, mechanics and other employees to the municipality for the operation of the municipality's transit system. A union represented the employees of the organization. The municipality terminated the contract and hired its own drivers, mechanics and other employees. Many of the employees the municipality hired were former employees of the organization the municipality had previously contracted with. The union that held the bargaining rights for the organization's employees sought a declaration that there had been a sale as defined by the legislation. This would mean that the municipality was a successor employer and was bound by the terms of the collective agreement.



The board found that there had been a sale of the business as defined by the *Act*—even though no money had changed hands—and the municipality was bound by the collective agreement.<sup>ii</sup>

When an application for certification is pending at the time of the sale, the purchaser is treated as the employer for purposes of the application. Accordingly, the purchaser will be bound by any certification order made after the purchase is finalized. In cases in which the union has been certified and negotiations with the employer are under way when the sale of the business occurs, the union may give a notice to bargain to the successor employer. Any previous negotiations with the seller of the organization do not carry forward to the buyer. In most jurisdictions there cannot be a strike or lockout until the union and the employer have completed a conciliation or mediation process. When there is a sale during the negotiation of a collective agreement, the successor employer (purchaser) and the union must go through this process even if there has already been conciliation between the organizational seller and the union. If a strike or lockout is under way at the time of the sale, it must cease until the successor employer and the union have gone through the conciliation process. If there is a collective agreement between the union and the seller of the organization, it is binding upon the successor employer.

Additional issues will arise when the buyer of an organization combines employees of the business purchased with employees of another business. If a union already represents the buyer's employees, the board may direct a representation vote to determine which of the two unions will represent the employees.

## **VI. Review Questions**

### **1. Why do some employees want to have a union represent them?**

The reasons why some employees may want a union representation are reviewed at page 101.

### **2. Outline the factors external to the workplace that could affect employees' desire to unionize?**

Public opinion on the issue of unionization and economic factors could affect employees' desire to unionize.

### **3. Why do some employees oppose unionization of their workplace?**

The reasons why some employees may oppose union representation are reviewed at pages 103-105.

### **4. How can the union obtain the right to be the bargaining agent for a group of employees?**

Voluntary recognition and certification.

**5. What are the four things that a union will have to establish when it applies to a labour relations board to be certified?**

When the union applies to the Board it will have to establish that:

- 1) it is a trade union as defined in labour relations legislation,
- 2) the application is timely,
- 3) the group of employees specified in the application is an appropriate bargaining unit, and
- 4) the union has the support of a majority of employees in the proposed unit.

**6. What are two different examples of jobs that are prevented from being part of a union? Give the reason for their exclusions?**

The following are prevented from unionizing:

- 1) managerial employees
- 2) employees engaged in a confidential capacity regarding labour relations
- 3) employees in specified occupations which vary by jurisdiction Appendix 6.2 provides occupational exclusions by jurisdiction.

Managerial employees and employees working in a confidential capacity in labour relations are excluded to avoid a conflict of interest. The occupational exclusions in various jurisdictions do not appear to be logical. For example, there does not appear to be a reason why land surveyors cannot unionize in Ontario and can unionize in other provinces. The occupational exclusions are an area influenced by the political environment.

**7. Who decides what the appropriate bargaining unit is when a union applies for certification and what is the significance of this determination?**

If the employer and the union cannot agree on the appropriate bargaining unit it is determined by the labour relations board. The appropriate bargaining unit affects the probability of certification and contract negotiations. Consider the example of 12 Tim Horton's locations under common ownership in a municipality. If the appropriate bargaining unit is a single location certification will be easier than if it is all 12 locations. However, if the appropriate bargaining unit is each location, a strike at any one location is not a very effective weapon. The union would be in a stronger position if all 12 locations were in one unit that negotiated an agreement.

**8. What are the factors considered when the appropriate bargaining unit is determined?**

The key factor is the "community of interest" of employees. Other factors are the concern with fragmentation, the affect on the likelihood of establishing collective bargaining in the industry, and avoiding labour relations problems.

**9. Why do unions prefer a process that allows for certification on the basis of membership cards without a representation vote being held?**

Unions prefer a card system because it avoids the possibility of employers influencing or pressuring employees prior to a vote. Studies have shown that mandatory representation votes reduce the probability of certification.

**10. What is the meaning and significance of the phrase of “business as usual” at the time of a certification application?**

A statutory freeze is imposed when the union makes an application for certification. This means that the employer cannot make any changes in the terms and conditions of work. However, the freeze does not mean that the employer is prohibited from making any or all changes. Instead the employer must conduct business as it would if the certification application had not been made. For example, if employees are scheduled to get a pay increase the employer must go ahead with “business as usual” and provide the increase. However, it would be a violation of the statutory freeze if the employer made a change employees were not expecting, such as reducing or increasing the employee discount, because this would not be “business as usual”.

**11. Are employees allowed to sign up their co-workers as union members on the employer’s property?**

There may be a problem here in Nova Scotia. However, in other jurisdictions employees can solicit union members during non-work hours such as breaks and lunch periods.

**12. What are the remedies for unfair labour practices during an organizing campaign and certification application?**

Remedies for unfair labour practices during an organizing campaign and certification application are listed in Figure 6-7.

**13. Why is decertification an important part of labour relations legislation:**

Employees should have the right to terminate the union’s bargaining rights if the union is ineffective or be able to replace one union with another.

**14. What does the phrase successor rights refer to and why are successor rights a necessary part of labour relations legislation?**

“Successor rights” refers to the bargaining rights (certification) of a union and the status of a collective agreement when there is a sale of a business. The certificate issued by the Labour Relations Board granting bargaining rights to a union refers to a particular employer and similarly any collective agreement negotiated provides that it is between a specified employer and the union. Unless labour relations legislation protected the union's bargaining rights and provided for a continuation of any collective agreement, a sale of the business could negate the bargaining rights and any collective agreement. In brief, the successor rights provisions in labour relations

legislation provide that the union's bargaining rights are not affected by a sale and a purchaser is bound by any existing collective agreement with a union.

## VII. Discussion Questions

**1. Consider a non-union organization that you have worked for in the past or are familiar with. Which of the reasons for employees seeking unionization referred to in this chapter might have led employees in the organization to seek union representation? Were there any other reasons why employees might have tried to unionize?**

This question requires a consideration of the factors that lead employees to unionize, which are referred to in the text. The question refers primarily to the internal factors that affect unionization including compensation, job security, and employer policies. External factors including the economy and attitudes toward unions might also be referred to. It is anticipated that the reasons for unionization will vary. Attention could be drawn to concerns other than compensation.

**2. Consider a non-union organization that you have worked for in the past or are familiar with. This chapter provided reasons why some employees may not support unionization. Would any of these reasons apply to you or your co-workers? What may be other reasons why you or your co-workers might oppose unionization?**

This question requires a consideration of the reasons why some employees may not wish to join a union, which are set out in the text on page 104-106.

**3. What is the significance of the group of employees found to be the appropriate bargaining unit at certification?**

The appropriate bargaining unit will be significant because it will affect whether or not a group of employees is certified and the bargaining power of any unit that is certified. At the certification stage it may be easier for a union to obtain support from a smaller group of employees at only one location; however, a small bargaining unit may have more difficulty when negotiating an agreement with an employer. In the banking industry the Canada Industrial Relations Board formerly held that the single branch was not the appropriate bargaining unit and it was extremely difficult to organize in the industry. The skills of the employees included in the bargaining unit could also affect the bargaining power of the union. If the bargaining unit consists entirely of unskilled employees who could easily be replaced, the union will be in a weaker bargaining position.

**4. An automotive dealership has four departments: service, sales, office and a body repair shop. There is a supervisor for each of the departments. The technicians and technical assistants in the service department have a separate incentive compensation system. The employees in the service department and body repair department have the same benefits package, and they work in the same building that is separate from the auto showroom. There is no interchange of employees between departments. A union has applied for certification seeking to represent the technicians and technical assistants in the service department. What, if anything, should the employer's response be?**

The purpose of this question is to illustrate the concept of the appropriate bargaining unit and its significance for the certification of a union. The employer's response to the application for certification could be that the union has proposed a bargaining unit that is not appropriate. There may be some variation between jurisdictions regarding the concept of the appropriate bargaining unit; however, generally Boards want to avoid fragmentation and do not certify on a department basis. This particular question is based upon a British Columbia application for certification. The British Columbia Board has favoured broader all employee bargaining units. In the case that this question is based upon, *Durek Chevrolet and Teamsters*, 19 CLRBR (2nd) 161, the British Columbia Labour Relations Board found the bargaining unit inappropriate and dismissed the application for certification.

**5. Confirm whether the labour relations legislation in your province or territory provides for the possibility of certification of a union based on membership cards or requires a representation vote. If the legislature was considering changes to the legislation, what arguments would you make in favour of relying on membership cards instead of requiring a vote? Conversely, what arguments would you make in favour of requiring a vote in all applications for certification?**

The determination of union support by way of membership cards or a vote by employees is referred to on pages 126. The jurisdictions which allow for a certification without a vote on the basis of membership cards are listed in Figure 6-7 as follows: Canada, Manitoba, New Brunswick, Newfoundland and Labrador (where both parties request), Quebec, and Prince Edward Island. A vote is mandatory in Alberta, British Columbia, Nova Scotia, Ontario and Saskatchewan. The proponents of a card system argue that relying on membership cards avoids employer influence on employees. Those who argue in favour of a mandatory vote claim that a secret ballot vote is the way in which critical issues are determined in our society, and suggest that some employees may be susceptible to peer pressure when signing a membership card.

**6. An employer has been notified that a union has filed an application for certification for a group of its employees. The employer is considering implementing the changes or taking the steps referred to below. In each case explain whether the employer should take the action referred to:**

a) The employer is considering the amount that will be paid to employees who use their vehicles in the course of their employment. For five years the employer has increased the mileage allowance on an annual basis after reviewing the costs of gas and other factors affecting the cost of operating a vehicle. No announcements relating to an increase have been made.

Although there has been no announcement by the employer, the past practice would appear to have established an employee expectation of an increase. The employer is obligated to continue with business as usual and a failure to provide the increase would be a breach of the legislation. The employer should proceed with a change in the mileage allowance as it would have if the union had not applied for certification.

b) The employer is considering a new incentive pay system. The system has been designed by a consultant, the consultant has been paid, and the senior management team has approved the system; however, employees have not yet been advised about the system.

The employer's obligation is to continue with business as usual. If the employer implements the new system there would be a breach of the statutory freeze because this would be viewed as a change by employees.

c) Same situation as in (b), except that the system was announced to employees two weeks before the application for certification was filed by the union.

Failing to implement the new system would be deviating from business as usual. The employer should proceed with implementation of the new system.

**7. Confirm whether the labour relations board in your province or territory can certify a union without a vote as a remedy for employer unfair labour practices. What are the arguments for and against the board having this authority:**

In six jurisdictions, federal, British Columbia, Manitoba, New Brunswick, Ontario, and Nova Scotia the Board has the authority to certify a union without a vote. Labour Relations Issue 6-2 illustrates a situation where a union was certified despite the fact that it lost a vote 151 to 43. The main argument against certification without a vote or despite a vote is that it appears undemocratic because employees may be unionized even though they have voted against the union. The main argument in favour of a Board having the right to certify without a vote is that without this remedy there will be nothing to prevent the unscrupulous employer from coercing employees into voting against the union.

## **VIII. Web Research**

**1. Go online to search for particular information in your jurisdiction regarding managerial exclusions and occupational exclusions from unions; how the appropriateness of a bargaining unit is decided; and union certification procedures and decertification procedures. Note more specific detail on particular points of interest in any of these areas that may require more searching on the related federal or provincial government site.**

The managerial and professional exclusions vary from province to province and territory. Typically, managers, supervisors, and other professionals who are an integral part of the management of the operations are excluded. For example, a HRM professional or the administrative support person for the CEO, may be excluded due to the nature of the responsibilities.

**2. Using the British Columbia Labour Relations Board define two key information items you would incorporate into a management training session to inform workshop attendees regarding any limits or restrictions they must consider in their actions during a period of union certification in the workplace.**

Code guide and the Employers Guide to the Certification process are both valuable sources of information regarding an employer's responsibilities and rights during a certification process.

- 3. Go online to confirm when labour relations legislation in your province or territory allows employees to make an application for decertification. Explain any labour relations policy behind the restrictions on an application for decertification, and whether the restrictions are too broad or too narrow.**

All provinces will provide for policies for a decertification process which will be similar to the process for certifications. Typically, employers are not permitted to influence employees to apply for decertification.

## **IX. Vignette**

### **Employers' Point of View Towards Unions**

It would seem Canadian organizations are opposed to unionization of their workplaces. The primary organizational concerns stem from increased costs, reduced productivity, increased workplace regulations, and loss of operational control as a result of a unionized workplace. Notably, one study reported that a unionized workplace had little or no union effect on business viability over the 1-18-year time frames.

In fact, 88 percent of the employers in one study limited their employees' capacity to communicate among themselves or with union representatives and 68 percent of employers communicated directly with their employee. Sadly, 12 percent of employers admitted to unfair labour practices during the organizing drive.

Only 20 percent of employers did not oppose the certification applications of their organization. These employers most often retained a lawyer or consultant, or trained their managers concerning a union organizing drive. Some of these employers did file an objection to the proposed bargaining unit. Other employers put administrative challenges such as postponements, objections or appeals of board decisions in place or tightened work rules or monitoring of employees.

SHRM suggests employers reduce employee dissatisfaction which may translate into employees' reduce motivation for union representation. Employers may be able to dissuade unions in their workplace with fair and consistent policies and practices, open door management policies, competitive pay and benefits, employee trust and recognition, and functional management and employees relationships.

## **X. Case Incident**

This incident illustrates unfair labour practices during a union organizing campaign and remedies that may be granted by a Labour Relations Board.

**1. Outline the basis, if any, for Mills to file a complaint with the Labour Relations Board in your jurisdiction.**

Mills could file a complaint alleging that he was terminated because of his involvement in union activity.

**2. Assuming that Mills files a complaint with the Labour Relations Board, how would the employer likely respond to the claim(s) made in any filing with the Board?**

The employer could respond as follows:

- deny that Mills' termination was linked to union activity
- there was a need to reduce the number of employees for financial reasons
- the new plough that the municipality owns increased efficiency and reduced the number of employees required.

**3. Explain the outcome you expect in this case in light of your understanding of theories and concepts discussed in the course.**

The employer is required to establish that its reasons for terminating the employee were not related to union activity. This case is based upon a decision of the Saskatchewan Labour Relations Board, *Meroniuk v. Rural Municipality of Preeceville No. 334, 2003 CLLC 200-025* in which the complaint was allowed. Council members indicated that they thought other employees would not be willing to join the union. This leads to the conclusion that council members perceived Mills was the instigator of the union organizing effort. The new plough, which is alleged to have increased efficiency so that fewer employees were required, was acquired two years ago. It stretches credibility to say that before the council learned about the union organizing attempt the new plough did not establish a need to reduce the number of employees; however, it was the reason for council's action after it knew about the union organizing effort. It is apparent that there was no assessment made of Mills' work, or a comparison of his work to the more junior employee. It is noted that council did not consult Mills' supervisor prior to making a decision regarding his termination.

In this case the Board ordered that Mills be reinstated to his former position and be paid the wages and benefits lost. This incident illustrates that the onus is on the employer to show that its actions were not the result of anti-union animus when discrimination or termination because of union activity is alleged. It also illustrates that the Board will consider the explanation put forward by the employer to determine if it is credible.

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<sup>i</sup> Section 44(1), *Canada Labour Code*.

<sup>ii</sup> *Ajax (Town) v. C.A.W. Local 2221*, 185 D.L.R. (4th) 516.