CERTIFICATION AND UNFAIR LABOUR PRACTICES

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The purpose of this paper is to provide an overview of the certification process and discuss related unfair labour practice complaints.

I. THE BRITISH COLUMBIA LABOUR RELATIONS CODE

A. Purpose of the Code

One of the express purposes of the British Columbia Labour Relations Code (the “Code”) is to encourage the practice and procedure of collective bargaining between employers and representatives of employees, ie. unions. The Code guarantees the right of every employee to join a union. Employees are free to be members of trade unions and participate in a union’s lawful activities. They are also free not to join unless required by a collective agreement. Many of the provisions in the Code are designed to protect these freedoms. The Code expressly prohibits conduct that is likely to interfere with the exercise of an individual’s rights under the legislation. A violation of these provisions is referred to as an unfair labour practice.

B. Employees Covered by the Code

The Code covers approximately 85 to 90 per cent of employees in B.C. Federal labour laws apply to federal employees and to businesses falling within federal jurisdiction such as banks, airlines, and interprovincial trucking companies. The following materials deal only with provisions of the B.C. provincial legislation.

II. THE LABOUR RELATIONS BOARD

A. The Role of the Board

The British Columbia Labour Relations Board (the “Board”) is the administrative body which is established under the Code. The Board is like an informal court, which deals with labour relations issues. It has two divisions, the Adjudication Division and the Mediation Division. Board staff provide the public with general information and assistance; however, they cannot act as representatives or advisors. If an employer wants legal or other advice from someone who will represent its interests, it must arrange this at its own expense.

B. The Adjudication Division

The Adjudication Division investigates and resolves complaints and applications under the Code. This process generally involves conducting hearings where verbal and written submissions are made or based on written submissions. The Board’s procedures are flexible and designed to
allow each affected party to a dispute an opportunity to present its case. After a case is presented, a panel of the Board makes a decision binding on the parties. The Board can direct a broad range of remedies which require parties to do (or refrain from doing) particular acts or to make monetary payments.

C. The Mediation Division

The Mediation Division of the Board is a resource which assists the parties in collective bargaining. While a large majority of collective agreements in the province are settled without work stoppage, often parties have difficulty concluding an agreement. In certain circumstances the parties may decide to involve a neutral third party to assist them. The mediator’s job is to help the parties find their own solutions to their collective bargaining problems. Either party can apply to the Mediation Division for the appointment of a mediator after collective bargaining is in progress. The Code contains express provisions regulating the mediation process. The Mediation Division also pays a role in Essential Services issues.

III. THE PROCESS OF UNION CERTIFICATION

A. The Organization Drive

Surveys indicate that employees become interested in unions because of:

- concerns about job security,
- pay and benefits dissatisfaction,
- arbitrary management decisions,
- a feeling of remoteness or alienation from management.

If employee concerns are not identified and dealt with fairly and promptly, rather than dealing with their employer as individuals, a group of employees may decide they want a union to represent them in negotiations regarding wages, benefits, and working conditions. Usually a group of employees who want union representation will contact an established union. Employees are, however, free to form their own union. Established unions routinely employ organizers to contact employees and encourage them to join the union so it may become certified.

Neither employees nor a union is required to inform an employer that an organizing drive is being conducted. In fact, until a union is assured of success, organization drives are often conducted secretly in order to prevent the employer from taking action in response. Employers should seek experienced labour relations advice before any unionization activity takes place and in any event as soon as they become aware of an organization drive. The Code places constraints on the kinds of responses employers may lawfully make. There are positive strategies available
for employers who wish to avoid or resist certification, however employers must be careful not to breach the Code or risk being found guilty of an “unfair labour practice”.

B. The Application for Certification

The Code provides the means for unions to be recognized as the exclusive bargaining agent for a group of employees. This recognition is called certification. The certification process is initiated through an application to the Board for certification.

The Code contains a number of requirements for a union wishing to apply for certification. In order to apply for certification, the union has to be able to demonstrate that it has at least 45 per cent of the employees in the proposed bargaining unit as members in good standing. Membership in good standing means that an employee is an existing member or has signed an application for membership in the union within 90 days of the date of the application. The union’s support is proved by producing membership cards signed and dated by employees in the proposed bargaining unit. Valid membership cards can be very simple documents containing the employee’s name and address, the date, and a statement indicating that the employee is aware that the union is seeking certification in order to negotiate on his behalf with the employer. There is no requirement to pay a membership or application fee.

C. Employer’s Duties

Upon receiving the union’s application for certification, the Board will advise the employer that the application is pending. Formal Notice of this Application for Certification and a copy of the Board’s Guide to the Certification Process will be mailed or faxed to the employer. The employer is then required to notify all affected employees by posting the Notice in a prominent location in the workplace for five consecutive working days.

The unfair labour practice provisions of the Code mean that employers must be careful not to make threats or promises which interfere with an employee’s freedom to unionize. Under the Code, while an organization drive or application for certification is pending employers have a limited right to communicate to employees. Employers are permitted to “… express … views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union …” but must not “… use intimidation or coercion”.

While an application for certification is pending, and for four months after certification, a “freeze” is in effect and employers must continue normal business practices. For example, if a wage increase was previously scheduled for a specific date during the “freeze” that wage increase should be implemented accordingly. Employers may not make any unscheduled changes to rates of pay, or other terms and conditions of employment during the “freeze”, without the permission of the Board. Employers continue to have the right to suspend, transfer, lay off or discharge an employee for proper cause, but in response to a complaint may be required to establish that proper cause exists for such action. In practical terms this “freeze” during an organization drive requires that an employer must be prepared to justify any changes or dismissals to the Board.
D. **Investigations by the Board**

Upon receiving an application for certification, the Board appoints an Industrial Relations Officer ("IRO") from the Ministry of Labour who is assigned to investigate the accuracy of the information contained in the union’s application. Under the Code, employers and unions are required to co-operate with the IRO by making available all payroll and other records necessary for the Board’s investigation. The IRO will examine employer payroll records and prepare a list of employees in the bargaining unit described by the union in its application. If the union apparently meets the 45% threshold the employee list is published as part of the IRO’s report.

Union membership information is confidential to the Board. However, employers should be aware that anything that is said to an IRO is “on the record” and could be recorded in a written report prepared for the Board, and ultimately used against the employer at a certification hearing.

On receipt of the Notice of the Application for Certification and before being approached by an IRO, an employer should seek experienced labour relations advice.

E. **Jurisdiction**

As noted above, the labour relations of most employees are regulated by provincial legislation. Exceptions are employees in banking, shipping, inter or extra provincial transportation, grain handling and other specific industries. Although it may be obvious, consideration should be given to ensure the provincial legislation applies. If not, a preliminary objection should be raised to the application.

F. **Determining the Appropriate Bargaining Unit**

When a union applies to be certified it seeks to represent a specific group of employees. The certification will cover various positions in the employer’s operation, not simply the individuals who occupy those positions. The Board must decide whether the group of employees applied for is appropriate for collective bargaining purposes. This process is called the determination of an appropriate bargaining unit.

An appropriate unit is one which the Board decides is suitable for collective bargaining. It need not be the preferred all employee unit nor even the best unit. As long as it is suitable the Board will accept it. The decisions about appropriateness are often subtle but have a very significant impact on the application. An application may be defeated if the Board determines the unit described in the application is not appropriate.

G. **Informal Discussions and the Certification Hearing**

The Board will set a hearing date within 7 or 8 days of the receipt of the application for certification. The Board receives many certification applications each week. Centralizing the location of the hearings is necessary to permit the Board to deal efficiently and expeditiously with these matters. The Board’s resources cannot accommodate hearings scheduled throughout
the province and meet the time limits imposed by the *Code*. Hearings are invariably conducted at the Board’s offices in Vancouver.

Before the hearing, the report of the IRO will be sent to the parties. When the application is heard, all parties including affected employees and other affected unions are entitled to make submissions to the Board.

The Vice-Chair in charge of the hearing will first determine if there are any objections to the application. If so, the Vice-Chair may direct an officer of the Board to meet with employer and union representatives to see if any differences can be resolved through informal discussions. Such informal discussions are usually held on the morning the hearing is scheduled. This process is often successful and many matters are quickly resolved. If necessary, the Vice-Chair will conduct a formal hearing to deal with any unresolved issues. Employers should be prepared to outline and support any objections to certification on that day. If witnesses are to be called the hearing may be adjourned for a few hours or a few days but it will be heard expeditiously.

Informal discussions almost always save resources and money, by reducing legal costs and the time involved. They also provide an opportunity to explore general concerns. Statements made in the informal hearings may not be used directly in a formal hearing which follows, however, facts disclosed may be proven through witnesses or on cross-examination. On many occasions when the informal meeting leads to agreement between the employer and the union, a positive base has been established for the future collective bargaining relationship.

The formal hearing is normally brief and very straightforward. It is intended to address only four issues:

i) Has the union named the correct employer?

ii) Is the applicant a trade union as defined in the *Code*?

iii) Is the group of employees applied for an appropriate unit for collective bargaining?

iv) Does the applicant trade union have the necessary membership support?

Employers may raise objections on any of the four questions listed above. Examples include arguments that the group of employees applied for does not constitute an appropriate unit for collective bargaining, or that particular individuals should be included in or excluded from the bargaining unit. Persons may be excluded if they are management, had given notice to quit or had been dismissed or are otherwise inappropriately included.

If the employer has no objections to the application, it does not have to attend or be represented. If it does have objections it is very important that the employer attend or be represented at the hearing. The employer is entitled to be represented by legal counsel or by any individual authorized to speak on its behalf.
Board decisions on certifications are usually made promptly. The decision will usually be either to dismiss the application or order that a vote be conducted.

If the application is dismissed, the union may immediately re-apply for the same or a different unit using the same and additional membership cards, if available.

H. **Granting Certification: requirement of a representation vote**

If the union has membership evidence of support of at least 45% of the employees in the bargaining unit at the time of the application, then the Board will order a representation vote by secret ballot. This vote normally takes place prior to the hearing and is required to be held within 10 days of the application for certification or it may be by a mail-in ballot. All representation votes are supervised by the Board. For the purposes of a vote, a majority is based on the majority of employees in the proposed unit who vote.

Typically votes are held at the Employer’s place of business at a time or times designed to ensure every employee has the opportunity to vote. On application, the Board will make limited efforts to accommodate employees who are on vacation or otherwise unable to attend the usual voting time or place. Employers and the union are entitled to have a scrutineer present while the vote is being conducted and counted.

The prohibitions on unfair labour practices continue to apply. The union applying for certification will be particularly suspicious of the actions of the employer between the application for certification and the vote. The Board may grant automatic certification as a remedy and without a vote if it decides that the employer has committed unfair labour practices and that the union would likely have obtained majority support if the employer had not done so.

I. **Effect of Certification**

If the application is successful, the Board will issue a formal Certification Order. **THIS DOES NOT MEAN A COLLECTIVE AGREEMENT IS IN FORCE OR ANY PARTICULAR TERMS OR CONDITIONS APPLY.** The Certification Order means the union becomes the exclusive bargaining agent to negotiate for all employees in the bargaining unit. The employer is not entitled to bypass the union and negotiate separately and individually with any of the unionized employees. In addition recall that, for at least 4 months or until a collective agreement is reached (whichever is sooner), there is a “freeze” and employers are prohibited from changing wages or terms or conditions of employment, without written permission from the Board or unless the union agrees.

Once the Board issues a certification, either party may then give the other notice to commence collective bargaining. Within 10 days of the notice, “good faith” bargaining must begin with the objective of achieving a collective agreement. Bargaining in good faith means meeting with the other side, exchanging proposals for the contents of a collective agreement and making a sincere attempt to reach an agreement. Failure to agree with the other side’s proposals does not, in itself, constitute bad faith or failure to bargain in good faith. A party may bargain hard as long as it is
IV. UNFAIR LABOUR PRACTICES

The Code prohibits any conduct by employers, unions or other organizations or persons that might interfere with an employee’s freedom to exercise the right to join a union or the union’s right to try to organize and seek to represent the employees. Anyone who engages in conduct prohibited by the Code commits what is referred to as an “unfair labour practice”.

The Code contains express provisions regulating the acts that are contrary to the legislation. Unfair labour practices by a union include: coercing and intimidating employees, and organizing by a trade union at the employer’s place of business during working hours without the employer’s consent. Unfair labour practices by an employer include:

- participating or interfering with the formation or administration of a trade union;
- discharging, suspending, transferring or laying off an employee because that employee seeks to exercise the right to be a member of a union;
- discharging, suspending, transferring, laying off or disciplining an employee except for proper cause during a union certification drive;
- imposing contractual conditions of employment that attempt to restrain employees’ rights under the Code; or
- threatening a penalty or promising any benefit in order to compel employees to refrain from becoming or continuing to be union members.

Despite the foregoing, the Code preserves for employers a limited right to communicate to employees. Specifically an employer may communicate its views to employees about “… the employer, a trade union or representation of employees ... by a trade union”. However, the Board has said that if such statements are coercive (i.e. if they place undue pressure on an employee to choose not to join a union) that will be an unfair labour practice. The Board has also said, for example, that if an employer calls a meeting of its employees during an organization drive, the employer’s statements during the “captive audience” meeting will be scrutinized very carefully, and while those statements may be permissible if made in another context, they may constitute an unfair labour practice because they are made during the meeting where employees are, in effect, compelled to listen to the employer.

The Code makes it an offence for anyone, whether associated with an employer or a union or other organization, to use “coercion or intimidation of any kind” which could have the effect of inducing a person with respect to union membership. Actions by employers which are motivated by anti-union animus are prohibited. For the employer this means, unless acts such as suspensions, dismissals or other employee discipline or even layoffs can be justified by the...
existence of proper cause, they are likely to be found to be violations of the Code. Even where a union’s application for certification has been dismissed, an employer may still be in violation of the Code by terminating or penalizing an employee based on membership in or support for a union.

Further, while an application for certification is pending, an employer is prohibited by the Code from altering wages or other terms and conditions of employment of the affected employees. Employers may make changes to their operations that are reasonably necessary for the proper conduct of the business. It should be emphasized that employers must be prepared to justify and be extremely careful about what is said and done.

Some examples of employer conduct during or following a certification application that have been found to be in violation of the Code include:

- changing an employee’s shifts so he works weekends,
- laying off an employee when the past practice had been to reduce hours for all employees rather than lay off one individual,
- where an employer encouraged and facilitated the formation of a plant committee, as an alternative to the union, and
- where an employer encouraged its employees to support one of two unions and provided that union with an employee list.

Employers are vulnerable to applications for certification. The certification of a trade union will dramatically change the relationship between employer and employee. Employers should anticipate issues which could lead to organization. An employer should seek experienced labour relations advice on what action and conduct is appropriate before, during and after an organizing drive.

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This paper is intended to be an explanation of the process not legal advice. For more detailed information or legal advice about any aspect or a specific case, please contact a member of the Employment, Labour and Human Rights Department at Fasken Martineau DuMoulin LLP.