

DIRECTED CERTIFICATION

INTRODUCTION

Directed (or automatic) certification allows a labour board to certify a trade union without requiring a vote of the members in the bargaining unit. The [Labour Relations Code](#) gives the Board the power to remedy unfair labour practices by granting or revoking bargaining rights. [Section 17\(2\)](#) does not, however, allow the Board to certify or decertify a trade union without a vote. Certification or revocation can only occur if the majority of employees voting support such a move in a representation vote. These provisions frequently cause confusion. Some parties believe the Board does not have the power to certify directly. That power does exist but, in some cases, it is now subject to a vote. This policy describes:

- granting and revoking bargaining rights as available remedies;
- the extraordinary nature of the remedies; and
- the Section 17(2) vote limitation.

GRANTING AND REVOKING BARGAINING RIGHTS AS REMEDIES

The Code gives the Board general and specific powers to remedy unfair labour practices. Section 17(1)(d) gives the following specific remedies:

17(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made and, without restricting the generality of the foregoing, ...

(d) may, subject to subsection (2) but notwithstanding any other provision of this Act,

- (i) certify or refuse to certify a trade union as the bargaining agent for a unit of employees;
- (ii) revoke or refuse to revoke the certification of a bargaining agent;
- (iii) revoke or refuse to revoke the bargaining rights of a bargaining agent voluntarily recognized;
- (iv) register or refuse to register an employers' organization as an agent for collective bargaining on behalf of employers in a trade jurisdiction and sector in the construction industry;
- (v) cancel or refuse to cancel the registration certificate of a registered employers' organization.

Panels can use these powers to rectify any form of unfair labour practice, wherever they might rectify the harm done. These remedies include all forms of bargaining rights—certification, voluntary recognition and registration.

Imposing a bargaining relationship—direct certification or registration—may rectify interference with an organizing campaign. Directed revocation is a severe remedy for misconduct by a bargaining agent (union or registered employers organization). Misconduct during an organizing campaign may lead the Board to refuse registration or certification. Misconduct by an existing bargaining agent may result in the cancellation of a registration or certification.

EXTRAORDINARY NATURE OF THESE REMEDIES

The Board's approach to using Section 17(1)(d) remedies has been cautious. The powers in Section 17(1)(d) exist "notwithstanding any other provision of this Act." This means, for example, subject to Section 17(2), the Board may certify without an application, and without the normal 40% support. These powers are extraordinary—they recognize that some conduct is so extreme that it may have frustrated the normal procedures under the Code.

The Board described its approach to directed certification in [AFCW 401 v. TAS Communications \[1981\] Alta.L.R.B. 81-047](#). This case arose before the introduction of Section 17(2), so these principles may need modification considering the mandatory vote requirement. The Board said:

The right of employees to organize and seek certification is a right that is protected, hopefully, by the various unfair labour practice provisions of the Labour Relations Act. It is also, however, a right that may be frustrated by an employer perpetrating an unfair labour practice. On the one hand, therefore, we have the guiding principle of democratic selection of a trade union by a majority of employees in a unit, while on the other hand those employees may be faced with actions by an employer that frustrates the majority support being obtained. With these considerations in mind it is appropriate that the Board should have a power exercisable at its discretion to award a certification when an unfair labour practice has taken place.

The Board then outlined two situations where this might apply.

Firstly, the actions of the employer may result in an unfair labour practice so outrageous and pervasive and with such dire consequences upon employees that any wish of those employees to organize would be totally frustrated. Thus an organizational campaign that has commenced has been brought to an abrupt and premature end by the flagrant actions of the employer rendering further effort to organize employees futile. Where such an organizational effort has been brought to an end by the outrageous intimidatory acts of the employer before the organizational campaign has gathered momentum and before a significant number of employees have been approached this Board may decide to certify pursuant to Section 142(5)(c) even though the Board may not be able to assess with any certainty whether the campaign would have, in due course, resulted in a bona fide claim of majority support by the trade union.

A second situation ... is where a campaign has commenced and has made significant progress before an unfair labour practice of the employer has impeded it or brought it to a halt. In such a case the Board will be able to judge the likelihood of success of that organizational campaign and the Board will also consider whether a viable collective bargaining relationship will result from the issuance of a certificate, and where the campaign was likely to succeed and where the collective bargaining relationship would be effective the Board may decide to certify.

The Board adopted a similar approach about when it should refuse a certification application, otherwise valid, because of a trade union's unfair labour practices. In [OE 955 v. Spiess Construction \[1983\] Alta.L.R.B. 83-058](#), the Board drew a parallel to the first situation described in the *TAS* case. It said:

If the actions of the trade union result in an unfair labour practice so outrageous and pervasive and with such dire consequences, this Board may, notwithstanding any degree of majority support that the trade union may have achieved, refuse to certify that trade union. ... The analogue to the second scenario set out in the T.A.S. case would be: Where the Board may reasonably conclude that but for the unfair labour practice, the trade union would not have likely attained the majority support demonstrated on the application for certification.

When should the Board refuse a request for revocation, otherwise timely and with support, because of employer unfair labour practices? The Board considered this situation in [UFCW 401 et al. v. Lansdowne Foods \[1992\] Alta.L.R.B.R. 413 at 439](#).

A revocation application proceeded to a vote. In the interim, the union filed unfair labour practice complaints, leading the Board to seal the ballots. The union asked the Board to refuse revocation so as to rectify the unfair labour practices. The Board would not refuse to revoke. It did, however, set aside the original vote and ordered a new one following some other remedial action. The Board expressed the following caution about refusing a revocation application supported by employees.

... Ultimately all bargaining rights flow from the employees on whose behalf that bargaining takes place. This is the clear theme of the Labour Relations Code. The Code's emphasis on votes in matters of representation, in authorizing strike and lockout action, and in some respects in bargaining itself, shows that the freely expressed wishes of employees affected are entitled to high priority in the administration of the Code. It is also a practical reality that collective bargaining, divorced from employee support, becomes an exercise in frustration.

The Board noted that, if trade union representation is imposed on a group of unwilling employees, the union may be unable to get ratification or a strike vote.

THE SECTION 17(2) VOTE LIMITATIONS

Section 17(2), first enacted with the *Labour Relations Code* in 1988, provides:

17(2) Subsection (1)(d) and section 16(8) do not authorize the Board to certify a trade union or to revoke the certification of a trade union unless the majority of employees voting at a representation vote conducted by the Board vote in favour of the certification or revocation of certification, as the case may be.

This provides a limitation on the Board's power to rectify, but does not eliminate the powers the Board otherwise has. In two specific situations, it makes the exercise of that power subject to a Board-conducted representation vote amongst the affected employees. The Board cannot order that uncertified employees become certified, as a remedy, unless the employees confirm that remedy through a representation vote. Similarly, the Board cannot revoke an existing certification, presumably because of unfair labour practices by a trade union (or those acting on its behalf) without those certified employees confirming that revocation by vote. The Board decided in *UFCW 401 et al. v. Lansdowne Foods* [1992] Alta.L.R.B.R. 413 that the remainder of the Board's powers in [Section 16\(8\)](#) and [17\(1\)\(d\)](#) remain unimpaired.

When the Board directs certification, or revocation rights subject to a representation vote, the Board can set the time and conditions of that vote as it sees fit. The returning officer conducts the vote like any other representation vote, subject to any special directions from the panel. See: [[Representation Votes, Chapter 28\(a\)](#)].