

INVESTIGATIONS & REPORTS

INTRODUCTION

Two processes occur at the same time during a certification application:

1. an officer investigates facts for the Board, and then the Board makes a ruling; and
2. the people affected (i.e., the employer, union(s) and employees) decide whether they oppose the application or want to raise concerns over particular issues.

The contents of an officer's report affects the positions taken by the parties. They must have sufficient time to read and react to the report. Late reports deny them the time they need to assess their position and prepare their case.

This policy describes:

- An officer's investigation and the report. The report includes the names of the employer and the union, the scope of the bargaining unit, employee support, the timeliness of the application, which employees the officer considers in the bargaining unit, and voting arrangements.
- How a report is issued.

The Director of Settlement appoints an officer to investigate each certification application. Each application becomes a process file. Officers record all activity as it happens (or at least daily) in the database's LRO Comments or Resolution Strategies sections. See: [[Dispute Resolution Initiatives, Chapter 19\(c\)](#); [LRO Comments, Chapter 19\(i\)](#)].

The officer compiles the results of an investigation into a report. The original of the report goes on the process file to become evidence before the Board at any hearing. Copies go to the parties. The parties use the report to assess their positions and decide whether or not to object to any item in the report. Affected parties **must** receive copies of the report **at least two working days** before the hearing. See: [[Rule of Procedure 26](#); [Information Bulletin #3, Officer's Investigations](#)].

Throughout the process, officers must try to find out what concerns parties or employees have about the application. Officers work to resolve these issues if possible. The report contains the relevant facts about unresolved issues. This alone may help disclose and resolve the dispute. Even if it does not, the officer should keep working with the parties up to and after the hearing.

The officer's report contains information about:

- **Employer’s Name and Description:** This helps the Board identify the correct name of the employer. Descriptions of the business, the owners and managers, the work and the locations mean less evidence may be introduced at a hearing.
- **Trade Union Status:** This tells the Board if the applicant is deemed to be a trade union under Rule 25 or has met the requirements of Section 24(1) in the Code.
- **Bargaining Unit Appropriateness:** This helps the Board decide if the unit applied for, or a reasonably similar unit, is appropriate for collective bargaining.
- **Evidence of Support:** This helps the Board decide whether the applicant union has the support of 40% of the employees in the proposed bargaining unit. Using the officer’s report for this keeps each employee’s preference confidential.
- **Timeliness:** This helps the Board determine if there are any time bars to the application.
- **Vote Arrangements:** This assists in arranging the date, time, and place of any vote.

Each of these topics is expanded below with sample language that may be used in the report. See also: [[Information Bulletins #3, 7, 8, 9, 10, 11 and 12](#)].

NAMING THE EMPLOYER

Section 1(m) of the Code defines employer as:

...a person who customarily or actually employs an employee;

Establish who is the true employer. If you need to research this question, see: [[True Employer, Chapter 24\(f\)\(ii\)](#)].

Establish the employer’s **correct legal name**. Often people use a division, trade name, abbreviation or the name of a particular institution. The Board only uses the correct legal name and identifies the specific division or geographical location in the bargaining unit description. This is because a unit description describes which employees a certificate covers. See: [[Certificates and Bargaining Units, Chapter 22\(a\) and \(e\)](#)].

The usual way to find the correct legal wording and spelling of an employer’s name is to conduct a search with Alberta Corporate Registries and confirm this information with the employer. If there is an inexplicable discrepancy, use the official information in your report and explain why. If necessary, recommend the application be amended to reflect the correct employer name.

TRADE UNION STATUS

Section 34(1)(a) directs the Board to satisfy itself that “the applicant is a trade union.” An officer’s report must indicate if the applicant is a trade union. Section 1(x) defines a trade union as

...an organization of employees that has a written constitution, rules or bylaws and has as one of its objects the regulation of relations between employers and employees;

Normally, the Board only needs to check the validity of a trade union (meaning each parent and each local) once. The Board has, therefore, [Rule of Procedure 25](#) that states:

25. Any organization that has previously been found by the Board to be a trade union or employer's organization shall, in the absence of evidence to the contrary, be deemed to be a trade union or employer's organization in respect to any subsequent proceedings.

Check the database to determine if the applicant union has other bargaining relationships. If so, they most likely satisfy Rule 25. The Board's policy is to use the union's correct legal name and local number (if any). Either a parent union or one of its locals may apply for certification. Ensure you are examining the trade union or local making the application, not some similar organization. If it is unclear whether two organizations are in fact the same, the officer's report should note this.

The union must also comply with Section 24(1) of the [Code](#). This section requires the union to file its constitutional documents and contact information with the Board. Section 37(1)(a) requires this filing at least 60 days prior to an application being filed. See: [[Information Bulletin #7](#)].

There are four possible outcomes of an investigation into a trade union's status:

1. the applicant union was previously certified;
2. the applicant union was not previously certified but has filed the required documents;
3. the applicant union was not previously certified and has not filed documents; and
4. the application is jointly filed by two or more unions.

Investigating and reporting on each of these scenarios is described below.

Previously Certified Applicants

Usually, applicant unions are established unions with certificates for other units. If the database search indicates that the union has been certified before, this is all the report needs to show. In these cases, the requirements of Sections 1(x) and 24(1) of the [Code](#) are satisfied. The report would then read:

The Board has previously certified the applicant union. Rule 25 deems it to be a trade union in the absence of evidence to the contrary. The application names the union correctly.

If the research reveals an error in the union's name on the application form, recommend and specify an amendment to the name.

The Board has previously certified the applicant union as bargaining agent. Rule 25 deems it to be a trade union in the absence of evidence to the contrary. I recommend amending the union's name on the application to its correct form: (name).

Previously Uncertified Applicants with Filed Papers

Previously uncertified applicants must meet the requirements of Sections 1(x) and 24(1) of the Code. See: [[Trade Union Filing Requirements, Chapter 33\(b\)](#)]. Review the union's charter, constitution and bylaws and note the following:

- If and when the constitution and bylaws were filed with the Board. Section 37(1) stipulates that unions must file their constitutional documents 60 days prior to applying for certification. In special cases, the Board can waive this waiting period. To make an application before the 60 days have elapsed, unions must have the Board's prior permission.
- The correct wording and spelling of the union's name and local number.
- The union's geographical jurisdiction, if any.
- Provisions for dealing with the regulation of labour relations between employers and employees and a procedure for electing officers and calling meetings.
- The appearance of a real organization, not just a paper entity.

The Board should have reviewed a union's constitution and bylaws before accepting the initial constitutional filing. This review should have determined if they met the statutory requirement of an objects clause. Sometimes it is necessary to examine how a union was formed to ensure that it is a real organization. When investigating the steps an applicant took to properly establish itself as a trade union, look for the following:

- the creation of a written constitution, bylaws or rules;
- a provision in the constitution, bylaws or rules for dealing with the regulation of labour relations between employers and employees and a procedure for electing officers and calling meetings;
- the approval of the constitution, bylaws or rules at a meeting of employees;
- the admission to membership in the trade union of employees attending the meeting;
- the ratification by members of the constitution, bylaws or rules;
- the election of officers by members; and
- the absence of employer influence or domination in the organization.

There need not be strict compliance with each item above for trade union status. The definition of trade union in the Code does, however, require some **real entity** to carry out the duties of collective bargaining and representation of employees.

Depending on what you find, the report should state:

The applicant union filed its constitution and bylaws on _____. The certification application is therefore timely under Section 37(1). The applicant has not been certified before. A review of the union's documents indicates that one of its objects is the regulation of relations between employers and employees. The applicant union therefore appears to be a trade union as defined by the Code.

or

The applicant union filed its constitution and bylaws on _____. The certification application is therefore timely under Section 37(1). The applicant has not been certified before. A review of the union's documents indicates that it does not have as one of its objects the regulation of relations between employers and employees. The applicant union therefore does not appear to be a trade union as defined by the Code.

or

The applicant union filed its constitution and bylaws with the Board on _____. The certification application does not meet the 60-day filing requirement under Section 37(1) of the Code.

Uncertified Applicants with No Documents Filed

If the Board has no record of the applicant union, check with the union. If they have not met the filing requirements of Sections 24(1) and 37 (1) and have never been certified by the Board, say so in the report.

The Board has neither previously certified the applicant union nor has the union filed a copy of its constitution, bylaws or other constitutional documents with the Board. The application is therefore untimely under Section 37(1) of the Labour Relations Code.

Joint Applications

Two or more trade unions may jointly apply for certification. The [Labour Relations Code](#) says:

36(1) Two or more trade unions that together claim to have been selected by at least 40% of the employees in a unit that the trade unions consider appropriate for collective bargaining may join in an application for certification as a bargaining agent.

(2) When 2 or more trade unions join in an application in accordance with subsection (1), this Division applies to the trade unions in respect of the joint application and to all matters arising from the joint application as if the application had been made by 1 trade union.

Joint applications are rare and generally occur in the construction industry. Most joint applications occur in the non-destructive testing field where the Boilermakers and Pipefitters work together to perform testing duties.

For a joint application, each union must have filed their constitution, bylaws or rules with the Board 60 days prior to the application in order to comply with Sections 24(1) and 37(1). Both applicants must also meet all of the other tests for new unions as well. The two unions joined in the application for certification only become one union for the purposes of that application alone. An officer's report must report the status of each of the joint applicants.

BARGAINING UNIT APPROPRIATENESS

An officer must report on the appropriateness of the bargaining unit for collective bargaining. An appropriate bargaining group means a group of employees that make "labour relations sense."

The unit must be **an** appropriate unit, not the **most** appropriate.

Board policy may require an amendment to the proposed unit. This may be because the unit applied for is not appropriate for collective bargaining. It may just be to bring the wording of the proposed unit in line with the Board's policy for wording bargaining units. See: [[Section 35; Appropriate Bargaining Units, Chapter 22\(b\); Information Bulletins #9, 10 and 11](#)].

Officers recommending an amendment to the bargaining unit must report on whether the amended unit is reasonably similar to the unit applied for and is appropriate for collective bargaining. For an amended bargaining unit to be reasonably similar to the unit applied for, it must include essentially the same employees covered by the description proposed by the applicant union. A factor in deciding similarity is a substantial difference in the number of employees in the proposed and proposed amended bargaining unit.

Sample standard statements for an officer's reports are:

The proposed bargaining unit is one the Board should find appropriate for collective bargaining.

or

The proposed bargaining unit requires a minor amendment to standardize the wording in keeping with Board policy. I recommend the unit be amended to read:

All employees except office and clerical personnel.

The proposed amended unit is one the Board should find appropriate for collective bargaining. It is reasonably similar to the unit applied for since it has no effect on the number of employees involved.

or

The proposed bargaining unit “All employees at the 10th Avenue plant” is not appropriate for collective bargaining because the employer has another plant on 11 Avenue. There is intermingling of employees between the two locations. I recommend the proposed bargaining unit be amended to read:

All employees in Edmonton

While the proposed amended bargaining unit is one the Board should find appropriate for collective bargaining, it is not reasonably similar to the unit applied for by the union. There are only 30 employees at the 10 Avenue plant. The second plant location has 40 employees.

EVIDENCE OF SUPPORT

Determining if the union has the support it needs to have the Board order a vote can be problematic. Section 33 of the Code says:

33 An application for certification shall be supported by evidence, in a form satisfactory to the Board, that

- (a) at least 40% of the employees in the unit applied for, by
 - (i) maintaining membership in good standing in the trade union, or
 - (ii) applying for membership in the trade union and paying on their own behalf a sum of not less than \$2 not longer than 90 days before the date the application for certification was made,

or both, have indicated their support for the trade union, or

- (b) at least 40% of the employees in the unit **applied for** have, not longer than 90 days before the date the application for certification was made, indicated in writing their selection of the trade union to be the bargaining agent on their behalf.

To discover whether the applicant union has 40% support in the bargaining unit applied for, the officer must:

1. decide which employees belong in the bargaining unit **applied for**; and
2. report if at least 40% of them have shown timely support for the union.

The primary purpose of this activity is to determine if 40% of the employees in the bargaining unit applied for support the union's application. While the focus is on the bargaining unit **applied for**, officers also collect information used in a broader voters list if the bargaining unit is amended.

Creating an Employee List

To determine if the union has the requisite support, officers first create an employee list. The union's evidence of support provides the names of some members of the unit. Gather additional information from the employer. This information comes from the employer's payroll documents and time sheets. See which employees performed work on and around the date and time of application which placed them within the proposed bargaining unit. While still at the employer's premises, the officer may want to discreetly crosscheck the employee list with the list of supporters provided by the union to see if there are any discrepancies (e.g., missing names). **Do not, under any circumstances, allow the employer to see the names of those who have shown support for the union.**

Once an initial list of employees has been generated, determine who is included and who is excluded. This process is often called "the ins and the outs." Subject each to the following tests:

- **Is this employee covered by the Code?** The [Labour Relations Code](#) excludes several types of workers from bargaining units. Excluded workers are not eligible to support a union (e.g., sign a petition or vote) for the purposes of this application. For example, workers exercising managerial functions, doing confidential work related to labour relations, some professionals employed in their field, and some farm and ranch employees are excluded. See: [[Information Bulletin #8; Determinations, Chapter 24\(b-g\); Voting Rules 16 and 17](#)].
- **Do they fall within the bargaining unit?** The Board uses the **prime function test** to determine if the employee is in the proposed bargaining unit. The prime function test requires the consideration of a number of factors including both the employers' and the employees' classification of their position, rates of pay, duties responsible for and work performed, and circumstances of their hiring. These factors allow the Board to determine what an employee's prime function was at or around the date of the application. See [[Braun's Construction Ltd. v. Labourers 92 \[1992\] Alta. L.R.B.R. 10](#)]. Be careful not to imply that these individuals are the ones who supported the union.
- **Do they meet the Board's voting rules?** Only employees who were employed at the time of the application may support a union. Employees terminated prior to the application do not count. Similarly, employees hired after the application do not count. In determining who was employed on the date of the application, the Board distinguishes between full-time, regularly scheduled part-time, and casual employees. For guidance on this issue, see: [[Information Bulletins #8 and 23; Determinations, Chapter 24; Voting Rules 16 and 17; Sections 1\(1\) and 4\(2\)](#)].

- **Are there other reasons to exclude this employee?** An employee's last voluntary expression of opinion made before the application date is the one the Board uses in determining 40% support for the application. **Include** in the list of application supporters employees who may have signed a counter petition in opposition to the certification application after the filing of the application with the Board. The officer's report should mention the number of supporters who signed a document indicating a change of mind, again being careful not to reveal the identity of those individuals. If some of the petition supporters signed a counter petition before the certification application was filed with the Board, **exclude** them from the list of application supporters. Again, make mention of the numbers in the report but keep names confidential.

Creating the Final Employee List

Prepare alphabetical lists of employees included in the proposed bargaining unit and those excluded. Indicate their union support. The list should include **all** employees, not just those affected by the application. In cases of large employers, officers can use their discretion to exclude obviously irrelevant employee groups (e.g., employees working at a different site unless someone may take issue with the single-location limitation).

Generally, account for all persons even if the person is no longer employed by the employer. Be careful to list all recent ex-employees as well as those on long-term leaves of absence, so as not to only identify union supporters. If the union has support from a person but the employer does not mention them, placing that employee's name on the list effectively reveals their support of the union. Discuss this with the union and ask them if they wish to raise this issue as an objection to the report.

To keep union support confidential, the Board generates two employee lists. The external list shows employee names, classifications and type as well as their inclusion or exclusion. This list is released with the report to all affected parties. The internal list also shows union support. The Board members hearing the matter receive the internal list. **Do not fax the internal list out to the parties.**

Calculating Union Support

Once you have a final employee list, the database calculates what percentage of employees who are included in the bargaining unit support the union. If the bargaining unit is amended, base this calculation on the measurement of support in the bargaining unit applied for, **not** in the amended bargaining unit.

If the union has the required 40% support and the evidence was in the form of applications for membership or memberships in good standing, the officer's report should state:

It appears that, of the (number) employees employed on the date of the application, at least 40 percent have indicated timely support of the union in writing, pursuant to Section 33(a) of the Code. I recommend that the Board order a vote to determine the wishes of the employees in the (unit description) bargaining unit.

If the union has the required 40% support and the evidence was a petition, the report should state:

It appears that, of the (number) employees employed on the date of the application, at least 40 percent have indicated timely support for the union in writing, pursuant to Section 33(b) of the Code. I recommend that the Board order a vote to determine the wishes of the employees in the (unit description) bargaining unit.

If the union's support does not meet the 40% threshold, make the following conclusion:

It appears that, of the (number) employees employed on the date of the application, fewer than 40 percent have indicated timely support of the union in writing, pursuant to Section 33(a) (or (b)) of the Code. I recommend that the Board dismiss this application.

It may not be possible to determine if a union has the required 40% support. For example, the ins and the outs may put the 40% support in question. In this case, leave it to the Board to determine if the union has 40% support. If the inclusions and exclusions are disputed but they **do not affect** the union's required 40% support, recommend a vote and leave it to the Board to determine who is in and out if there are disputed ballots.

TIMELINESS

Applications must be timely. The Code sets out six time limits that can affect unions seeking certification:

- constitutional filing;
- existing strikes and lockouts;
- previous applications;
- window periods;
- notice to end a voluntary recognition; and
- revocation of bargaining rights.

Consider whether any of these limits might affect an application. If so, investigate and report on the facts as set out below.

Constitutional Filing

Under Section 37(1)(a), certification application cannot be made without the Board's prior consent until 60 days after the union has complied with the filing requirements in Section 24(1)(a). See: [[Trade Union Status, Chapter 33\(a\)](#); [Trade Union Filing, Chapter 33\(b\)](#)]. The Board may waive this requirement. Applicants must get consent to waive the filing requirement **before** applying for certification. See: [[Consent, Chapter 31\(a\)](#)].

Existing Strikes and Lockouts

Under Section 37(1)(b), no certification application can be made without the Board's consent if a strike or lockout is in effect. The applicant must get consent to apply for certification under such circumstances **before** making the certification application. See: [[Consent, Chapter 31\(a\)](#)].

Strikes and lockouts have a limited duration of two years under Sections 77 and 90(1). Board consent for a certification application during a strike or lockout involves balancing different considerations. The Board weighs employees' wishes as well as the impact such an application might have on any collective bargaining. See: [[ATA and EPSB \[1991\] Alta.L.R.B.R. 463](#)].

Previous Applications

Section 57 prohibits unions from making the same or substantially the same certification application for 90 days if they have withdrawn an application or had an application dismissed. The Board can waive this waiting period. A union must have the Board's consent **before** making an application within the 90-day period. See: [[Consents, Chapter 31\(a\)](#)].

Two questions determine if an application is the same or substantially the same:

1. Is the applicant the same?
2. Is the application the same or substantially the same?

When two different locals apply, the 90-day time bar does not apply. The time bar also does not apply to applications from a parent and local union that are separate entities. The Board looks at whether an applicant is the same from the perspective of employees. To be separate applicants, the employees must notice some difference between the two organizations. Whether an application is the "same" or "substantially the same" depends on whether the unit applied for is substantially the same as the one in the earlier application.

Window Periods

Applications for certification are allowed only during a “window period.” Window period time bars arise when another union already has bargaining rights for some or all of the employees in the unit. A union’s own voluntary recognition and collective agreement may also create a time bar. Section 37(2) and (3) say that:

37(2) An application for certification may be made,

- (a) if no collective agreement or certification of a bargaining agent is in effect in respect of any employees in the unit, at any time,
- (b) if a bargaining agent has been certified in respect of any of the employees in the unit, at any time after the expiration of 10 months from the date of the certification of the bargaining agent, unless a collective agreement has been entered into by the bargaining agent,
- (c) if the certification of a bargaining agent in respect of any of the employees in the unit is questioned or reviewed by the Court, at any time after the expiration of 10 months from the date of the final disposition of the question or review, unless the Court quashes the decision of the Board to certify the bargaining agent,
- (d) if a collective agreement for a term of 2 years or less is in force in respect of any employees in the unit, at any time in the 2 months immediately preceding the end of the term of the collective agreement, or
- (e) if a collective agreement for a term of more than 2 years is in force of respect of any of the employees in the unit, at any time
 - (i) in the 11th or 12th month of the 2nd or any subsequent year of the term, or
 - (ii) in the 2 months immediately preceding the end of the term.

(3) Notwithstanding subsection (2), no application shall be made under clause (e)(i) of that subsection unless the application is made at least 10 months prior to the end of the term of the collective agreement.

Investigate to see if there is another bargaining agent involved with any of the bargaining unit employees. If there is, examine the window periods to see if a time-bar exists. Report on the facts that determine the application’s timeliness. See: [[Window Periods, Chapter 24\(h\)](#)].

Notice to End a Voluntary Recognition

A union can represent a unit of employees without being certified. This is called voluntary recognition. Section 43 requires an employer to serve notice of its intention to end its voluntary recognition of a trade union and to refuse to bargain collectively. That notice must be given at least six months before the expiry date of the collective agreement. A union that receives such a notice then gets a special chance to apply for certification for the unit involved. The collective agreement time bars outlined in Section 37(2)(d) and (e) then do not apply to that union. See: [[Window Periods, Chapter 24\(h\)](#)].

Revocation of Bargaining Rights

Section 54(2)(c) prohibits a union from applying to certify the same or substantially the same bargaining unit for 6 months following the revocation of their bargaining rights for that unit. See: [\[Revocations, Chapter 23\]](#).

Sample Report Statements

Sample standard statements for the officer's report which address the timeliness issue are:

There are no current bargaining relationships affecting any employees in the proposed unit. The application is therefore timely under Section 37(2)(a).

The Board certified the (name of incumbent union) on (date). The parties have been negotiating a first agreement. On the date of application (date at least 10 months later), there was no collective agreement in effect between the parties. This application is timely under Section 37(2)(b) of the Code

The term of the existing collective agreement between the parties is (date) to (date). The application, received (date), falls within the last two months of the existing collective agreement. It is therefore timely, under Section 37(2)(d) of the Code.

The term of the existing collective agreement between the parties is (date) to (date two years or less later). The parties signed a memorandum of agreement on (date). The employer is to ratify the agreement on (date after the application was made) and the union on (date after the application was made). The application, received (date), is timely, as the new collective agreement is not yet signed. The bridging clause in the existing collective agreement is not a bar to this application because of Section 56 of the Code. The application is therefore timely under Section 37(2)(d).

The term of the existing collective agreement between the parties is (date) to (date). The application, received (date) is timely. The application falls within the 11th or 12th month of the second year of a collective agreement with a term of more than two years. It is therefore timely under Section 37(2)(e)(i) of the Code.

VOTE ARRANGEMENTS

If the application meets the requirements under the Code, an officer's report should recommend date(s), time(s) and location(s) for a representation vote. Work out proposed arrangements in consultation with the parties. The Returning Officer or the Deputy Returning Officer has the authority to make final vote arrangements if the parties cannot agree. For more information on vote arrangements see: [[Information Bulletin #14](#); [Voting Rules](#); [Representation Votes, Chapter 28\(a\)](#)].

The Board should conduct the vote as soon as possible after the hearing. Allow enough time to give voters reasonable notice of the vote arrangements. Generally, schedule the vote two or three working days after the hearing. Recommend adequate polling times to avoid congestion at the voting location(s).

ISSUING THE REPORT

Affected parties and their legal counsel must receive copies of the officer's report with the external employee list **at least two working days before the hearing**. There is a covering letter to go with the report. See: [[Standard Letters and Documents, Chapter 21\(h\)](#)]. Fax or courier all reports.

If, for some reason, the report cannot be issued to the parties at least two days before the hearing, consult with the parties. In such circumstances, it may be necessary to adjourn the hearing date and vote. Keep in mind that all certification issues and votes must be conducted "as soon as possible" according to the [Labour Relations Code](#). If the hearing is adjourned, issue amended Notices to the Employer and Employees for the employer to post.