

# DEFERRAL TO OTHER PROCEDURES

---

## INTRODUCTION

[Section 135](#) of the *Labour Relations Code* states that every collective agreement must have a method of resolving differences over the “interpretation, application or operation” of the agreement. Usually parties use their grievance and arbitration procedures to resolve differences.

In some cases, both the collective agreement and the Code cover the matter in issue. In other cases, another statute may also touch on the issue. When both the Board and an arbitrator (or other statutory body) have jurisdiction over a difference, [Section 16\(4\)\(d\)](#) gives the Board the discretion to decline to hear the matter and defer the question to the other process. This policy deals with:

- the reasons for the Board’s discretion;
- the kinds of cases that raise the issue of deferral to arbitration;
- the approach the Board takes to deferral; and
- the kinds of cases where the Board might defer to “some other proceeding authorized by statute.”

## WHY ALLOW A BOARD TO DEFER TO ANOTHER PROCESS?

The Board and grievance arbitrators have important but distinct jobs. The Board polices the rules that govern bargaining rights and collective bargaining. The Board’s powers enable it to act quickly to restore the proper labour-management relationship. Labour boards generally do very little, however, to interpret and enforce a collective agreement. Rather, employers and unions fashion their own grievance and arbitration process pursuant to Section 135. Using this process, the parties deal with differences during the term of a collective agreement.

It serves the public interest when employers and unions address day-to-day disputes about the workplace through their custom-made dispute resolution process. Labour relations boards recognize this and try to allow arbitrators to perform the job the Legislature intends them to perform. It is also in the public interest, however, that a single statutory tribunal oversees the broad rules of collective bargaining. Labour relations boards try to balance these competing public interests through intelligent use of their power to defer to arbitration. Similarly, the Board may see value in deferring to the jurisdiction of another statutory body.

## WHAT KINDS OF CASES RAISE DEFERRAL ISSUES?

Deferral is not an issue if a dispute lends itself only to one forum. For example, not every collective agreement breach triggers a matter within the Board’s jurisdiction. The following types of disputes do, however, typically lend themselves to both a Board proceeding and a grievance:

- **Allegations of discriminatory termination or discipline:** Collective agreements almost always protect employees from termination without just cause. Many agreements also prohibit discrimination against employees because of union membership or activities. If the employer arbitrarily terminates a shop steward, the union might grieve the dismissal under both clauses. Depending on the facts of the case, it might also file a complaint with the Board alleging, for example, interference with the representation of employees by a union under [Section 148\(1\)\(a\)\(ii\)](#).
- **Determinations:** The Board can, under [Section 12\(3\)](#), decide a variety of questions that can also come before a grievance arbitrator. For example, an arbitrator can decide whether a collective agreement exists to determine if the arbitrator has jurisdiction. The Board can also decide this under Section 12. Similarly, a union can apply to the Board to declare a person included or excluded from the bargaining unit. It could also pursue a grievance involving interpretation of the collective agreement's scope clause.
- **Strikes and Lockouts:** A party normally applies to the Board to decide that a strike or lockout has occurred or is unlawful. The question can, however, arise before an arbitrator. It may arise as an employer defence to discipline or dismissal. Or it may be the central issue in a grievance alleging breach of a collective agreement's "no strike, no lockout" clause.
- **Damages:** A party can ask the Board to rule on damages flowing from an illegal strike or lockout. The party may also claim damages through arbitration.
- **Conduct of disciplinary interviews:** Many agreements prescribe how the employer will conduct the disciplinary process. Often they give an employee the right to the presence of a union representative at a disciplinary interview. Failing to allow access to a union representative can be a breach of the collective agreement. It can also be a prohibited interference in trade union representation of employees.
- **Large-scale collective agreement violations:** Occasionally, a union will allege the employer is engaging in a course of conduct that suggests the employer refuses to recognize the agreement as binding. Grievance arbitration can address this. Alternatively, the Board can address it as a reference of a difference concerning the application or operation of the Code under [Section 16\(3\)](#).

## HOW DOES THE ISSUE OF DEFERRAL ARISE?

The party seeking deferral usually raises the issue as a preliminary objection to the Board's proceeding with the case. Objections are made in writing before the hearing and argued in the hearing. Raising the issue early may avoid a hearing, particularly if related statutory issues settle. If a party suggests deferral, or it seems appropriate to the Director, the Board should find out:

- if a grievance was filed;
- is it a timely grievance under the collective agreement;
- the status of the grievance or arbitration;

- what relief the grievor seeks from the arbitrator; and
- what articles of the agreement the grievor alleges the employer violated.

The objecting party must supply a copy of the collective agreement and other documents supporting the objection.

## WHAT THE BOARD CONSIDERS IN A DEFERRAL REQUEST

The primary factor the Board considers is whether the application raises “an issue of statutory proportions.” The dispute may raise an issue of interpretation of the Code. Arbitrators have authority to interpret and apply statutes while adjudicating a grievance under the collective agreement. The Board prefers, however, to assume authority over cases which raise important issues of interpreting the Code

The Board assesses whether the dispute raises important statutory issues by asking questions such as:

- Does the issue affect only the parties to the agreement or will it affect the labour relations community?
- Does the collective agreement enable the arbitrator to adequately remedy the issue?
- Is the matter primarily a statutory right or obligation, or a collective agreement right or obligation?
- Do the issues go beyond the collective agreement to the collective bargaining relationship itself?
- Is the statutory issue the main issue in the proceeding, or only an ancillary issue?
- Do issues demand the labour relations expertise of the Board more than the contract-interpretation expertise of an arbitrator?

There is no simple test of when a matter raises an issue of “statutory proportions.” The best way to approach the test is through examples.

- **Strikes and lockouts:** The Board will rarely defer to arbitration when the main question is whether a strike or lockout has taken place or is lawful. The Board has greater expertise in strike and lockout questions than arbitrators. The Board might defer, however, where: the stoppage is over; the facts appear straightforward; and the issue bears only on whether an arbitrator should award damages for breach of a “no work stoppage” clause of an agreement.
- **Determinations:** The Board hears many determination applications that an arbitrator might equally hear. Parties call on the Board to decide many of these applications because of its investigation and settlement machinery and because the Board’s services are free to the parties. In practice the Board has been lenient in dealing with determination applications,

mostly because of its high settlement rate. In deciding whether to defer, the Board considers whether the application asks for a ruling that will apply beyond the facts of the immediate dispute or involves the rights of third parties.

- **Unfair Labour Practices:** Many employer actions can be characterized both as a breach of the collective agreement and an unfair labour practice such as a layoff during a statutory freeze period, termination of an active unionist employee, or refusal to allow union representatives access to an employee. The Board looks at the broad circumstances of each case. Is there a credible argument that the employer is not just breaching the collective agreement, but trying to deny its obligations under the Code? The Board will also look to the scope of the alleged unlawful act and the bargaining history. It will consider any evidence of anti-union motive.
- **Damages:** When deciding to defer, the Board considers which statutory tool (arbitration or a Board order) will best achieve the objects of the statute. The Board also considers who has the duty to end the dispute causing the damages. A party may be liable for all or only part of the losses.

Questions the Board asks when deciding whether or not to defer to arbitration include:

- **Has a grievance been filed?** The Board has not determined if it has the power to defer to arbitration if a grievance is time barred. Whether or not a grievance has been filed in respect of the difference, for practical purposes, the Board is more likely to defer if there is a real prospect that an arbitrator can hear the dispute in a reasonable time.
- **Is the application an attempt to pre-empt an arbitrator's ruling?** The Board will defer to arbitration if it feels that the application before it is primarily a preliminary objection to an arbitrator's jurisdiction where an employer grievance was pending.
- **Will arbitration adequately deal with the issues raised before the Board?** An example is the alleged discharge of an employee for union activities. Some collective agreements prohibit dismissal without just cause, but do not prohibit discrimination for union activities. The arbitrator may be unable to properly remedy a dismissal tainted by anti-union motive. A dispute may call for the use of interim powers, available to the Board but not to arbitrators. The Board is less likely to defer to arbitration in this kind of case.
- **Can arbitration offer a broad enough remedy?** An arbitrator may be unable to grant a remedy that repairs the damage to the union and the bargaining relationship. For example, the employer may dismiss an activist employee. The arbitrator can award reinstatement with back pay. An arbitrator may also make declarations about breaches of the agreement. The Board can order broader remedies, however, like posting of notices, allowing union access to employees on employer time, or damages payable to the union.

## DEFERRING TO OTHER PROCEDURES

[Section 16\(4\)](#) allows the Board to defer cases to procedures other than arbitration. No case has yet invoked this discretion. The kinds of cases that might raise this discretion include:

- **Human rights complaints:** The Code and the [Human Rights, Citizenship and Multiculturalism Act](#) overlap in the area of union discrimination. The Code prohibits discriminatory application of union discipline ([Section 152\(1\)](#)) and discrimination in representation of employees ([Section 153](#)). Section 9 of the HRCMA prohibits union discrimination against members on the enumerated grounds. These grounds are race, colour, gender, age, religious beliefs, marital status, ancestry, place of origin, sexual orientation and physical or mental disability. The Board may consider it appropriate to defer a case of union discrimination to the Human Rights Commission's procedure.
- **Jurisdictional disputes:** The Impartial Jurisdictional Disputes Board could deal with jurisdictional disputes sometimes raised before the Board as determination applications. See: [[Sections 202-206](#); *Impartial Jurisdictional Disputes Board*, [Chapter 31\(k\)](#)]. The Impartial Jurisdictional Disputes Board has not yet been constituted.
- **Employment standards complaints:** Some disputes can found a grievance, an unfair labour practice complaint, or an Employment Standards complaint. An example is non-payment of wages. If a union has advised employees to file Employment Standards complaints rather than grievances, the Board might defer any application under the Code to the Employment Standards process. See: [*Employment Standards Code*, [Chapter 15\(b\)](#)].
- **Quasi-criminal prosecutions under Division 25:** The Code provides specific offences and penalties (fines) for a trade union, employer or person who breaches these provisions. The fines can only be imposed after a quasi-criminal proceeding. The Minister must give consent to commence a prosecution. If the Minister gives consent, (e.g., in an illegal strike or lockout) the Board may defer parts of an unfair labour practice complaint to the prosecution process.