A GUIDE TO THE
LABOUR
RELATIONS ACT, 1995

AND OTHER STATUTES ADMINISTERED BY
THE ONTARIO LABOUR RELATIONS BOARD

MARCH 2000
CAUTION

This Guide is not a complete statement of the law or the Board's practices. To determine your precise legal rights, you should refer to the appropriate statute (for example, the Labour Relations Act or Employment Standards Act), the Board's Rules of Procedure, and any Board decisions on the subject. Be aware that statutory amendments, changes to the Rules, and Board decisions issued after this Guide was written may change the rights and obligations discussed in it. Check the date of this Guide and ensure that there have been no changes since its publication.
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A. INTRODUCTION

What This Guide Is
Whether you are an employee, trade union, or employer, it is important that you understand your rights and obligations under Ontario’s labour and employment laws. This Guide describes the Labour Relations Act and other statutes administered by the Ontario Labour Relations Board, and what the Ontario Labour Relations Board does.

This Guide is not an exhaustive statement of labour and employment law. It provides only a simplified statement of basic principles and may not be a complete answer to your own particular problem.

Where a statement in the Guide is based upon a particular section of an Act or one of the Board's Rules, the section or Rule number is indicated.

Where To Get More Help
Copies of statutes are available through Publications Ontario (1-800-668-5300). Copies of the Board's Rules of Procedure, forms and Information Bulletins are available by writing or telephoning the Board (see below for the number and address) or from the Board's website at www.gov.on.ca/lab/olrb. Employment Standards Fact Sheets and the Employer's Guide to the Employment Standards Act are available from the Ministry of Labour’s website at www.gov.on.ca/lab/es/ese.htm or from any Ministry of Labour office listed on page 2.

The Board's staff is available to explain our procedures to you. They cannot, however, give you legal advice or help you make decisions about your case.

The Board's library, called the Ontario Workplace Tribunals Library, is located on the 7th floor of the Board's offices at 505 University Avenue in Toronto and is open to the public on weekdays.

Important decisions from the Board are reported bi-monthly in the Ontario Labour Relations Board Reports, which are available in many reference and county law association libraries. An annual subscription to the Reports is available for a nominal charge. The Board's decisions are also available in the on-line research service called QuickLaw. There may be a charge for this service.

Address Of The Board
The offices of the Ontario Labour Relations Board are located in Toronto at:

505 University Avenue
2nd Floor
Toronto, Ontario
M5G 1P3
Telephone: (416) 326-7500
Facsimile: (416) 326-7531
Addresses Of Other Ministry Of Labour Offices
For information about the Ministry of Labour or its programs, you can contact the Ministry at its main office, its Employment Standards or Occupational Health and Safety Inquiry numbers, or at any of its regional offices listed below:

The main office of the Ministry of Labour is located at: 400 University Ave. Toronto, Ontario M7A 1T7

Employment Standards Inquiries: Province-wide 1-800-531-5551
Toronto 416-326-7160

Occupational Health and Safety Inquiries: Province-wide 1-800-268-8013

REGIONAL OFFICES

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217 York St., 5th Floor
London, Ontario
N6A 5P9
(519) 439-2210
Fax (519) 672-0268

Windsor
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Windsor, Ontario
N9A 6V9
(519) 256-8277
Fax (519) 258-1321

Kitchener
155 Frobisher Drive, Unit G213
Waterloo, Ontario
N2V 2E1
(519) 885-3378
Fax (519) 883-5694

Peel North & Peel South
1290 Central Parkway West, 4th Floor
Mississauga, Ontario
L5C 4R3
(905) 273-7800
Fax (905) 615-7098

York
1110 Stellar Drive, Unit 102
Newmarket, Ontario
L3Y 7B7
(905) 715-7020
Fax (905) 715-7140

Barrie
114 Worsley Street, 2nd Floor
Barrie, Ontario
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(705) 722-6145
Fax (705) 726-3101
B. THE ONTARIO LABOUR RELATIONS BOARD

The Ontario Labour Relations Board is an independent, quasi-judicial, administrative tribunal. It hears and determines disputes that arise under several employment-related statutes.

When mediating disputes, holding hearings and making decisions, the Board and its officers must be fair and impartial. The Board is responsible to the Legislature, through the Minister of Labour, for its operation. However, its decision-making is completely independent of the Government and the Ministry.

Who Works At The Board?
The Board has special expertise in labour relations and employment related matters. The Board’s decision-makers include the Chair, Alternate Chair, Vice-Chairs, Members representing employers, and Members representing employees. The Chair, Alternate Chair and Vice-Chairs are neutral adjudicators. Members represent the perspectives of employers and employees in the Board’s decision-making. Depending upon the statute and issues to be determined, a hearing may be held before the Chair or a Vice-Chair alone or before a tripartite (three person) panel consisting of the Chair or Vice-Chair, a Member representing employees, and a Member representing employers.

The Board’s Registrar and Director is responsible for supervising the day-to-day administration of the Board. This includes the scheduling of hearings, ensuring that everything you provide to the Board is properly recorded and filed, and communicating with you on the Board’s behalf.

The Board also employs Labour Relations Officers (“LRO's”), and Returning Officers (“RO's”).

What Do Labour Relations Officers Do?
The LRO is usually the first person you meet at the Board. They usually contact and/or meet with the parties before a hearing or consultation to attempt to resolve some or all of the issues in dispute. LRO's and RO's are also responsible for conducting votes.

Labour Relations Officers do not decide the case. The role of the LRO is to help the parties reach a settlement of the case. In order to encourage frank and open discussion between the parties and the LRO and increase the likelihood of settlement, LRO's do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair or panel who will be hearing and deciding the case. All communication between the LRO and the parties remains confidential. This includes documents that are given to an LRO. If a party wants a document to be considered by the panel that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.
During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a hearing or consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

It May Look Like A Court But It’s Not
In some respects the Board proceeds in the same way as a court - it holds hearings, issues summons, decides matters on the basis of the sworn evidence of witnesses, and its decisions are legally binding. However, its proceedings are much less formal than those of a court. For example, hearings are not recorded or transcribed, and the rules of evidence are applied less strictly.

What Kinds Of Powers Does The Board Have?
The Board gets its authority from the particular statute under which the proceeding is taking place (e.g. Labour Relations Act, Employment Standards Act, etc.), as well as from the Statutory Powers Procedure Act. These Acts allow the Board to issue various orders, declarations, and directions, including (in some cases) reinstatement orders and orders to pay damages. Most such orders can be filed in the Superior Court of Justice and become enforceable as orders of that court.

Can The Board Issue Interim Orders?
Yes, although the type of interim order that can be issued depends on the statute that governs the proceeding:

- under the Labour Relations Act, the Board can only make interim orders concerning procedural matters. The Board cannot make interim orders reinstating an employee to employment. [s.98 LRA]
- all other proceedings are governed by the broad interim order power contained in the Statutory Powers Procedure Act.
- in addition to the SPPA power, some statutes give the Board a substantive interim order power (e.g. Employment Standards Act, Occupational Health and Safety Act as it relates to s.61 appeals, Education Act, Crown Employees Collective Bargaining Act, 1993 as it relates to making essential services agreements, and the Public Sector Labour Relations Transition Act, 1997).

Do You Need A Lawyer?
You are not required to have a lawyer represent you at the Board. However, because proceedings at the Board affect your legal rights, you may wish to consult a lawyer or other competent adviser who is familiar with the Board's practices and the relevant statute. In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under any of the statutes administered by the Board.
If you wish to consult a lawyer but do not have one, you may want to contact the Law Society of Upper Canada's Lawyer Referral Service. This service will refer you to a lawyer who has agreed to conduct a one-half hour consultation with prospective clients for free. The service can be contacted at:

Toronto - 416-947-3330
Toll Free - 1-800-268-8326

You may also be eligible for Legal Aid if you meet the financial and other requirements of the Legal Aid plan. As well, Community Legal Clinics are located throughout the province. Consult your local telephone directory for the location of the clinic closest to you.

**Are There Any Other Costs Associated With Filing An Application At The Board?**

Except for grievance referrals in the construction industry, the Board does not charge any application filing fees or service fees for a mediation, consultation or hearing. However, other costs associated with the case (for example, the cost of photocopying documents that a party wants the Board to read) are the responsibility of that party. It is not the Board's practice to have the "loser" pay the "winner's" costs.

**Are The Board's Hearings Open To The Public?**

Yes. Any member of the public can attend a hearing as an observer.

**The Board's Jurisdiction**

The Board has jurisdiction to deal with applications filed under the following statutes:

- Colleges Collective Bargaining Act
- Crown Employees Collective Bargaining Act, 1993
- Education Act, (Part X.1)
- Employment Standards Act
- Environmental Bill of Rights Act, 1993
- Environmental Protection Act
- Fire Protection and Prevention Act, 1997
- Hospital Labour Disputes Arbitration Act
- Labour Relations Act, 1995
- Occupational Health and Safety Act
- Public Sector Labour Relations Transition Act, 1997
- Public Service Act
- Smoking in the Workplace Act
How Do You File An Application With The Board?

All applications are made on forms provided by the Board. Copies of the forms can be obtained by calling, writing or visiting the Board, or from the Board's website at www.gov.on.ca/lab/olrb.

The person, organization or company that files the application is called the "applicant". The person, organization or company against whom the application is made is called the "responding party". The applicant must list as a responding party everyone who may be affected by an application.

It is important to include all of the facts on which the application is based when filling out the form. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. The party against whom the application has been made is entitled to know the particulars of the complaint against it. Applicants who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at a hearing or consultation. [Rules 26, 42]

There are requirements about the number of copies of the application that must be filed with the Board, whether or not the application must first be delivered to the responding party, and when and how the application has to be filed and delivered. These requirements are all set out in the Board's Rules of Procedure.

It is very important to follow the Rules when filling out and filing an application or a response with the Board. If you do not, the Board may not process your application or response, or it may decide the case without giving you further notice. [Rules 39, 40]

The Board’s Rules Of Procedure

The Board issued new Rules of Procedure in August 1999. The Rules are divided into a general section that applies to all proceedings that come to the Board, and several special sections that apply to specific types of proceedings such as applications for certification, Occupational Health and Safety Act matters, or applications for first contract arbitration. There is also a list of definitions.

You must read the Rules before filing anything with the Board. Start with the general section and then, if a specific section applies to your case, turn to it. Sometimes the specific rules will differ from the general rules. When there is a difference you must follow the specific rule.

The Rules also contain a series of charts that list the responsibilities of each party in each type of application. Refer to it if you are having difficulty following the Rules or if you want to be sure you haven’t missed anything.
C. THE LABOUR RELATIONS ACT, 1995

1. OVERVIEW

Purpose Of The Labour Relations Act
The Labour Relations Act ("LRA") is intended to facilitate collective bargaining between employers and trade unions, and to promote the expeditious resolution of workplace disputes. The LRA affirms the right of employees to join a trade union and, where the majority of the employees in a workplace agree, to have that trade union represent them. [ss. 2, 5]

Collective bargaining is a system that allows employees to deal with their employer collectively through a trade union, rather than on an individual basis. The process by which a trade union is chosen is referred to as certification. The LRA contains a number of provisions to protect the right of employees to choose a trade union free from interference, intimidation or coercion by their employer, any other person, or any other trade union. [ss. 70, 72, 76]

After the Board certifies a union to represent a group of workers, the union and employer must bargain together to reach a collective agreement that will establish employees' wages, benefits and working conditions. The LRA promotes orderly collective bargaining and contains a number of sections regulating the bargaining process, the content of collective agreements, and the timing of strikes and lock-outs.

Once a collective agreement is ratified, the union acts on behalf of the workers it represents in matters arising out of the operation of the collective agreement. The LRA places a duty on unions to fairly represent the employees for whom they bargain and to provide their members with basic information about the conduct of union affairs [ss. 74, 92].

Who Does The Labour Relations Act Apply To?
The Labour Relations Act applies to all workplaces in Ontario unless the employees are among the workers excluded from the Act or work for employers that are covered by the federal Canada Labour Code.

Employees to whom the LRA does not apply can be divided into two groups:
• employees who are covered by their own special collective bargaining legislation, and
• employees who are not covered by any legislated collective bargaining regime at all.
Employees Covered by Other Collective Bargaining Legislation

- Members of a Police Force
Both police officers and civilian employees of a police force are included in this
category. Members of police forces engage in collective bargaining under the terms of
the Police Services Act. Security guards, even those sworn as special constables, are not
police officers and are covered by the LRA.

- Firefighters
The collective bargaining regime for firefighters is set out in the Fire Protection and
Prevention Act, 1997 ("FPPA"). The Board has some responsibility for firefighters,
including determining confidential and managerial exclusions from the bargaining unit,
and giving consent for the parties to terminate a collective agreement early. The
Board's jurisdiction under the FPPA is discussed at page 98.

- Teachers
Collective bargaining by teachers employed by school boards is conducted under the
terms of the Education Act. The Board's responsibilities under the Education Act are
explained at page 97.

- Provincial (Crown) Employees
The Crown Employees Collective Bargaining Act, 1993 ("CECBA") determines the
collective bargaining rights of Crown employees working for either the government of
Ontario or a Crown agency. The Board's role in administering CECBA is discussed at
page 85.

- Hospital and Nursing Home Employees
These workers are covered by both the LRA and by the Hospital Labour Disputes
Arbitration Act ("HLDAA"). For most purposes hospital and nursing home employees
are subject to the provisions of the LRA. However, because of the nature of the work
they perform, these employees have no right to strike and cannot be locked out of their
workplace by their employer. HLDAA establishes the regime by which collective
bargaining disputes are resolved through interest arbitration. The Board's role under
HLDAA is explained in more detail at page 87.

- Community College Employees
Employees of community colleges are subject to the Colleges Collective Bargaining
Act. The Board has certain powers under this Act, which are discussed at page 88.

- Employees Under Federal Jurisdiction
Labour relations matters concerning people who are employed in areas regulated by the
federal government are subject to federal labour laws. This includes employees of the
federal government, people employed by interprovincial railway, bus or trucking
companies, the airlines, telephone services, and other federally regulated businesses
such as banks, television and radio stations, and grain elevators.
Employees not covered by any form of collective bargaining legislation
(some of these employees may still be subject to the Employment Standards Act)

• Domestic workers employed in private homes
• Farmers, hunters and trappers
• Workers engaged in landscaping and the growing of plants. (Employees of employers whose primary business is not agriculture or horticulture are covered by the LRA, as are employees engaged in the growing and cutting of timber.)
• Provincial judges
• Labour mediators and labour conciliators
• Persons who, in the opinion of the Board, exercise managerial functions. In making this determination, the Board looks at the degree of supervision and control the person exercises over others. For example, does the person have the power to hire and fire, grant time off, grant or recommend promotions and wage increases, and make decisions involving the exercise of independent judgment and discretion? In the manufacturing field, non-working forepersons are generally seen to be managerial, while lead hands are generally considered to be employees. A managerial title does not, by itself, make a person managerial.
• Persons who, in the opinion of the Board, are employed in a confidential capacity in matters relating to labour relations.

[ss. 1(3), 2(a)-(c), (i), & (j)]

Self-employed individuals have no need for the provisions and protections of the LRA. However, sometimes people who appear to be self-employed are actually so dependent on the person paying for their work that they more closely resemble an employee than an independent businessperson. These people are defined as "dependent contractors" and are covered by the LRA. Some taxi drivers or truck drivers, for example, may be dependent contractors even if they own their own cab or truck. [s. 1(1)]

Can Employees Who Are Excluded From The LRA Participate In Collective Bargaining?
In the absence of a statute establishing collective bargaining rights (such as the LRA, Fire Protection and Prevention Act, Education Act or other Act described above), the rights of employees are governed by the common law. The common law is far from clear on this question.

While there is nothing to prevent excluded employees from joining together to attempt to bargain with their employer to set wages and other conditions of work, there is also no legislated source of support or protection for those employees. This means that while employees who are covered by collective bargaining legislation cannot be fired or discriminated against because of their trade union activity, persons not covered by such legislation have no such protection apart from their individual contracts of employment.
It also means that the employer is not required to recognize or bargain with such organizations. Any agreement made between these employees and their employer would probably only be enforceable if its terms are understood to be incorporated into the individual employees' contracts of employment or because the parties have explicitly agreed to a dispute resolution process.

Also, whereas a trade union has a statutory obligation to fairly represent the employees for whom it has bargaining rights, the extent to which a similar obligation rests on this type of association is unclear.

**What Rules Apply To Employees Who Don't Have A Union?**

If there is no union in the workplace, wage rates and other conditions of employment are generally settled between the individual employer and employee, without government intervention. There are, however, some statutes that set out minimum standards for these relationships. These minimum standards apply whether or not employees have a written contract, or are members of a union, or are covered by a collective agreement. Of course, many employees will have a contract or collective agreement with their employer that provides for wages and benefits above the basic minimums. In that case an employee's right to the term or condition above the minimum will usually depend on the terms of the contract or collective agreement.

The *Ontario Human Rights Code*, which is administered by the Ontario Human Rights Commission (416-314-4500 or 1-800-387-9080) prohibits discrimination with regard to hiring, dismissal, promotion, apprenticeship, seniority, or terms or conditions of employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age (between 18 and 65), record of offences, marital status, family status, or handicap. (The Code also prohibits trade unions and self-governing professions from discriminating on any of these grounds, except for record of offences.)

The *Employment Standards Act* ("ESA") establishes minimum standards on issues such as overtime pay, minimum wage, public holidays, vacation pay, pregnancy and parental leave, termination and severance pay, and equal pay for substantially equal work. The ESA is administered by the Employment Standards Program of the Ministry of Labour (416-326-7160 or 1-800-531-5551). The Board hears applications for review of Employment Standards Officers' decision to issue or not issue an Order to Pay. The Board's role in this area is discussed at page 72.
2. CERTIFICATION OF TRADE UNIONS

See Information Bulletins #1 and #3 (#6 and #8 for the construction industry) for a
detailed description of the steps in a certification application, including the filing and
delivery obligations of each of the parties, the Board's role, and how the vote is
arranged and conducted.

A. The Legal Requirements For Establishing A Trade Union

What is a Trade Union?
A trade union is an organization of employees formed for purposes that include the
regulation of relations between its member-employees and their employer. It can be a
local union, a provincial, national, or international union, or a certified council of trade
unions. It can also be an independent employee association. In order to bargain on
behalf of employees and enter into binding collective agreements, a trade union must
prove it is a "union" within the meaning of the Labour Relations Act. In other words, it
must prove its "status". [s. 1(1)]

What must a group of employees do to form an organization that will be
recognized as a trade union?
The Ontario Labour Relations Board decides whether or not an organized group of
employees qualifies as a trade union. The requirements for trade union status can be
rather technical, so people seeking to draft a constitution and form a trade union should
consider consulting a lawyer before doing so. The following steps are generally
sufficient to bring a trade union into existence:

• a constitution is written that sets out, among other things, the purposes of the
  organization (which must include the regulation of labour relations) and the
  procedure for electing officers and calling meetings.
• the employees hold a formal meeting. Minutes of the meeting should be kept.
• the constitution is placed before the employees at the meeting for approval.
• once the constitution is approved, the employees become members of the union in
  accordance with the procedure set out in the constitution. If some employees have
  already become union members, they should be confirmed as members.
• the members vote to ratify the constitution.
• officers are elected pursuant to the constitution to administer the union's business
  and to represent it.

A different approach is to have the employee group apply to a larger (or parent) trade
union for a charter as a "local" of the larger union. Such a charter would normally
provide that the members of the local will adhere to the constitution of the parent union.
Evidence must then be presented to the Board to show that the charter was properly
issued to the local in accordance with the constitution of the parent union. The
organization must show that one purpose of its formation is to regulate relations between
employees and employers. This is normally done by having the constitution of the union state exactly that.

**How can a group of employees demonstrate that they have fulfilled all of the requirements?**

Normally, the issue of union status is dealt with on the basis of written submissions. Where an oral hearing is held, a person directly connected with the formation of the union gives testimony under oath about the events surrounding both the formation of the union and the election of the officers. This person would also provide the Board with a copy of the union's constitution. It is usual to have a person keep minutes of the meetings at which the union was formed and officers elected. That person can then give the relevant testimony to the Board. The advantages of this approach are that the person can refer to the minutes during testimony and file those minutes as an exhibit with the Board. All of these steps are unnecessary if the employees are joining an established organization that has already been certified for other groups of employees in Ontario.

**Are there any other important points employees should know about when they form a trade union?**

Yes. The Act prohibits the Board from certifying any organization that was formed with assistance from an employer. Also, the Board cannot certify a group that discriminates against any person on any ground of discrimination that is prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*. (Examples of these grounds are: race, creed, colour, ethnic origin, citizenship, ancestry, age, sex, sexual orientation, place of origin, marital status, family status, or handicap.) [s. 15]

**Must a union prove its status all over again every time it asks to be certified?**

No. A union need only prove its status once. Note, however, that an organization that has been recognized as a trade union in another province, or by the Canada Industrial Relations Board, does not automatically have such status in Ontario. Such a union must prove that it is a trade union the first time it appears in a proceeding before the Ontario Labour Relations Board. [s. 113]

**Can a trade union lose its status?**

Although it seldom happens, it is possible for the Board to decide that an organization that once was recognized by the Board as a trade union is no longer a trade union. This might happen if there have been major changes in the structure or function of the organization. Changes in the internal operation of a union would, however, seldom be sufficient reason for an organization to lose its status as a trade union if these changes were in accordance with the union's constitution.

**Can an "association" be recognized as a trade union?**

Yes. The test is whether or not the organization meets the criteria of a trade union, not what it calls itself. For example, groups such as the Ontario Nurses'
Association, the Schneider's Employees' Association, and the Christian Labour Association of Canada are recognized trade unions. A union may be an entirely independent local organization and need not be affiliated with any other trade union or association.
B. How Unions Get Bargaining Rights

How does a union get the right to represent employees with their employer? There are two methods. The first, and most common, is certification. The Board is asked to grant a certificate declaring that the union is the exclusive bargaining agent for a defined group of employees in a bargaining unit that the Board considers appropriate for collective bargaining. [s. 9]

The second method is voluntary recognition. The employer agrees in writing to recognize the union as the exclusive bargaining agent for a group of its employees as defined in an agreement between the union and employer. This is usually done by private arrangement without any government supervision and happens frequently in the construction industry.

What can employees do if their employer voluntarily recognizes a trade union other than the one they would prefer? The Labour Relations Act protects employees in such situations. In the first year following voluntary recognition, or in the first year of the first collective agreement's operation following voluntary recognition, any employee affected -- or any union that the employee may have joined -- may take the matter to the Ontario Labour Relations Board. They can ask for a declaration that the employer-recognized union was not, at the time of recognition, entitled to represent the employees. Also, another union can bring a certification application if no collective agreement has been entered into one year after the union was voluntarily recognized.

When such action is taken, it is then up to the voluntarily-recognized trade union to show the Board that it is, in fact, a trade union as defined by the LRA, that it did not receive any assistance from a member of management, and that it had the support of the majority of the employees it claims to represent at the time it received voluntary recognition. If it cannot do so, the Board can nullify both the voluntary recognition agreement and any collective agreements that the union and the employer may have entered into. Remember, a trade union must be independent of the influence of management. Any union that is not independent cannot be certified, and no collective agreement signed by such union is legally binding. Forming a trade union is essentially a matter for the employees -- the choice is theirs. An employer cannot impose a particular trade union upon its employees by voluntarily recognizing the union that it prefers to deal with. [s. 66(1)]

What rights does a union have once it is certified? Essentially, a union gets two rights. First, it becomes the exclusive bargaining agent for all the employees in the bargaining unit whether or not they are members of the union. This means that the employer cannot settle wages and working conditions directly with the employees in the bargaining unit, whether they are union members or not, or negotiate with a union other than the one that has been
certified. The employer must negotiate with the union that has been certified and that union only. [s. 73(1)]

Second, the union gains the right to insist that the employer bargain in good faith in order to reach a collective agreement. Both the union and the employer have a legal obligation to bargain in good faith and make every reasonable effort to enter into a collective agreement. [s. 17]

**How does an organization apply for certification?**
A union must first demonstrate to the Board that at least 40% of the employees in the bargaining unit it proposes appear to be members of the union. [s. 8(2)] The membership evidence, which usually takes the form of union cards, must be in writing, signed and dated by the individual employee, and have been obtained from each employee within a reasonable period prior to the certification application (generally, up to one year is reasonable). Special care is taken to keep this information secret. If a union local is applying for certification, the membership evidence must indicate membership in the local. By contrast, if the parent union is seeking certification, evidence of membership in the local will be accepted. The Board looks only at the information supplied in the application when determining whether the 40% threshold has been met. No hearing is held. [s. 8(4)]

If the 40% threshold is met, the Board will then conduct a secret ballot vote, usually five days after the application for certification is filed (or, in the construction industry, five days after the application was delivered to the employer, whichever is later). The union will not be certified unless more than 50% of the employees in the bargaining unit who are eligible to vote cast votes in favour of the union. [s.10(1)]

There are very specific filing and delivery requirements for parties involved in a certification application. These obligations, and a description of the Board's processes, including the conduct of the vote, are described in detail in Information Bulletins #1 and #3 (#6 and #8 for the construction industry), and in the Board's *Rules of Procedure*.

**Who is eligible to vote?**
All employees in the voting constituency described by the Board who had an employment relationship with the employer on the certification application date are eligible to vote. This includes employees who were not at work on that date so long as there is a reasonable expectation of their return to employment, such as employees on maternity leave, sick leave, vacation, workers' compensation and lay-off.

In the construction industry, those eligible to vote are all those employed by the employer and at work in the voting constituency on the certification application date.
How is the vote conducted?
A Returning Officer is sent out by the Board to conduct the vote. Each party is given an opportunity to select one scrutineer for each polling place. The scrutineers make sure that everyone who votes is entitled to do so. Individuals whose eligibility to vote is challenged are allowed to vote but their ballots are segregated until their eligibility is resolved.

Usually, the ballots are counted by the Returning Officer, in the presence of union and employer representatives, immediately after the voting is completed. The ballot box may, in some circumstances, be sealed and the ballots not counted until certain issues are resolved. This can happen, for example, if the employer raises a numerically significant objection to the union's estimate of the number of individuals in the bargaining unit or if there are material disputes as to some workers' status or eligibility to vote. [ss. 8(7), 8.1]

What choices are employees given on the ballot?
Generic ballots that do not identify the union or employer by name are used when there is only one union involved in the application. The names of the union and employer are set out instead in a Notice in every voting booth.

If there is already a union on the scene, both the incumbent union's name and the applicant union's name appear on the ballot, with the incumbent union's name appearing on top.

What happens to spoiled ballots?
Spoiled ballots are not counted. A ballot is only spoiled if it does not clearly indicate the choice of the voter, or if the person voting has put his or her name or some other identifying mark on the ballot.

What if someone believes the vote was not conducted properly?
After the vote, the Returning Officer issues a report to the employer and union. Copies are also posted at the workplace for employees to read. The report states how objections can be made to the Board about the vote. If the Board decides that irregularities have occurred, it can set aside the vote and direct a new one.

When can an application for certification be filed?
The Board will not consider an application for certification unless it is "timely". To be timely, applications must be made during one of the open periods provided for in the LRA. Generally, these open periods are:

• If no other union holds bargaining rights for the affected employees → the application can be made at any time. [s.7(1)]

• If another union has been certified but there is no collective agreement yet in place → the application can be made one year from the date of the certificate. But
if the Minister of Labour has appointed a conciliation officer or mediator the application cannot be made until:

- 30 days have elapsed since the mediator or conciliation officer's report was released to the parties, or
- 30 days have elapsed since the Minister issued a notice refusing to appoint a conciliation board, or
- six months have elapsed since the release of a report of the conciliation officer stating that the differences between the parties were settled,

*whichever situation applies.*

\[s. 7(2), 67(1)(a) - (c)\]

- If there is a collective agreement in place with a term of three years or less → an application can be made in the last two months of the agreement. \([s. 7(4)]\)

- If there is a collective agreement in place with a term of more than three years → an application can be made in the last two months of the third year of operation, or in the last two months of each subsequent year, or after the commencement of the last two months of the agreement. \([s. 7(5)]\)

- If there is a collective agreement in place that states that it will continue to operate for a further term or terms if neither the union or employer gives notice to bargain for modifications → an application can be made during the last two months of the agreement's stated date of operation, and during the last two months of each year that it continues to operate. \([s. 7(6)]\)

- If bargaining for a new collective agreement is going on and the Minister has appointed a conciliation officer or mediator, an application cannot be filed until →
  - 30 days after the conciliator's or mediator's report is released, or
  - 30 days after the notice that no conciliation board will be appointed, or
  - 12 months after the date of the appointment of the conciliator or mediator, *whichever is later.* \([s. 67(2)]\)

- If there is a legal strike or lock-out → an application can be made:
  - six months after the strike or lock-out commenced, or
  - seven months after the Minister released the report of the conciliation board or mediator or gave notice declining to appoint a conciliation board, *whichever occurs first.* \([s. 67(3)]\)

**If a union's application for certification is unsuccessful, when can it re-apply?**

It depends:
- If a trade union withdraws its application for certification after the representation vote has been held → that union cannot make another application to represent those employees for one year. \([s. 7(10)]\)
• If a trade union withdraws its application for certification before the representation vote has been held → the Board may bar that union from reapplying for a period of up to one year. [s. 7(9)]

• If the Board dismisses a union's application for certification because it lost a representation vote → the Board will not consider another application from that union for those employees for one year from the date of the dismissal. [ss. 10(3), 160(3)]

• If the Board dismisses a union’s application for certification for any other reason (for example, under section 8.1 of the Act) → the Board will not automatically impose a bar on future applications. [ss. 8.1(5), 10(3), 10(4)]

• If the Board dismisses a union’s application for certification for any reason, the Board has a discretion to refuse to entertain another application from any union for those employees within one year after the dismissal. [s. 111(2)(k)]

**What if the employer or trade union violates the LRA so that employees were afraid to vote in favour of the union (or, in the case of union misconduct, against the union)?**
If this has happened and the Board is satisfied that the vote results likely did not reflect the employees' true wishes, the Board can order that another vote be held. [s. 11(1)]

This could happen where the employer has either threatened employees with the loss of benefits or jobs if the union is successful, or promised them increased benefits or higher wages if the union loses the vote. Illegal anti-union statements by an employer may be sufficient to cause another vote to be ordered. Union threats are also unlawful. The Board is primarily concerned with the effect that the employer's or union's conduct has on employees' ability to freely choose whether or not they wish to be represented by a union.

**What if an employer carries on related businesses under more than one name or through more than one company?**
A trade union, or an employer, can apply to the Board for a "related employer" declaration. This declaration can be sought at any time but often arises in the context of certification applications. The declaration may be issued if more than one corporation, firm, association or individual are under common control and direction and carrying on related activities or businesses.

When a declaration is sought in an application for certification, the Board may certify the union as the bargaining agent for the employees of all the "related" employers provided that it has the required level of overall support. [s. 1(4)]
Are the affected employees notified of an application for certification?
Yes. The employer is required to post copies of the Notice to Employees of Application for Certification and copies of the application in conspicuous places in the workplace. This ensures that employees are fully informed about the details of the application, notifies them that a secret ballot vote will likely be held five days after the application was filed with the Board (or, in the construction industry, five days after the application was delivered to the employer, whichever is later), advises them of their rights, and alerts them to look for future postings that will inform them of voter eligibility, the date, time and location of the vote, and the date and location of Board meetings and hearings.

Because employees will be entitled to express their support or opposition to the union in a secret ballot vote, the Board does not consider "petitions", which are written statements of employees' views of the union.

Who can attend a certification hearing?
All hearings of the Board are open to the public and anyone can attend as an observer. Only certain people may take an active part in them, however. Those people are: representatives of the applicant union, representatives of the employer, representatives of any intervenor that has an interest in the application, and any employee (or representative) who has filed a timely request to participate.

It is not always necessary to hold a hearing in an application for certification.

What is an intervenor?
An intervenor is any individual or group with an interest that is permitted to participate in a case. Sometimes, another union that represents any of the employees affected by the certification application becomes an intervenor. It is given notice of the certification application and has an opportunity to protect its interests by filing an Intervention and participating in the hearing.
C. Determining The Appropriate Unit Of Employees

What is a bargaining unit?
A bargaining unit is the group of employees that the union is certified to represent. [s. 1(1)]

Must the bargaining unit always be determined before a certificate is granted?
No. If the Board is satisfied that any dispute as to the composition of the bargaining unit will not affect the union's right to certification, the Board may certify the union pending the final resolution of the dispute. This is called "interim certification". [s. 9(2)]

Information Bulletin #4 (#9 for the construction industry) describes in detail how the Board deals with disputes as to the composition of the bargaining unit.

How is the bargaining unit determined?
Both the union and employer propose descriptions of the appropriate bargaining unit. If they agree on the unit, the Board will generally, but not always, accept it. If the parties do not agree on the appropriate bargaining unit, the Board will decide the issue. [s. 9(1)]

What criteria does the Board use when deciding what the appropriate bargaining unit is?
The Board focuses on the union's proposed bargaining unit. The Board asks itself whether there is a sufficient community of interest in the unit proposed by the union so that the employees can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. The primary, though not only, considerations are:

- the wishes of the employer and union.
- the community of interest among employees. This involves taking into account such factors as the nature of the work performed, the conditions of employment, and the skills of the employees.
- the organizational structure of the employer.
- the desire not to split the work force of one employer into too many bargaining units.
- the Board's general policy of not putting office staff and production workers in the same bargaining unit.

While the Board has a wide discretion in fashioning appropriate bargaining units, the Act does place some restrictions:

- the bargaining unit must contain more than one employee.
- a bargaining unit cannot include people who are excluded from the Act, such as:
people who exercise managerial functions. (See page 10 for a discussion of what qualifies a person as being managerial.) [s. 1(3)(b)]

people who are employed in a confidential capacity in matters relating to labour relations [s. 1(3)(b)]

architects, dentists, land surveyors, lawyers or doctors [s. 1(3)(a)]

domestics, teachers, firefighters, police, people employed in agriculture, horticulture, hunting or trapping, employees under the *Colleges Collective Bargaining Act*, provincial judges, labour mediators or conciliators. [s. 3]

- dependent contractors and professional engineers are entitled to their own separate unit unless a majority of them wish to be included in a unit with other employees. [s. 9(4), (5)]
- security guards can be included with other employees unless the employer objects and it cannot be shown that no conflict of interest will result. [s.14]
- under certain conditions the Board must find a craft unit to be appropriate.

**What is a craft unit?**

A craft unit is one composed of skilled workers engaged in some trade (for example, typesetting, nursing or carpentry) who commonly bargain together, separate and apart from other employees. These employees can be put in a separate unit if the union applying to represent them is known as a representative of that skill or craft. Generally, these employees must not be in a general bargaining unit at the time of the application. The Board can include people who usually work in association with the craft workers in the craft unit. Appropriate bargaining units in the construction industry are usually craft bargaining units. [s. 9(3)]

**What other types of bargaining units are there?**

The opposite of a craft unit is an industrial unit. Unions can organize all workers at a particular workplace, or across an entire industry, no matter what their trades. The Board's practice is to describe bargaining units in terms of classes of employees (e.g. clerical or production workers) or of occupational classifications, and not in terms of particular individuals. Standard industrial units recognized by the Board include production units, office units, technical units, and professional units. Students and part-time employees will be excluded from the regular bargaining unit at the request of either the employer or the union. The Board has found students and part-time employees (working not more than 24 hours a week) to be an appropriate separate bargaining unit on their own.

Where most of the employees of an employer are organized, the remaining employees may be included in a "tag-end" unit even though they may not otherwise be an appropriate bargaining unit by themselves. This is done so as not to deprive these employees of their collective bargaining rights.
How does the Board determine the bargaining unit when the union is applying to be certified to displace another union?
Generally, the Board will refuse to change the description of the existing bargaining unit.

What geographic limits does the Board place on bargaining units?
If an employer carries on business in only one location in a city or town, the Board will normally limit the unit to the municipality in which the city or town is located. If business is carried on at more than one location, the Board will often make each place of business a separate bargaining unit. Sometimes, however, the operations at two or more locations are so integrated and the community of interest shared by employees is so complete, that a larger unit covering all locations is desirable.

The construction industry is different. Under the LRA, the Board is prohibited from determining a bargaining unit on the basis of a particular project. Rather, it must base its judgment on geographic areas. To do this the Board has divided most of the province into 32 geographic areas. These geographic areas are essentially a reflection of (with some modifications and extensions) areas of collective bargaining between trade unions or councils of trade unions and employers' organizations that existed prior to the introduction of the construction industry provisions of the LRA in 1962. [s. 128]
3. NEGOTIATION OF COLLECTIVE AGREEMENTS

How do negotiations for a collective agreement begin?
If a trade union has just been certified or voluntarily recognized, it will usually give the employer written notice of its desire to bargain. If the employer and the union are already bound by a collective agreement, either party can give the other party written notice to bargain a renewal agreement within the 90 days before the agreement is due to expire (or during any other time period specifically set out in the agreement). In either case, the union and employer must meet within 15 days from the giving of notice, unless they agree to some other time period. [ss. 16, 17, 59]

Does the law require that there be a ratification vote before a collective agreement becomes effective?
Yes. A proposed collective agreement has no effect unless a ratification vote is taken and more than 50% of those voting vote in favour of the proposed agreement. The vote must be conducted by secret ballot, all eligible voters must have ample opportunity to vote, and the time and place of the vote must be reasonably convenient. All employees in the bargaining unit, whether or not they are members of the union, are entitled to participate in the vote. [s.44]

Unions do not have to tell its members in advance of the vote and in written form the contents of the proposed settlement that the union is hoping to have ratified.

The requirement for a ratification vote does not apply:
• in the construction industry, or to maintenance employees where at least one of the employees in the bargaining unit was referred to their employment by a construction industry union
• where the agreement is imposed by the Board or settled by arbitration
• where the agreement reflects an offer accepted by a final-offer vote held pursuant to sections 41 or 42 of the Labour Relations Act.

What can one side do if the other side refuses to negotiate, or appears not to be negotiating in good faith?
It can file an application with the Board. The Board can issue remedial orders, including a direction that the offending party bargain in good faith.

Bad faith bargaining applications are:
• made on Form A-33
• dealt with in Parts I & II of the Board's Rules of Procedure.
What happens if, during negotiations, the employer and the union cannot agree on the terms of a collective agreement?
Either the employer or the union can ask the Minister of Labour to appoint a conciliation officer. This officer will try to help them reach an agreement. [s. 18]

What if the employer and the union cannot reach agreement even with the help of a conciliation officer?
The conciliation officer informs the Minister of Labour of the state of affairs. The Minister can then appoint a three-person conciliation board. This seldom happens, however. Instead, the Minister will issue a report informing the union and employer that he or she does not consider it advisable to appoint a conciliation board. This is generally referred to as a "no-board report". [s. 21]

What happens after the Minister issues a no-board report?
After a given period of time, and provided there is no collective agreement in operation, the employer is in a legal position to lock-out its employees. The union, provided that a strike vote has been taken and more than 50% of those voting vote in favour of a strike, will be in a legal position to call a strike.

At any time after the no-board report, either the employer or the union can apply to the Conciliation and Mediation Services Branch of the Ministry of Labour for the appointment of a mediator to help them reach an agreement. The appointment of a mediator has no effect on the time period for a legal strike or lock-out.

Can the employer request that the employees vote on its final offer?
Any time before or after the beginning of a legal strike or lock-out, the employer can request the Minister of Labour to direct a vote of the employees in the bargaining unit as to their acceptance or rejection of the employer's final offer on all matters remaining in dispute. Upon the receipt of such a request the Minister is obligated (except in the construction industry where the Minister has a discretion) to direct such a vote to take place. The Board conducts this kind of vote. Neither the request to the Minister nor the conduct of the vote affect the time periods for a legal strike or lock-out. [s.42]

The Minister of Labour also has the discretion where he or she is of the opinion that it is the public interest to do so, to require at any time after the beginning of a strike or lock-out that a vote be held in order to give the employees an opportunity to accept or reject the employer's offer last received by the union. [s.41]

When is a strike or lock-out legal?
A strike or lock-out is never legal during the term of a collective agreement.

When there is no agreement in operation, strikes and lock-outs are not legal until the conciliation provisions of the LRA have been exhausted. This means that they are not legal until the beginning of the 17th day after the Minister of Labour's no-board report is mailed, or the 16th day after the no-board report was delivered, as
the case may be. For example, if the Minister mails the no-board report on August 1, the parties can legally strike or lock-out on August 18. (There is some confusion about this because the LRA states that the waiting period is 14 days after the release of a no-board report. The report is not deemed to be released, however, until the second day after it was mailed or the day after it was delivered, as the case may be. This extends the period to 16 days in the case of mailing, and means that a strike cannot legally start until the beginning of the 17th day. In the case of delivery, the period is extended to 15 days and means that a strike cannot legally begin until the start of the 16th day.) [ss. 79(2) and 122(2)]

In addition, a strike is not legal unless a strike vote is taken, and more than 50% of those voting vote in favour of a strike. If there is or has been a collective agreement in operation, the strike vote must take place no more than 30 days before the collective agreement expires, or any time after the agreement expires. If no agreement has been in effect, the strike vote has to occur on or after the day the conciliation officer was appointed. The strike vote must be conducted by secret ballot, all eligible voters must have ample opportunity to vote, and the time and place of the vote must be reasonably convenient. All employees in the bargaining unit, whether or not they are members of the union, are entitled to vote. [s. 79(3), (4), (7)-(9)]

The requirement for a strike vote does not apply in the construction industry or for a bargaining unit of maintenance employees where at least one employee was referred to their employment by a construction industry union. [s. 79(5)]

See page 62 for detailed information on unlawful strikes and lock-outs.

**Are strikers still employees?**
Yes. And it is illegal for them to be fired only because they are on strike. [s. 1(2)]

**When does a strike come to an end?**
In almost all cases a strike comes to an end when the employer and the union sign a collective agreement that is then ratified by the employees, and the striking employees return to work.

**Do all employees covered by the Labour Relations Act have the right to strike?**
No. Employees of hospitals and nursing homes do not have the right to strike. Instead, differences between the employer and the union are settled by binding arbitration under the Hospital Labour Disputes Arbitration Act.

In addition, the Crown Employees Collective Bargaining Act requires unions and the provincial government to negotiate an essential services agreement to guarantee the continued delivery of essential services during a strike. Crown employees whose positions are designated as essential are not permitted to strike.
The LRA also gives unions and employers the right to agree that the matters about which they are negotiating be referred to an arbitrator or board of arbitration, who will decide, after hearing arguments from both sides, what the terms of the collective agreement will be. When a union and an employer agree to submit to arbitration, strikes and lock-outs are forbidden both before and after the arbitration decision. Neither the union nor the employer is allowed to change its mind and decide to call a strike or engage in a lock-out. [s.40]

**Do employees have any right to get their jobs back after they have been on a lawful strike?**

Striking employees have a right to be reinstated to their former jobs, on terms agreed upon by the employer and employee, if the employee gives an unconditional written application to return to work within six months of the start of the strike. This requirement does not apply if the employer no longer has employees performing the kind of work performed by that employee, or if there has been a suspension or discontinuance for cause of all or part of the employer's operations. [s. 80]

Just because a striking employee had been replaced by another person during the six-month strike period does not alter the employer's obligation to reinstate the striking employee so long as she or he provides the unconditional application.

**Can employers hire replacement workers during a lawful strike?**

Yes. Employers are entitled to hire temporary replacement workers during a lawful strike (or lock-out). However, employers are prohibited from hiring professional strike breakers (people whose main goal is to interfere with someone else's LRA rights), or from engaging in strike-related misconduct (conduct that interferes with someone else's LRA rights).
4. FIRST CONTRACT ARBITRATION

What is first contract arbitration?
Negotiations for a first collective agreement are often very difficult because the parties are new to a collective bargaining relationship. As a result, the Labour Relations Act provides that if a union and an employer are unable to reach a first collective agreement, either party can apply to the Board for a direction that the agreement be settled by arbitration. The application can be made any time after the Minister of Labour has released the no-board report or the report of a conciliation board. [s. 43]

It is not necessary to establish that bad faith bargaining has occurred to obtain a direction to arbitration. The Board will make a direction where it appears that the process of collective bargaining has been unsuccessful because of:

- the refusal of the employer to recognize the bargaining authority of the union,
- the uncompromising nature of any bargaining position adopted by the responding party without reasonable justification,
- the failure of the responding party to make reasonable or expeditious efforts to conclude a collective agreement, or
- any other reason the Board considers relevant. [s.43(2)]

Once the direction is made, strikes and lock-outs are prohibited and any strike or lock-out in progress must be terminated. [s. 43(14)]

If a direction is made by the Board, a separate proceeding is held to settle the terms of the first collective agreement. The parties choose whether this proceeding will be before the Board or before a board of arbitration. [s.43(3)]

First contract arbitration is not available in construction industry negotiations where one party is either an employers' organization accredited under s.136 of the LRA or the agreement is a provincial agreement within the meaning of s.151 of the LRA. [s.43(21)]

Applications for a direction that a first collective agreement be settled by arbitration are:
- made on Form A-19
5. TERM OF THE COLLECTIVE AGREEMENT

How long does a collective agreement run?
The term is something that the union and the employer must agree upon when negotiating the agreement. The law only requires that a collective agreement have a minimum term of one year. [s. 58]

Can a collective agreement be changed or amended during its term?
The union and employer can agree to change any of the agreement's terms, but not its length of operation. [s. 58(5)]

What if the union and the employer want to terminate their agreement early so that they can enter into a new collective agreement?
They can jointly apply to the Board for permission to terminate the agreement early. The Board will generally grant the application if employees are told of the application and none object. The major concern of the Board in such applications is that an early termination will not affect the position of another union that might intend to apply for certification in the last two months of the existing agreement. [s. 58(3)]

Applications to terminate a collective agreement early are:
• made on Form A-50
• dealt with in Parts I & II of the Board's Rules of Procedure

What rights do employees have after a collective agreement has expired?
If notice to bargain has been given, the terms of the expired collective agreement, including any arbitration provisions, will continue to apply. But once the union is in a legal strike position, the employer is free to alter the conditions of employment. The union and the employer may agree, however, to continue the operation of the collective agreement while they are bargaining for its renewal. [ss. 58(2) and 86]
6. UNION SECURITY (DUES AND MEMBERSHIP)

Who is covered by a collective agreement?
All employees who are in the bargaining unit that is described in the collective agreement itself. This bargaining unit may, if both the union and the employer agree, be different from the bargaining unit the union was originally certified to represent. The bargaining unit may also, if the employer and union agree, change from one collective agreement to the next.

Can an employee who is covered by a collective agreement be forced to join the union or pay dues to the union?
The fact that a union becomes certified does not, by itself, mean that all employees in the bargaining unit must join the union. The employer and the union may agree, however, to include union membership requirements in a collective agreement as a condition of continued employment. This is generally known as a "union security clause". In addition, at the request of the union all bargaining unit employees, except in the construction industry, will be required through a provision of the collective agreement to pay union dues. [s.47]

What kinds of union security clauses are there?
Union security clauses take many forms. The most common ones are:

The Union Shop, the most common form of union security arrangement, requires all present and future employees to become and remain union members.

The Closed Shop, which is found most frequently in the construction industry, requires the employer to hire only union members.

The Agency Shop or Rand Formula does not require employees to join the union, but non-members must pay the union an amount equal to the dues paid by members. This is seen as a service charge for the benefits derived from having the union act as their bargaining agent. In return the union has a legal obligation to represent all employees in the bargaining unit, whether or not they are members. Except in the construction industry, this type of arrangement must be incorporated into the collective agreement at the union's request. [s.47]

Maintenance of Membership, which is not used very often, does not require employees to be members of the union but anyone who is already a member must maintain their membership.

In a Voluntary Checkoff arrangement, employees do not have to join the union, but the employer, at the written request of the employee, must deduct regular union dues from the employee's wages and remit them to the union.
A collective agreement can include a combination of two or more union security clauses. For example, the agreement could require new employees to join the union but waive that requirement for existing employees.

**What happens to employees who do not join the union if it is a condition of employment under the collective agreement?**
The union could ask the employer to discharge them. If the employer fails to do so the union could file a grievance.

Employees are protected, however, if they were denied membership or were expelled from the union only because they supported a rival union, engaged in reasonable dissent within the union, refused to pay unreasonable fees or assessments, or where the application of the union's membership rules is found to be discriminatory. [s. 51(2)]

**What if an employee objects to union membership for religious reasons?**
In some situations, the employee may be exempted from the collective agreement requirements to be a union member and/or to pay union dues.

Employees are only eligible for the exemption if:
- they were employed at the workplace before the union security provisions were negotiated (this means that a person cannot take a job at a company where union membership is a condition of employment, and then apply for the exemption), and
- the application is made during the term of the first collective agreement in which those provisions are included.

In order to grant an exemption, the Board must be satisfied that the employee's belief or conviction is a religious one, that it is sincerely held, and that it is the cause of the objection to belonging to a union and/or paying union dues.

Employees who are exempted from paying union dues must pay an equivalent amount to a charity mutually agreed upon by the employee and the union. If they cannot agree on a charity, the Board will designate one. [s. 52]

**Religious exemption applications are:**
- made on Form A-35
- dealt with in Parts I & II of the Board's Rules of Procedure
- described in detail in Information Bulletin Number 18
7. GRIEVANCE AND ARBITRATION

What if an employee or a trade union feels that the employer is not following the terms of the collective agreement, or if there is a disagreement about the meaning of part of the collective agreement?

The employee or the union can file a "grievance". The grievance procedure is set out in the collective agreement itself. It normally involves three or four steps, with more senior people from both the union and the employer trying to settle the grievance at each step.

The collective agreement will often state that a grievance must be filed within a certain number of days after the event giving rise to the grievance occurred. If the employee or union does not file the grievance within this period, it may be dismissed. Unless the collective agreement specifically says otherwise, an arbitrator has the power to extend the time limits, but will do so only if the other side will not be prejudiced. [s.48(16)]

Can the employer file a grievance if it believes that the union is not complying with the collective agreement?
Yes. Such grievances are processed in the same general way as union or employee grievances.

What if the union and the employer cannot settle the grievance?
The grievance may then be referred to a sole arbitrator or a three-person board of arbitration. The collective agreement usually sets out the method for doing this. If a three-person board of arbitration is used, the union and the employer each select a member, and those two members then agree on a chair. An arbitrator/arbitration board is similar to a judge in that it makes a binding decision resolving the matters in dispute between the parties.

What if the union or the employer refuses to appoint a representative to an arbitration board, or if there is no agreement on the selection of a chair?
If the collective agreement itself does not provide for such a situation, then the Minister of Labour can be asked to make whatever appointments are necessary. If the right of the Minister to make such an appointment is challenged, the Minister may refer the issue to the Board. [ss. 48(4), 115(1)]

What happens if a collective agreement doesn't provide for a grievance procedure or the procedure is inadequate?
Every collective agreement is deemed to contain an arbitration provision. If, in the opinion of the Board, any part of an arbitration provision is inadequate or unsuitable, the Board may modify it. [s. 45(2), (3)]
Is the decision of an arbitrator or arbitration board final and binding?
Yes. If the decision is not obeyed, it can be filed with the Superior Court of Justice and enforced as a decision of that court. Failure to abide by an arbitration decision can result in a contempt of court charge. [s. 48(18), (19)]

Does the Ontario Labour Relations Board ever do arbitrations?
Only in the construction industry. See page 69 for more information on this topic.

What can an employee do if she or he feels the union did not handle the grievance properly?
As the exclusive bargaining agent of the employees, the union has the right to settle any grievance, to decide whether a grievance should go to arbitration, and to decide how a grievance should be presented at arbitration. The union does not have to take every grievance through to arbitration simply because an employee asks that this be done, but the union must honestly consider the matter and not act in a manner that is arbitrary, discriminatory, or in bad faith.

If an employee is unhappy with the way the union has handled the grievance, she or he might be able to appeal the union decision internally if the union's rules or constitution allow such an appeal. Some union constitutions state that if the union decides not to take an employee's grievance to arbitration, the employee can appeal to the membership of the union local. A vote of the membership then determines whether or not the grievance should go to arbitration. Apart from any such internal union appeal, an employee has no general right to appeal a union's decision. The Ontario Labour Relations Board will not generally deal with an employee's complaint about the manner in which the union handled a grievance, except when the union's conduct amounts to a breach of the duty of fair representation. See "Union's Duty of Fair Representation" on page 39 for more information on this topic. [s. 74]

Can employees try to force an employer to live up to the terms of a collective agreement by going on strike?
No. It is illegal to strike, or threaten to strike, during the term of a collective agreement. Such a strike would mean that the employees themselves are not living up to the terms of the agreement, since all agreements are deemed to contain a no-strike clause. Instead, employees should make use of the grievance and arbitration procedure contained in the agreement. Illegal strike activity during the term of a collective agreement includes where employees agree to book off sick, slow down, or conduct a study session with the aim of restricting or limiting output. This is so even if it is done without the support or against the advice of the union. In addition, picketing (except where it is in connection with a lawful strike or lock-out) that causes others to engage in an unlawful strike by refusing to cross the picket line is contrary to the LRA. [ss. 46, 81, 83]

What if the employer and the union disagree about something that is not covered by their collective agreement?
The Minister can appoint a special officer to meet with the union and employer and try to help them resolve the problem. [s. 38]

**Can the arbitration process be expedited?**
Yes. A party can request, in writing, that the grievance be referred to a sole arbitrator appointed by the Minister. Such a request can be made only after the grievance procedure under the collective agreement has been exhausted, or 30 days (14 days if the grievance relates to a discharge) have elapsed since the grievance was first brought to the attention of the other party, whichever comes first. A request can be made even if there is an arbitration clause in the collective agreement, although any time period for referring grievances to arbitration contained in the collective agreement must be complied with.

Any arbitrator that is appointed is required to begin hearing the matter within 21 days after the Minister received the request. The parties share equally the arbitrator's fees and expenses. [s. 49]

More information about the expedited arbitration process, and the application forms, can be obtained from the Ministry of Labour, Office of Arbitration, 400 University Ave., 9th floor, Toronto, Ontario, M7A 1T7, (416) 326-1300.

**What if the union or the employer want to try mediation before going to arbitration?**
A request can be made to the Minister to appoint a settlement officer who will try to help the parties settle the grievance before going to arbitration. [ss. 48(5), 49(6)]

Parties can also, at any time, agree to refer a grievance to a mediator-arbitrator instead of to an arbitrator. If the parties cannot agree on a mediator-arbitrator, they can ask the Minister to make the appointment. The mediator-arbitrator will try to help the parties settle the grievance and, if unsuccessful, will determine the grievance by arbitration. [s.50]
8. INTERFERENCE WITH RIGHTS CONFERRED BY THE ACT

What prevents an employer from interfering with its employees' right to join a union?
The Labour Relations Act protects the right of employees to join a union and to attempt to have that union become their bargaining agent. The LRA states that no employer can interfere with the formation or selection of a union. Among other things, this means that an employer cannot try to unduly influence its employees.

At least two types of employer activity are regarded as undue influence. One is the promise of benefits to employees if they do not join a union. An employer can point to its past and present policies, but it cannot make promises about the future. The second prohibited activity is the issuing of threats against employees. This includes threats of closing down, of moving the firm's facilities elsewhere, and of ending certain employee benefits. [ss. 70, 72, 76]

Similarly, a trade union cannot resort to intimidation to compel anyone to join the union or refrain from joining another union. [s. 76]

Does this mean that an employer cannot make its feelings about unionization known to its employees?
No. The employer has the freedom to express its views as long as it does not use coercion, intimidation, threats, promises, or undue influence.

An employer that wants to make its feelings known must use extreme caution. It must watch not only the content of what is said but also the way in which it is said. For example, in some situations a letter to employees posted on a bulletin board may not be as coercive as calling employees together in a "captive audience" situation. [s. 70]

What can the union do if an employer does use undue influence to try to persuade employees away from the union?
Employees are supposed to be able to express their feelings about the union through a secret ballot vote. If the Board is satisfied that the vote results likely did not reflect the employees' true wishes because of the employer's unlawful actions, the Board can order that another vote be held. The Board has the power to do anything to ensure that the new vote reflects the true wishes of the employees. [s. 11]

What if the employer tries to gain control of the union rather than oppose it?
An employer is forbidden from supporting a union in any way. If a union has had employer support it will not be certified. [ss. 15, 70]
What can be done if an employer fires or in some other way penalizes an employee because the employee is a union supporter?

It is illegal for an employee to be fired or penalized for this reason. If this happens, the employee or the union can file an unfair labour practice application with the Board. [ss. 96 and 70, 72, 76]

What happens when an unfair labour practice application is made?

Normally, the Board will send out one of its Labour Relations Officers to see if a settlement can be worked out. If a settlement cannot be reached, the Board will either hold a hearing or dismiss the application without a hearing if it is clear that it is without legal foundation. [Rule 46] At the hearing the employer will have the onus to prove that the discharge or other penalty was proper and that the person was fired or penalized for some reason other than union activity. Any doubt as to the employer's motive will be resolved in favour of the employee. [s. 96(5)]

The key issue is whether the employee was fired for exercising rights under the Labour Relations Act. The Board does not rule on the "fairness" of the firing. The grounds for firing an employee might exist, but the actual firing can be unlawful if these grounds were the excuse for the firing and not the reason. On the other hand, a petty or unfair reason for discharging an employee will not be a violation of the LRA, if that, rather than the employee's union activity, was the real reason for the firing. If, however, any part of the motive for firing or disciplining an employee was because she or he was exercising rights under the LRA, the employer will have violated the Act.

What happens to an employee if the Board decides that she or he was fired for union activity?

The Board can order the employee's reinstatement with back pay and interest. The amount of this back pay will be decreased by any amount the employee earned at another job between the time of the discharge and the reinstatement. If the employee did not look for other employment, the amount of back pay may be decreased by the amount that could have been earned if the employee had looked for a job.

If an employee does not want to go back to work for her or his former employer, the Board will not order reinstatement, but may order that the employee be reimbursed for lost wages until another job is found.

The Board can also require the employer to sign and post notices stating that it was found in violation of the LRA and that it undertakes to comply with the LRA in the future. The Board can also order the employer to allow the union access to employees at work and on company time, and access to employee bulletin boards. [s. 96(4)]

Is an employee protected if she or he is fired for taking an active role in the union at times other than during an organizing campaign?

Yes. Any actions that are taken against an employee because of their union activity are illegal. If an employee has a remedy under a collective agreement, however, the Board
will normally refuse to consider such an application. Instead, the employee should file a grievance.

Do employees have the right to join a trade union during working hours?
Generally speaking, no. This should be done outside working hours. An employee is not prohibited from getting other employees to sign union cards before work or during a break. While an employer cannot punish or dismiss employees merely because they have signed union cards during working hours, it can take appropriate disciplinary action if the employees' union activities begin to disrupt its business operations. [s. 77]

Union organizers who do not work for a particular employer do not have the right to go onto that employer's property to try to get employees to join their union. The only exception to this is if the union gets a Board order permitting its organizers to have access to the property. This could happen where the employees live on property either owned or controlled by the employer, such as in remote logging or mining camps. [s. 13]

Applications for right of access are:
- made on Form A-17
- dealt with in Parts I & II of the Board's Rules of Procedure

What other acts by an employer are unfair labour practices?
Other offences include:

- changing the terms and conditions of employment without the union's approval after the union has applied for certification and before:
  - the application has been dismissed,
  - a collective agreement has been signed, or
  - the union is in a legal strike position. [s. 86(2)]

- changing the terms and conditions of employment without the union's approval when the union and the employer are bargaining for a new agreement following the expiry of the old one, but before the union is in a legal strike position. [s. 86(1)]

- trying to make it a condition of employment that a person not join a trade union. [s. 72(b)]

- bargaining with one union when another union holds the bargaining rights. [s.73]

- using intimidation or coercion to compel an employee to stop exercising any rights under the LRA. [s. 76]

- penalizing or threatening employees who file complaints under the LRA or witnesses who may testify in a complaint under the LRA. [s.87]
This is not a complete list. There may be other conduct that violates the LRA.

**What can the union do if the employer commits any of these offences?**
The union, and in some cases the individual, can file an unfair labour practice application and ask the Board for an order forbidding the employer to continue the unfair practice or to compensate the union or employee for any damage done by the unfair practice. [s. 96]

Unfair labour practice applications are:
- made on Form A-33
- dealt with in Parts I & II of the Board's Rules of Procedure

**Can somebody be prosecuted for contravening the LRA**
Yes, but the applicant has to first ask the Board for permission to start the quasi-criminal proceedings in court. When deciding whether to grant its consent, the Board does not require the applicant to actually prove its case. The Board does, however, require the applicant to provide enough evidence to allow a judge to find that a violation of the LRA has occurred. Even if an applicant meets this test the Board may refuse to grant its consent to prosecute if a prosecution would serve no useful labour relations purpose. [ss. 104-107, 109]

Applications for consent to institute prosecution are:
- made on Form A-27
- dealt with in Parts I & II of the Board's *Rules of Procedure*
9. UNION'S DUTY OF FAIR REPRESENTATION

See Information Bulletins #11 and #12 for a detailed description of the steps in a duty of fair representation application, including the filing and delivery obligations of each of the parties and how the Board processes applications. These Information Bulletins also provide more answers to questions frequently raised by employees who wish to complain that they have not been properly represented by their union.

What kind of duty does the union have?
The *Labour Relations Act* imposes a duty on a trade union to fairly represent all of the employees in any bargaining unit for which it has bargaining rights, whether or not the employees are union members. It is a violation of the LRA for a union to represent employees in a manner that is arbitrary, discriminatory, or in bad faith. [s.74]

This duty applies only to a union's representation of an employee in connection with his or her employer. This includes the union's decisions in processing grievances, including those involving *Employment Standards Act* entitlements, and in conducting negotiations. The duty of fair representation does not apply to areas beyond the representation of employees in relation to the employer. For example, while some unions help employees with their claims at the Workplace Safety and Insurance Board, the LRA does not require them to do so and the duty of fair representation generally does not govern them when they do.

Will any mishandling of a grievance amount to a violation of the duty?
No. A union does not violate its duty simply because they could have, or even should have, treated the grievance differently. Union officials can make honest mistakes or exercise poor judgment without necessarily violating the LRA. It is not whether the union was right or wrong that is the concern of the Board, but whether the union's actions were motivated by bad faith, whether it was discriminating against the employee, or whether it acted in an arbitrary manner.

What does "arbitrary", "discriminatory" and "bad faith" mean?
*Arbitrary* means when a union handles a grievance in a superficial, capricious, or indifferent manner, or in reckless disregard of an employee's interests. For example, a union acts arbitrarily when it completely ignores a grievance. A union may also be found to have acted arbitrarily if it drops a grievance because of what the employer told it, without giving the grievor an opportunity to respond to what the employer said.

*Discriminatory* means when a union distinguishes among employees in a bargaining unit without a good reason. For example, factors such as race, religion, sex, sexual orientation, age or physical or mental disability should not influence the way a union handles an application or grievance.
Bad faith means when a union makes decisions that are motivated by ill-will, personal hostility, revenge, or dishonesty.

**Can a union refuse to process a grievance or to refer it to arbitration?**
Yes, so long as it is not acting on improper motives, and honestly considers the matter.

The union is expected to discuss the merits of the grievance with the employee to ensure that it takes into account the relevant considerations. However, the final decision on how far a grievance should be processed and whether or not it should go to arbitration is made by the union, not a grievor. The duty of fair representation does not require a union to carry a grievance to arbitration simply because an employee wishes that this be done, thinks they have a good case, or wants their day in court.

**What factors can the union consider when handling a grievance?**
A union can consider any legitimate factor. For example, one factor can be the union's promise to the employer that it would not advance a particular interpretation of the collective agreement. Another factor could be the possibility of a negative impact of a victory on the other employees in the bargaining unit. Or the issue may not be significant enough to warrant the time and money necessary to get the resolution the grievor seeks. The union must weigh these factors fairly against the wishes of the grievor.

Sometimes there is a conflict between the interests of the grievor and the bargaining unit as a whole after the union has decided that a grievance has merit. This often occurs during negotiations for a new collective agreement. The union and employer may wish to settle grievances in exchange for concessions in the agreement. The union is not prohibited from entering into such arrangements.

**What can be done if an employee feels the union has acted contrary to its duty?**
An employee can file a duty of fair representation application with the Board.

The application is made on a form supplied by the Board, Form A-29. Before the application can be filed with the Board, a copy of it, a blank response form (Form A-30), and a Notice of Application (Form C-14) must first be delivered to the employer and to the senior union official responsible for the employee's bargaining unit. This person may be a paid staff representative of the union, a senior elected member of the bargaining unit, or some other individual exercising official responsibility for the bargaining unit on behalf of the union. The deliveries can be made by hand, courier, facsimile transmission, or regular mail. [Rules 20, 24-26, 89, 90]
After the deliveries have been made, the employee files three copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries to the union and employer. If the application is not filed in this time, it will not be processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

**What kind of information goes into the application?**
All of the facts that the employee is relying on to support her or his allegation that the union acted in a manner that was arbitrary, discriminatory or in bad faith must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Employees who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the consultation. [Rule 42]

**Is there a time limit for filing an application?**
While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

**What happens after an application is filed?**
The application is first reviewed by the Board to see if it complies with the Board's Rules of Procedure and if it makes out an arguable case. If it doesn't, the application may be dismissed without being processed. If this happens, a Decision setting out why it was dismissed will be sent to the employee. If the application is processed, a Labour Relations Officer will normally be assigned to meet with the employee and union (and possibly the employer) to try to reach an agreement that will settle the application. The Officer may meet with the union, employee and employer separately, or at the same time.

**What does the Labour Relations Officer do?**
Labour Relations Officers do not decide the case. The role of the Officer is to help the parties reach a settlement of the application. In order to encourage frank and open discussion between the parties and the Officer and increase the likelihood of settlement, Officers do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair or panel who will be hearing and deciding the case. All communication between the Officer and the parties remains confidential. This includes documents that are given to an Officer. If a party wants a document to be considered by the panel that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.
During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

**What happens if the case doesn’t settle?**
If no settlement is reached, a consultation with a Vice-Chair or panel of the Board is held. At the consultation, the employee must establish that the union violated the LRA by showing the Board that the union acted in a manner that was arbitrary, discriminatory or in bad faith.

**What happens at a consultation?**
A consultation is different than a hearing. The goal of a consultation is to allow the Vice-Chair or panel to expeditiously focus in on the issues in dispute and determine whether the duty of fair representation has been violated. A consultation is meant to be more informal and less costly to the parties than a hearing, and the Vice-Chair or panel plays a much more active role in a consultation than in a hearing.

While the precise format of a consultation varies depending on the nature of the case and the approach of the individual adjudicators, there are some universal features. To draw out the relevant facts and arguments, the Vice-Chair or panel may:
- question the parties and their representatives,
- express views,
- define or re-define the issues, and
- make determinations as to what matters are agreed to or are in dispute.

The giving of evidence under oath and the cross-examination of witnesses are normally not part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board.

**What happens at the end of the consultation?**
A consultation normally lasts no longer than one day, and a decision containing brief reasons is made at the consultation or is issued afterwards. The decision will have one of four results. The Board may:
- exercise its discretion not to inquire further into the application,
- dismiss the application on its merits
- grant the application, or,
- in limited circumstances, schedule the application for a full hearing before the Board.

**Do you need a lawyer at a consultation?**
A lawyer is not required. However, since a consultation is a legal proceeding that affects your legal rights, it may be a good idea to discuss the matter with a lawyer. People who hire lawyers are responsible for their own legal costs. If you do not have a lawyer, you may wish to contact one through the Law Society's Lawyer Referral Service (416-947-3330 or 1-800-268-8326). This service will refer you to a lawyer
who has agreed to conduct a one-half hour consultation with prospective clients for free. You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. As well, Community Legal Clinics are located throughout the province. Consult your local telephone directory for the location of the clinic closest to you.

In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the *Labour Relations Act*.

**Are there any other costs associated with filing an application or attending a consultation?**
The Board does not charge any application filing fees or service fees for a mediation or consultation in duty of fair representation applications. However, other costs associated with the case (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

**What happens if the Board rules that the union has violated its duty of fair representation?**
The Board may order the union to take the grievance to arbitration, or it may issue another appropriate remedy, such as a cease and desist order, an award of damages and interest, and/or a requirement that the union sign and distribute notices stating that it was found in violation of the LRA and undertaking to comply with the LRA in the future.

The Board will not investigate the actual grievance that gave rise to the application, however. The purpose of the duty of fair representation section of the LRA is to determine if the union acted in a manner that was arbitrary, discriminatory or in bad faith in representing you. The Board will not rule on the merits of your grievance.

**Can the Board's decision be appealed?**
The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier. See pages 101 and 99 for more information on judicial reviews and the reconsideration power.

**Duty of fair representation applications are:**
- made on Form A-29
- dealt with by Part I & II and Rules 76-77 and 89-91 of the Board's *Rules of Procedure*
- described in detail in Information Bulletins #11 and #12
10. UNION'S DUTY OF FAIR REFERRAL

See Information Bulletin #13 for a detailed description of the steps in a duty of fair representation application, including the filing and delivery obligations of each of the parties.

What kind of duty does the union have?
The Labour Relations Act prohibits a trade union from acting in bad faith or in a way that is discriminatory or arbitrary in the selection, referral, assignment, designation or scheduling of people to employment pursuant to a collective agreement. [s. 75] This section applies primarily in the construction industry, where many unions operating hiring halls and refer employees to employers.

Will the exercise of discretion in making referrals and the making of honest mistakes in doing so amount to a violation of the duty?
No. A union does not violate its duty simply because it exercised its discretion (in fact, the exercise of discretion is inevitable in a hiring hall), nor because it could have, or even should have, acted differently. Union officials can make honest mistakes or exercise poor judgment without necessarily violating the LRA. It is not whether the union was right or wrong that is the concern of the Board, but whether the union's actions were motivated by bad faith, whether it was discriminating against the employee, or whether it acted in an arbitrary manner.

What does "arbitrary", "discriminatory" and "bad faith" mean?
Arbitrary means when a union operates the hiring hall in a reckless, cursory or non-caring manner, or is influenced by totally extraneous and irrelevant considerations.

Discriminatory means when a union distinguishes among employees without a good reason.

Bad faith means when a union makes decisions that are motivated by ill-will, personal hostility, revenge, dishonesty, or nepotism.

What kinds of behaviour can amount to a violation of the union's duty?
The union's refusal to provide information regarding the referrals it has made may amount to a violation if the refusal is arbitrary, discriminatory or made in bad faith. Accepting without questioning an employer's evaluation of a probationary employee and then refusing to refer the employee for future employment has been held to be arbitrary. And a union's decision to not extend an employee's leave of absence and to then post his job for bidding without telling him or taking into account the reason for his failure to return on time has also been held to be arbitrary.
What can be done if an employee feels the union has acted contrary to its duty?
An employee can file a duty of fair referral application with the Board.

The application is made on a form supplied by the Board, Form A-31. Before the application can be filed with the Board, a copy of it, a blank response form (Form A-32), and a Notice of Application (Form C-15) must first be delivered to the employer and to the senior union official at the hiring hall. The deliveries can be made by hand, courier, facsimile transmission, or regular mail. [Rules 20, 24-26, 89, 90]

After the deliveries have been made, the employee files three copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries to the union and employer. If the application is not filed in this time, it will not be processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

What kind of information goes into the application?
All of the facts that the employee is relying on to support her or his allegation that the union acted in a manner that was arbitrary, discriminatory or in bad faith in the referral to employment must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Employees who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the consultation. [Rule 42]

Is there a time limit for filing an application?
While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

What happens after an application is filed?
The application is first reviewed by the Board to see if it complies with the Board's Rules of Procedure and if it makes out an arguable case. If it doesn't, the application may be dismissed without being processed. If this happens, a Decision setting out why it was dismissed will be sent to the employee. If the application is processed, a Labour Relations Officer will normally be assigned to meet with the employee and union to try to reach an agreement that will settle the application. The Officer may meet with the union and employee separately, or at the same time.
What does the Labour Relations Officer do?
Labour Relations Officers do not decide the case. The role of the Officer is to help the parties reach a settlement of the application. In order to encourage frank and open discussion between the parties and the Officer and increase the likelihood of settlement, Officers do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair or panel who will be hearing and deciding the case. All communication between the Officer and the parties remains confidential. This includes documents that are given to an Officer. If a party wants a document to be considered by the panel that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.

During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

What happens if the case doesn’t settle?
If no settlement is reached, a consultation with a Vice-Chair or panel of the Board is held. At the consultation, the employee must establish that the union violated the LRA by showing the Board that the union acted in a manner that was arbitrary, discriminatory or in bad faith in the way it referred employees to employment.

What happens at a consultation?
The goal of a consultation is to allow the Vice-Chair or panel to expeditiously focus in on the issues in dispute and determine whether an employee's statutory rights have been violated. A consultation is meant to be more informal and less costly to the parties than a hearing, and the Vice-Chair or panel plays a much more active role in a consultation than in a hearing.

While the precise format of a consultation varies depending on the nature of the case and the approach of the individual adjudicators, there are some universal features. To draw out the facts and arguments necessary to decide whether the duty of fair referral has been violated, the Vice-Chair or panel may:
• question the parties and their representatives,
• express views,
• define or re-define the issues, and
• make determinations as to what matters are agreed to or are in dispute.

The giving of evidence under oath and the cross-examination of witnesses are normally not part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board.
What happens at the end of the consultation?
A consultation normally lasts no longer than one day, and a decision containing brief reasons is made at the consultation or is issued afterwards. The decision will have one of four results. The Board may:
- exercise its discretion not to inquire further into the application,
- dismiss the application on its merits
- grant the application, or,
- in limited circumstances, schedule the application for a full hearing before the Board.

Do you need a lawyer at a consultation?
A lawyer is not required. However, since a consultation is a legal proceeding that affects your legal rights, it may be a good idea to discuss the matter with a lawyer. People who hire lawyers are responsible for their own legal costs. If you do not have a lawyer, you may wish to contact one through the Law Society's Lawyer Referral Service (416-947-3330 or 1-800-268-8326). This service will refer you to a lawyer who has agreed to conduct a one-half hour consultation with prospective clients for free. You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. As well, Community Legal Clinics are located throughout the province. Consult your local telephone directory for the location of the clinic closest to you.

In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the Labour Relations Act.

Are there any other costs associated with filing an application or attending a consultation?
The Board does not charge any application filing fees or service fees for a mediation or consultation in duty of fair referral applications. However, other costs associated with the case (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

What happens if the Board rules that the union has violated its duty of fair referral?
The Board has broad discretion to fashion an appropriate remedy. This can include awarding financial compensation, rescinding fines that were imposed against the employee, ordering the union to restore the applicant's status as a union member with all the accompanying rights and privileges, or ordering the union to assign the member to employment. Where widespread abuse of the hiring hall system is found, the Board can make orders that will ensure the hiring hall rules will be transparent and equitable in the future.
Can the Board's decision be appealed?
The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier. See pages 101 and 98 for more information on judicial reviews and the reconsideration power.

Duty of fair referral applications are:
• made on Form A-31
• dealt with by Part I & II and Rules 76-77 and 89-91 of the Board's Rules of Procedure
• described in detail in Information Bulletin #13
11. TERMINATION OF BARGAINING RIGHTS

Once a union has been certified, can the employees later change unions?
Yes. The second union can apply to the Board to be certified. Once it is certified, the first union automatically loses its bargaining rights. [s. 62] See "Certification of Trade Unions" on page 12 for a description of that process.

Can employees apply to terminate a union's bargaining rights without seeking the certification of a new union?
Yes. Employees can bring an application to terminate the union's bargaining rights.

Applications for termination of bargaining rights can be brought under six different provisions of the LRA. The forms, Rules, and criteria for granting the application are different for each type of application. The six types are:

- under section 63 of the LRA
- under section 64 of the LRA (where certificate obtained by fraud)
- under section 65 of the LRA (for failure to bargain)
- under section 66 of the LRA (after voluntary recognition)
- under section 63 or 132 of the LRA (in the construction industry)
- under section 127.2 of the LRA (non-construction employer in the construction industry)

Each of these will be dealt with separately below:

A) Applications For Termination Of Bargaining Rights Brought Under Section 63 Of The LRA

See Information Bulletins #2 and #3 for a detailed description of the steps in a termination application made under s.63 of the LRA, including the filing and delivery obligations of each of the parties, the Board's role, and how the vote is arranged and conducted.

When can this kind of termination application be made?
The Board will not consider an application for termination unless it is "timely". To be timely, applications must be made during one of the open periods provided for in the LRA. Generally, these open periods are:

- If there is a collective agreement in place with a term of three years or less → an application can be made in the last two months of the agreement. [s. 63(2)(a)]

- If there is a collective agreement in place with a term of more than three years → an application can be made in the last two months of the third year of operation, or in the last two months of each subsequent year, or after the commencement of the last two months of the agreement. [s. 63(2)(b)]
• If there is a collective agreement in place that states that it will continue to operate for a further term or terms if neither the union or employer gives notice to bargain for modifications ➔ an application can be made during the last two months of the agreement's stated date of operation, and during the last two months of each year that it continues to operate. [s. 63(2)(c)]

• If bargaining for a new collective agreement is going on and the Minister has appointed a conciliation officer or mediator, an application cannot be made until ➔
  ➢ 30 days after the conciliator's or mediator's report is released, or
  ➢ 30 days after the notice that no conciliation board will be appointed, or
  ➢ 12 months after the date of the appointment of the conciliator or mediator, whichever is later. [s. 67(2)]

• If the union has been certified (as opposed to being voluntarily recognized) but there is no collective agreement yet in place ➔ the application can be made one year after the date of certification. But if the Minister of Labour has appointed a conciliation officer or mediator the application cannot be made until:
  ➢ 30 days have elapsed since the mediator or conciliation officer's report was released to the parties, or
  ➢ 30 days have elapsed since the Minister issued a notice refusing to appoint a conciliation board, or
  ➢ six months have elapsed since the release of a report of the conciliation officer stating that the differences between the parties were settled, whichever situation applies. [s. 67(1)(a) - (c)]

• If there is a legal strike or lock-out ➔ an application can be made:
  ➢ six months after the strike or lock-out commenced, or
  ➢ seven months after the Minister released the report of the conciliation board or mediator or gave notice declining to appoint a conciliation board, whichever occurs first. [s. 67(3)]

How do employees apply to terminate a union's bargaining rights?
The applicant employee or group of employees must first demonstrate to the Board that at least 40% of the employees in the bargaining unit appear to have expressed a wish not to be represented by the union. This is done by filing with the Application a petition or other written statement from employees stating that they do not wish to be represented by the union. This evidence must be in writing, and signed and dated by each employee. Special care is taken to keep this information secret. The Board can consider any evidence it considers appropriate in determining the number of employees in the bargaining unit. However, it can refer only to the information provided by the applicant when determining the number of employees who appear to have expressed a wish not to be represented by the union. [s. 63(4), (5), (6), (7) and Rules 70, 71]
If the 40% threshold is met, the Board will conduct a secret ballot vote, usually five to eight days after the application for termination of bargaining rights is filed with the Board (although it may be delayed if there are disagreements about the number of employees in the bargaining unit, if allegations of employer misconduct are made, or if there is an issue about the timeliness of the application). If a vote is held, the Board will grant a declaration terminating the union's bargaining rights if more than 50% of the ballots cast are opposed to the union. [s. 63(5), (14)]

There are very specific filing and delivery requirements for parties involved in an application for termination of bargaining rights. These obligations are described in detail in Information Bulletin #2 and in the Board's Rules of Procedure.

What if the employer, or someone acting on behalf of the employer, initiated the application or misconducts itself in connection with the application?
If the Board is satisfied that the application was initiated by or on behalf of the employer, or that the employer or someone acting on its behalf engaged in threats, coercion or intimidation in connection with the application, the Board can dismiss the application. This is so even if the 40% threshold is met and/or even if more than 50% of the voters opposed the union. [s. 63(16)]

Who is eligible to vote?
All employees in the bargaining unit who had an employment relationship with the employer on the application date are eligible to vote.

How is the vote conducted?
A Returning Officer is sent out by the Board to conduct the vote. Each party (including the employer, if it is participating in the application) is given an opportunity to select one scrutineer for each polling place. The scrutineers make sure that everyone who votes is entitled to do so. Individuals whose eligibility to vote is challenged are allowed to vote but their ballots are segregated until their eligibility is resolved.

Usually, the ballots are counted by the Returning Officer, in the presence of the scrutineers, immediately after the voting is completed. The ballot box may, in some circumstances, be sealed and the ballots not counted until certain issues are resolved. This can happen, for example, if there are material disputes as to some workers' status or eligibility to vote. [s. 63(11)]

What choices are employees given on the ballot?
Generic ballots that do not identify the union or employer by name are used. The names of the union and employer are set out instead in a Notice in every voting booth.
What happens to spoiled ballots?
Spoiled ballots are not counted. A ballot is only spoiled if it does not clearly indicate the choice of the voter, or if the person voting has put his or her name or some other identifying mark on the ballot.

What if someone believes the vote was not conducted properly?
After the vote, the Returning Officer issues a report to the parties. Copies are also posted at the workplace for employees to read. The report states how objections can be made to the Board about the vote.

Are the affected employees notified of an application for termination of bargaining rights?
Yes. The employer is required to post copies of Form C-5 - "Notice to Employees of Application for Termination of Bargaining Rights" and copies of the application in conspicuous places in the workplace. This ensures that employees are fully informed about the details of the application, notifies them that a secret ballot vote will likely be held five to eight days after the application was filed with the Board, advises them of their rights, and alerts them to look for future postings that will inform them of voter eligibility, the date, time and location of the vote, and the date and location of Board meetings and hearings.

Who can attend a termination hearing?
All hearings of the Board are open to the public and anyone can attend as an observer. Only certain people may take an active part in them, however. Those people are: representatives of the applicant employee or group of employees, representatives of the union, representatives of the employer, any intervenor that has an interest in the application, and any employee (or representative) who has filed a timely request to participate.

It is not always necessary to hold a hearing in an application to terminate bargaining rights.

Applications for termination of bargaining rights under section 63 of the Act are:
• made on Form A-6
• dealt with by Parts I & II and Rules 70-75 of the Board's Rules of Procedure
• described in detail in Information Bulletins #2, #3, and #5
B) Applications For Termination Of Bargaining Rights Brought Under Section 64 Of The LRA - Where Certificate Obtained By Fraud

What kind of application can be made under section 64?
An application is made under section 64 when there is an allegation that the union was originally certified as a result of fraud.

Are there any restrictions on when an application can be made?
No. An application under s.64 can be made at any time.

Who can make an application under section 64?
The employer or any employee in the bargaining unit can file a section 64 application.

What kind of union misconduct constitutes "fraud"?
The fraud must have been upon the Board, and the Board must have relied on it when granting the union a certificate. Fraud does not include behaviour that can be complained about under other sections of the LRA, such as allegations of union intimidation.

What happens if the Board rules that a fraud was committed?
The Board has the discretion whether or not to terminate the union's bargaining rights. However, once a finding of fraud has been made, it is incumbent on the union to show why its bargaining rights should not be terminated. If the Board terminates the union's bargaining rights, any collective agreement the union may have entered into after being certified is nullified.

Applications for termination of bargaining rights under section 64 of the Act (where certificate obtained by fraud) are:
• made on Form A-11
• dealt with by Parts I & II of the Board's Rules of Procedure

C) Applications For Termination Of Bargaining Rights Brought Under Section 65 Of The LRA - For Failure To Bargain

When can an application under section 65 be made?
An application can be made if:
• the union has failed to give the employer notice to bargain under s.16 within 60 days after it was certified. [s.65(1)]
• the collective agreement does not renew automatically and the union failed to give notice to bargain a renewal collective agreement under s.59 and the employer has not given notice. [s.65(1)]
• the union gave notice to bargain under s.16 or s.59 (or received notice under s.59) but failed to commence bargaining within 60 days of the notice being given [s.65(2)]
• the union commenced bargaining but, before the Minister has appointed a conciliation officer or mediator, allowed 60 days to elapse during which it did not seek to bargain. Even if 60 days did elapse, the application will be dismissed if the union seeks to bargain prior to an application being filed. [s.65(2)]

Who can file an application under section 65?
The employer or any employee in the bargaining unit.

What happens if it is proven that the union has failed to bargain?
The Board has the discretion to terminate the union's bargaining rights, with or without first holding a representation vote. If the union has a reasonable explanation for the delay in bargaining, the Board will dismiss the application. The Board is very reluctant to terminate a union's bargaining rights under s.65, and will not do so except in cases where it is clear the union is "sleeping" on its representation rights. Even then, the Board may hold a vote among the employees to learn of their feelings about the matter.

Applications for termination of bargaining rights under section 65 of the Act (for failure to bargain) are:
• made on Form A-11
• dealt with by Parts I & II of the Board's Rules of Procedure

D) Applications For Termination Of Bargaining Rights Brought Under Section 66 Of The LRA - After Voluntary Recognition

In what circumstances is a section 66 application made?
Section 66 protects against "sweetheart" deals between an employer and a voluntarily recognized union. It provides for the termination of a voluntarily recognized union's bargaining rights if the union was not entitled to represent the employees at the time of recognition. Forming a trade union is supposed to be a matter for the employees. An employer cannot impose a particular union upon its employees by voluntarily recognizing the union that it prefers to deal with.

When can an application under section 66 be made?
If a union became the bargaining agent through a voluntary recognition agreement with the employer, an application can be made:
• during the first year of the first collective agreement or,
• if there is no collective agreement, within one year from the signing of the voluntary recognition agreement. [s. 66(1)]
Who can file a section 66 application?
Any employee in the bargaining unit or any union that represents any employee in
the bargaining unit.

What happens after an application is filed?
The union must show that it is a trade union within the meaning of the LRA, that it
did not receive any assistance from a member of management, and that it was
entitled to represent the employees in the bargaining unit at the time it was
voluntarily recognized. [s. 66(2), (3)]

What happens if the Board declares that the union did not have the support of
a majority of the employees at the time it was voluntarily recognized?
The union's bargaining rights will be terminated and any collective agreement
ceases to operate. [s. 66(4)]

Applications for termination of bargaining rights under section 66 of the Act
(after voluntary recognition) are:
• made on Form A-11
• dealt with by Parts I & II of the Board's Rules of Procedure

E) Applications For Termination Of Bargaining Rights Brought Under
Section 63 Or 132 Of The LRA - Construction Industry

See Information Bulletins #7 and #8 for a detailed description of the steps in a
termination application made under s.63 or s. 132 of the LRA, including the filing and
delivery obligations of each of the parties, the Board's role, and how the vote is
arranged and conducted.

When can this kind of termination application be made?
The Board will not consider an application for termination unless it is "timely". To
be timely, applications must be made during one of the open periods provided for in
the LRA. Generally, these open periods are:

• If there is a collective agreement in place with a term of three years or less → an
  application can be made in the last two months of the agreement. [s. 63(2)(a)]

• If there is a collective agreement in place with a term of more than three years → an
  application can be made in the last two months of the third year of operation, or
  in the last two months of each subsequent year, or after the commencement of the
  last two months of the agreement. [s. 63(2)(b)]

• If there is a collective agreement in place that states that it will continue to operate
  for a further term or terms if neither the union or employer gives notice to bargain
  for modifications → an application can be made during the last two months of the
agreement's stated date of operation, and during the last two months of each year that it continues to operate. [s. 63(2)(c)]

• If the union has been voluntarily recognized and a first collective agreement is in place → in addition to the previous three bullet points, an application can be made after the 305th day of its operation and before the 365th day of its operation. [s. 132(2)]

• If bargaining for a new collective agreement is going on and the Minister has appointed a conciliation officer or mediator, an application cannot be filed until →
  ➢ 30 days after the conciliator's or mediator's report is released, or
  ➢ 30 days after the notice that no conciliation board will be appointed, or
  ➢ 12 months after the date of the appointment of the conciliator or mediator, whichever is later. [s. 67(2)]

• If the union has been certified (as opposed to being voluntarily recognized) but there is no collective agreement yet in place → the application can be made six months after the date of certification. But if the Minister of Labour has appointed a conciliation officer or mediator the application cannot be made until:
  ➢ 30 days have elapsed since the mediator or conciliation officer's report was released to the parties, or
  ➢ 30 days have elapsed since the Minister issued a notice refusing to appoint a conciliation board, or
  ➢ six months have elapsed since the release of a report of the conciliation officer stating that the differences between the parties were settled, whichever situation applies. [ss. 67(1)(a)-(c), 132(1)]

• If there is a legal strike or lock-out → an application can be made:
  ➢ six months after the strike or lock-out commenced, or
  ➢ seven months after the Minister released the report of the conciliation board or mediator or gave notice declining to appoint a conciliation board, whichever occurs first. [s. 67(3)]

**How do employees apply to terminate a union's bargaining rights?**
The applicant employee or group of employees must first demonstrate to the Board that at least 40% of the employees who were at work in the bargaining unit on the date the application was filed with the Board appear to have expressed a wish not to be represented by the union. This is done by filing with the Application a petition or other written statement from employees stating that they do not wish to be represented by the union. This evidence must be in writing, and signed and dated by each employee. Special care is taken to keep this information secret. The Board can consider any evidence it considers appropriate in determining the number of employees in the bargaining unit. However, it can refer only to the information provided by the applicant when determining the number of employees who appear to have expressed a wish not to be represented by the union. [s. 63(4), (5), (6), (7) and Rules 137, 138]
If the 40% threshold is met, the Board will conduct a secret ballot vote, usually five to eight days after the application for termination of bargaining rights is filed with the Board or delivered to the union and employer, whichever is later (although it may be delayed if there are disagreements about the number of employees in the bargaining unit, if allegations of employer misconduct are made, or if there is an issue about the timeliness of the application). If a vote is held, the Board will grant a declaration terminating the union's bargaining rights if more than 50% of the ballots cast are opposed to the union. [s. 63(5), (14)]

There are very specific filing and delivery requirements for parties involved in an application for termination of bargaining rights. These obligations are described in detail in Information Bulletin #7 and in the Board's Rules of Procedure.

**What if the employer, or someone acting on behalf of the employer, initiated the application or misconducts itself in connection with the application?**

If the Board is satisfied that the application was initiated by or on behalf of the employer, or that the employer or someone acting on its behalf engaged in threats, coercion or intimidation in connection with the application, the Board can dismiss the application. This is so even if the 40% threshold is met and/or even if more than 50% of the voters opposed the union. [s. 63(16)]

**Who is eligible to vote?**

All individuals who were at work and employed in the bargaining unit on the Application Filing Date are eligible to vote.

**How is the vote conducted?**

A Returning Officer is sent out by the Board to conduct the vote. Each party (including the employer, if it is participating in the application) is given an opportunity to select one scrutineer for each polling place. The scrutineers make sure that everyone who votes is entitled to do so. Individuals whose eligibility to vote is challenged are allowed to vote but their ballots are segregated until their eligibility is resolved.

Usually, the ballots are counted by the Returning Officer, in the presence of the scrutineers, immediately after the voting is completed. The ballot box may, in some circumstances, be sealed and the ballots not counted until certain issues are resolved. This can happen, for example, if there are material disputes as to some workers' status or eligibility to vote. [s. 63(11)]

**What choices are employees given on the ballot?**

Generic ballots that do not identify the union or employer by name are used. The names of the union and employer are set out instead in a Notice in every voting booth.
What happens to spoiled ballots?
Spoiled ballots are not counted. A ballot is only spoiled if it does not clearly indicate the choice of the voter, or if the person voting has put his or her name or some other identifying mark on the ballot.

What if someone believes the vote was not conducted properly?
After the vote, the Returning Officer issues a report to the parties. Copies are also posted at the workplace for employees to read. The report states how objections can be made to the Board about the vote.

Are the affected employees notified of an application for termination of bargaining rights?
Yes. The employer is required to post copies of Form C-36 - "Notice to Employees of Application for Termination of Bargaining Rights under Section 63 or 132, Construction Industry" and copies of the application in conspicuous places in the workplace. This ensures that employees are fully informed about the details of the application, notifies them that a secret ballot vote will likely be held five to eight days after the application was filed with the Board or delivered to the union and employer, whichever is later, advises them of their rights, and alerts them to look for future postings that will inform them of voter eligibility, the date, time and location of the vote, and the date and location of any Board meetings and hearings.

Who can attend a termination hearing?
All hearings of the Board are open to the public and anyone can attend as an observer. Only certain people may take an active part in them, however. Those people are: representatives of the applicant employee or group of employees, representatives of the union, representatives of the employer, any intervenor that has an interest in the application, and any employee (or representative) who has filed a timely request to participate.

It is not always necessary to hold a hearing in an application to terminate bargaining rights.

Applications for termination of bargaining rights under section 63 or 132 of the Act (construction industry) are:
• made on Form A-77
• dealt with by Parts I & II and Rules 76-77, 114, 127-130, and 137 to 141 of the Board's Rules of Procedure
• described in detail in Information Bulletins #7, #8, and #10
F) Applications For Termination Of Bargaining Rights Brought Under Section 127.2 Of The LRA - Non-Construction Employer In The Construction Industry

In what circumstances is a section 127.2 application made?
An application under section 127.2 can only be made by a non-construction employer, and only in respect of bargaining rights held by a construction trade union for construction employees. If, on the day the non-construction employer files an application, the non-construction employer does not employ any employees that are employed in the construction industry and represented by the union, the Board will declare that the union no longer represents such employees.

What happens if the Board issues a declaration?
Any collective agreement between the non-construction employer and the union ceases to bind the employer in so far as it applies to the construction industry. If the bargaining unit affected by the declaration also includes employees who are not employed in the construction industry, the Board can re-define the unit.

Applications for termination of bargaining rights under section 127.2 of the Act (non-construction employer in the construction industry) are:
• made on Form A-83
• dealt with by Parts I & II and Rules 76-77, 127-130, and 142 of the Board's Rules of Procedure
12. SALE OF EMPLOYER'S BUSINESS

What happens to a union's bargaining rights and to the collective agreement when an employer's business is sold?

The union keeps its bargaining rights and any existing collective agreement remains in effect. The new employer is also in the same position as the old employer was in any certification or termination proceedings that were begun with the old employer. In addition, if the union gave or was given notice to bargain a collective agreement with the old employer, it can give notice to the new employer (although the employer is not required to engage in bargaining until the Board has decided the application). [s. 69(2), (3)]

If any difficulties arise about the continuation of these rights, the Board can be asked to decide the issues. For example, if the new employer already had a union in its workplace, substantially changes the character of the business, or mixes the employees of the old employer with its own employees, the Board can determine which, if any, union will have bargaining rights and can define the bargaining unit. [s. 69(4), (6)]

The applicant has the onus to prove that a sale of a business took place. However, when the union is the applicant, the employer has an obligation to present all of the relevant facts of which it has knowledge. [s. 69(13)]

Sale of a business applications are:
- made on Form A-24
- dealt with by Parts I & II and Rules 85-88 of the Board's Rules of Procedure
13. RELATED EMPLOYER

What if an employer carries on related businesses under common control but different names?
A trade union, or an employer, can apply to the Board for a "related employer" declaration. This allows related or associated employers to be treated as one employer for the purposes of the LRA.

The declaration can be sought at any time but often arises in the context of certification applications. If more than one corporation, firm, association or individual are under common control and direction and carrying on related activities or businesses, a declaration may be issued.

When an application is made, the businesses in question have an obligation to provide all of the relevant facts of which they have knowledge. [s. 1(4), (5)]

Related employer applications are:
- made on Form A-24
- dealt with by Parts I & II and Rules 85-88 of the Board's Rules of Procedure
14. ILLEGAL STRIKES AND LOCK-OUTS

What is an illegal strike?
In general, an illegal strike is one that occurs:
• before a union gains bargaining rights through certification
• when a union is negotiating for a collective agreement but has not exhausted the conciliation provisions of the LRA
• during the term of a collective agreement
• without a strike vote having been taken, where more than 50% of those voting vote in favour of a strike (this does not apply in the construction industry or for a bargaining unit of maintenance employees where at least one employee was referred to their employment by a construction industry union). [s. 79]

A collective agreement provision that allows employees to engage in a work stoppage during the term of the agreement conflicts with the LRA, and any such work stoppage is an illegal strike. [s. 43]

See page 25 for more detailed information on when a strike is legal.

Is it an illegal strike if employees merely agree not to go in to work?
Yes. If employees agree to "book off sick", "slow down", or conduct a "study session" with the aim of restricting or limiting output, they are engaging in an illegal strike. This is so even if it is done without the support or against the advice of the union. [s. 1(1)]

Is the mere authorization or threatening of an unlawful strike prohibited?
Yes. Unions and union officials are prohibited from authorizing or supporting an unlawful strike. Unions, union officials and employees are prohibited from threatening an unlawful strike. [ss. 81, 100]

What can employers do if their employees engage in an illegal strike?
Employers can do one or more of several things. They can:
• seek a declaration from the Board that the strike is unlawful.
• ask the Board for an order directing the employees to return to work. This order can be filed in the Superior Court of Justice and enforced as an order of that court.
• seek the Board's consent to prosecute the employees -- and the union, if it called or authorized the strike. [ss. 100, 102, 108, 109, 144]

The Board usually holds a hearing within one or two days of the application being filed.

Even if the Board finds that a strike is unlawful, it may not make a declaration or direction. The Board generally won't issue them if, prior to the hearing, the employees have returned to work, unless there has been a pattern of illegal work
stoppages. A declaration of unlawful strike is not meant to be punitive. Rather, it is meant to inform the people involved that the strike is, in fact, unlawful.

Apart from the Board's remedies, relief is available to an employer through the collective agreement. Under the agreement, the employer could take disciplinary action against the employees. The disciplined employees can file a grievance against the discipline through the normal grievance/arbitration route, although arbitrators are generally not very sympathetic to employees who have engaged in an unlawful strike. The facts about the strike, the seniority of the employees involved, and the role each employee played in the strike will usually be taken into consideration.

The employer can also file a grievance against the union to seek damages for the losses suffered as a result of the strike. To be successful, the employer would have to demonstrate that the union called, or at least agreed to, the unlawful strike. If there is no collective agreement, the employer can, after getting a declaration from the Board, try recover damages through an arbitration process established under s. 103 of the LRA.

**Can someone who causes others to engage in an unlawful strike be in violation of the Act?**
Yes. If a person does anything that he or she knows, or should know, would cause others to engage in an unlawful strike, he or she will be committing an offence. For example, putting up a picket line (except where it is in connection with a lawful strike or lock-out) that causes others to engage in an unlawful strike by refusing to cross, is unlawful. [s. 83]

**When is a lock-out unlawful?**
It is unlawful if it occurs during the term of a collective agreement, or at any time other than after the conclusion of the conciliation process (and the relevant number of "extra days"). The threatening of an unlawful lock-out is also prohibited. [s. 79]

See page 25 for more detailed information on when a lock-out is legal.

**What can employees do if they believe they are being unlawfully locked-out?**
Their union can apply to the Board for a declaration that the lock-out is unlawful and for a direction compelling the employer to end the lock-out. The Board's order can be filed in the Superior Court of Justice and enforced as an order of that court. The union can also seek the Board's consent to prosecute the employer. [ss. 101, 102, 109, 144]

Employees who have been unlawfully locked-out might also be able to recover their lost wages through the grievance and arbitration procedure in their collective agreement. If there is no collective agreement, the employees can, after getting a
declaration from the Board, try recover damages through an arbitration process established under s. 103 of the LRA.

Relief may also be available from the Board if an unfair labour practice complaint is filed under section 96, but the Board usually requires that the parties attempt to resolve the matter by arbitration before it will deal with such a complaint.

Unlawful strike and lock-out applications:
• are made on Form A-39
• are dealt with by Parts I & II and Rule 100 of the Board's Rules of Procedure

Applications for consent to institute prosecution are:
• made on Form A-27
• dealt with in Parts I & II of the Board's Rules of Procedure
15. INTERNAL UNION AFFAIRS

What can a union member do if he or she disagrees with something the union did or is expelled from the union?

A union member has the right to enforce his or her union's constitution if it is being violated by others in the union. This is done through the appeal procedures set out in the constitution.

If there are no such procedures, or if they are inadequate, the member can initiate legal proceedings in the civil courts. However, a union member cannot ask the courts to interfere with the internal affairs of a union merely because the member is unhappy with some particular action taken by the union. The action must be contrary to the union's constitution or by-laws before the courts can grant a remedy.

The Board does not have the power to resolve disputes arising from union constitutions.

Can a union local be put under trusteeship?

If a union's constitution says that locals can be put under trusteeship (and most do), then the parent union can impose a trusteeship. The reasons for doing so and the procedure to follow are set out in the constitution. Such a trusteeship normally puts the local under the administration of a person appointed by the parent union. The parent union must file information about the trusteeship with the Board within 60 days by submitting a "Statement of Trusteeship Over Local Union to the Ontario Labour Relations Board" (Form 6 in Regulation 684 of R.R.O. 1990). The form must be verified by a notarized statement from the principal officers of the parent union. If the trusteeship is to last longer than a year, the Board must give its approval. [s. 89]

Are things different in the construction industry?

Yes. There are some provisions in the LRA that deal specifically with the relationship between parent and local unions in the construction industry, and allow parties to complain to the Board if they feel that those sections have been violated.

Under the LRA, a parent trade union cannot interfere with a local union's autonomy (for example, by placing the local under trusteeship) without just cause. A parent union also cannot alter the jurisdiction of a local union, penalize members or officials of a local union, or remove from office or change the duties of local union officials without just cause.

In addition, the LRA provides for shared bargaining rights between local trade unions and parent unions outside of the I.C.I. sector, and sets out rules for the appointment of trustees of employment benefit plans by local unions. [ss. 145-150]
Applications regarding the parent-local relationship in the construction industry are:
- made on form A-33
- dealt with by Parts I & II of the Board's Rules of Procedure

Are union members entitled to their union's financial statement?
Yes. Upon a request by any member, a union is required to provide a copy of its last audited financial statement, without charge. If the union does not provide the financial statement, or if the member considers it inadequate, the member can complain to Board. [s. 92]

Applications concerning the failure to file a financial statement are:
- made on form A-45
- dealt with by Parts I & II of the Board's Rules of Procedure

Applications concerning the adequacy of a financial statement are:
- made on form A-47
- dealt with by Parts I & II of the Board's Rules of Procedure

Unions that have welfare, vacation, or pension plan funds for its members or their survivors and beneficiaries must file a certified financial statement of the fund with the Minister of Labour every year. Copies of the financial statement must be given to any member who asks for it, without charge. Members can complain to the Board if the union does not file the statement or does not provide the member with a copy of the statement. [s. 93] (As there is no specific form for filing this type of application, anyone who wants to file a s.93 application should contact the Board's Registrar.)
16. JURISDICTIONAL DISPUTES

What is a jurisdictional dispute?
It is a dispute between two or more trade unions, usually but not always in the construction industry, over the right of its members to do particular work. The Board has the authority to resolve these disputes over work jurisdiction. [s. 99]

When can a jurisdictional dispute application be filed with the Board?
An application can be filed when one trade union feels that an employer, on its own initiative or as required by another union, assigns work to people in that other union rather than to people in its own union.

Does the Board have to hold an oral hearing before deciding a jurisdictional dispute?
No. Jurisdictional disputes are usually decided on the basis of the written submissions, and after a "consultation". If the Board considers it necessary to hear oral evidence or legal submissions on a particular point, it is usually done in the context of a consultation limited to that specific issue. The Board only holds an oral hearing where it considers it necessary. [ss. 99(3), 110(18), (20) and Rules 76, 77, 82]

What are the powers of the Board in a jurisdictional dispute?
The Board has wide discretion in deciding whether to intervene. If the Board intervenes, it can direct the assignment of work, issue a cease and desist order in respect of the assignment, or alter the bargaining unit described in a collective agreement or a certificate. The Board also has the power to issue interim orders directing the assignment of the work while the dispute is being litigated. [s. 99(5)-(9)]

What factors does the Board take into account in making a determination?
Among other things, the Board considers the jurisdiction of the competing trade unions as set out in their constitutions and collective agreements with the employer, existing agreements between the competing trade unions as to work jurisdiction, past practice in the area and in the particular industry, the nature of the work, the skills involved, and the safety, efficiency and economy in the performance of the work.

Jurisdictional dispute applications are:
- made on Form A-37
- dealt with by Parts I & II and Rules 76-77 and 80-82 of the Board's Rules of Procedure
17. THE CONSTRUCTION INDUSTRY

What is the construction industry?
The construction industry consists of businesses that are engaged in the constructing, altering, decorating, repairing, or demolishing of buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals, or other works at the job site. [s. 1(1)]

Why are there special provisions of the Labour Relations Act dealing with the construction industry?
These special provisions recognize the distinctive features of the construction industry: the mobility of the labour force, the likelihood that a construction employee will work for short periods for several employers in the course of a year, the variety of work performed, the existence of employers' organizations, local trade unions in different locations in Ontario, and the representation of employees by different trade unions on the basis of different skills. All of these factors prompted the Legislature to develop a distinct scheme to deal with collective bargaining in the construction industry.

What is the scheme of collective bargaining in the construction industry?
Collective bargaining in the construction industry is conducted on a craft and province-wide basis in the industrial, commercial and institutional sector of the construction industry. In the other sectors of the construction industry, collective bargaining is also conducted on a craft basis, but generally it is with reference to specific geographic areas of the province that are usually determined by mutual agreement between employers and trade unions. These areas need not necessarily conform to the geographic areas the Board uses in determining the scope of construction industry bargaining units in certification proceedings.

What is a sector of the construction industry?
A sector is defined by the LRA to mean a division of the construction industry that is determined by work characteristics and includes the industrial, commercial and institutional sector, the residential sector, the sewers and water mains sector, the roads sector, the heavy engineering sector, the pipeline sector, and the electrical power systems sector. The concept of sector reflects the diversity of the work performed and the projects undertaken in the construction industry and the special considerations that apply to employers, employees, and trade unions that represent such employees in the various sectors. [s. 126]

Who is an employer in the construction industry?
An employer in the construction industry is a person, other than a "non-construction employer", who operates a business in the construction industry. A "non-construction employer" is a person who is not engaged in a business in the construction industry or whose only engagement in such a business is incidental to the person's primary business. [s. 126]
Which trade unions can make an application to represent employees in the construction industry?
Only a trade union that according to established trade union practice pertains to the construction industry can apply to represent a bargaining unit of construction industry employees. [ss. 126, 158]

What is a trade union that according to established trade union practice pertains to the construction industry?
The Board has said that it is a trade union that has entered into collective agreements with employers who operate businesses in the construction industry, and that cover bargaining units that consist exclusively or primarily of construction industry employees. The established trade union practice arises from the acts of a trade union in seeking to represent and in representing such employees in construction industry bargaining units.

Is there an expedited procedure to deal with grievances arising under construction industry collective agreements?
Yes. In addition to the expedited arbitration procedures available under s.49 of the LRA, grievances arising in the construction industry can be referred to the Board for arbitration. Under the LRA, the Board must hold a hearing within 14 days of receiving the referral to arbitration. [s. 133]

Are fees payable to the Board for doing arbitrations?
Yes. Filing and hearing fees are payable by each party. These fees are set by the Lieutenant Governor in Council (the provincial Cabinet).

Grievance referrals in the construction industry are:
- made on Form A-86
- dealt with by Parts I & II and Rules 76-77 and 143-164 of the Board's Rules of Procedure
- described in detail in Information Bulletin #20

What is accreditation in the construction industry?
Accreditation of an employers' organization is similar to certification of a union. An employers' organization may apply to be accredited as the bargaining agent for all employers in a particular sector or sectors of the construction industry (except for the industrial, commercial and institutional sector, which is governed by the province-wide bargaining portion of the LRA) in a defined geographic area for whose employees a trade union holds bargaining rights. If the Board is satisfied that the employers' organization represents a majority of employers in the appropriate unit who employ a majority of the employees employed by all employers in that unit, a certificate of accreditation is issued to the employers' organization to represent in bargaining all employers in that unit.
A collective agreement between a trade union and an accredited employers' organization is binding upon all employers in the unit, whether or not an employer is a member of the employers' organization. If a trade union that is a party to a collective agreement with an accredited employers' organization obtains bargaining rights (by certification or voluntary recognition) for employees of an employer who would be covered by that collective agreement, the employer and the trade union are bound by that collective agreement. [ss. 136, 137]

Applications for accreditation are:
• made on Form A-92
• are dealt with by Part I & II and Rules 76-77 and 114-126 of the Board's Rules of Procedure

What is province-wide bargaining in the construction industry and who is affected by province-wide (provincial) collective agreements?
Province-wide bargaining is applicable only to the industrial, commercial and institutional sector of the construction industry. Unions that are affiliated with a designated or certified employee bargaining agency and employers for whom a designated or accredited employer bargaining agency holds bargaining rights are subject to province-wide bargaining.

The employee and employer bargaining agents attempt to negotiate a provincial agreement. The employee bargaining agency may call a strike or the employer bargaining agency may call a lock-out if no agreement can be reached after the conciliation process is exhausted. A strike or lock-out must be conducted on a province-wide basis.

If a strike vote, lock-out vote, or ratification vote is conducted relating to provincial bargaining, the LRA sets out who is eligible to vote. The party conducting the vote is required to report the results to the Minister within five days of the vote. The Minister may refer to the Board any complaint alleging that the rules as to voter eligibility have been violated. [s. 165].

Once a provincial agreement is reached, it is binding upon the unions affiliated with the employee bargaining agency and the employers for whose employees an affiliated local union holds bargaining rights. When an affiliated local union obtains bargaining rights for employees of an employer in relation to the industrial, commercial, and institutional sector, whether by certification or voluntary recognition, that employer and the affiliated local union are bound by the appropriate provincial agreement. [ss. 151, 163, 164]
What about Project Agreements?
A project agreement is an agreement between a proponent of an “economically significant” project, on the one hand, and affected trade unions, on the other hand, that allows projects to be built under terms and conditions different than the applicable provincial agreements that would otherwise govern. During the life of a project agreement, no employees performing work on the project can strike and no employer can lock-out such employees, even if a strike or lock-out is authorized in the ICI sector.

The LRA set out rules governing how project agreements are initiated, to whom notice of a project agreement must be given, how an agreement can be challenged, and how an agreement is approved. The Board has a limited role to play in this process. [s.163.1]

Does the LRA regulate any aspects of the relationship between local unions and their parent unions in the construction industry?
Yes. The LRA protects local unions from unjust interference by their parent unions and provides local unions with joint bargaining rights outside of the I.C.I. sector and the right to appoint trustees of benefit plans. (See the discussion under "Internal Union Affairs" at page 65.)
D. THE EMPLOYMENT STANDARDS ACT

What is the Employment Standards Act?
The Employment Standards Act ("ESA") is a statute that establishes minimum terms and conditions of employment called employment standards. It sets out rules on such things as hours of work, minimum wage, overtime pay, vacation with pay, public holidays, equal pay for equal work, pregnancy and parental leave, unauthorized deductions, notice of termination, and severance pay.

The ESA does not deal with sick benefits, bereavement leave, or dress codes. These issues are generally covered by workplace policy or, in unionized workplaces, a collective agreement. (The Human Rights Code and Occupational Health and Safety Act may also impact on dress codes.)

Who administers the ESA?
The Employment Standards Program of the Ministry of Labour is primarily responsible for administering the ESA. Questions about the ESA can be directed to any of the Ministry of Labour's Regional Offices (see page 2 for a listing). Alternatively, you can call the Ministry's General Inquiry number at 1-800-531-5551 or 416-326-7160. All of the Regional Offices have Fact Sheets that describe the minimum standards and provide information on how to file a claim. The Fact Sheets can also be obtained from the Ministry's Website at http://www.gov.on.ca/lab/es/ese.htm, or from the Ministry's fax-on-demand system at (416) 326-6546.

What is the Board's role in ESA matters?
The Board's role in ESA matters is restricted to dealing with applications for review. An application for review is an application that can be filed if an employee, employer, or company director disagrees with a decision of an Employment Standards Officer. Employees cannot file their ESA claims with the Ontario Labour Relations Board. They must file them with the Employment Standards Program of the Ministry of Labour.

What is the relationship between the Ministry of Labour and the Ontario Labour Relations Board?
The Board operates at arms' length from the Ministry of Labour and does not represent the Employment Standards Officer, the Employment Standards Program, or the Ministry of Labour. This ensures the fairness and neutrality of hearings into ESA matters.

Does the Employment Standards Act apply to all employees?
The ESA applies to most employees in Ontario, although some occupations are covered by only some parts of the ESA.

The ESA does not apply to people who are employed in areas regulated by the federal government. This includes employees of the federal government, people employed by railway, bus or trucking companies that cross provincial borders, the airlines, telephone
services, banks, post offices, televisions and radio stations, and grain elevators. These employees are covered by the federal Canada Labour Code.

**How does the ESA affect employees who are covered by a collective agreement?**
The minimum standards in the ESA apply to employees who are covered by a collective agreement. The collective agreement cannot provide for less than the ESA provides. (Of course, many employees will have a collective agreement with their employer that provides for wages and benefits above the basic minimums.) [ss. 3, 64.5]

The method for enforcing the ESA rights of employees who are covered by a collective agreement, however, is different than it is for employees who are not covered by a collective agreement. Unless they get permission from the Director of Employment Standards, employees who are covered by a collective agreement and who believe their ESA rights have been violated cannot file a claim with the Ministry of Labour. Instead, they or their union must use the grievance/arbitration procedure that is set out in the collective agreement, and file a grievance against the employer. This is so for all employees in the bargaining unit, whether or not they are union members. [s. 64.5]

The *Labour Relations Act* imposes a duty on trade unions to fairly represent all of the employees in any bargaining unit for which it has bargaining rights. It is a violation of the *Labour Relations Act* for a union to represent employees in a manner that is arbitrary, discriminatory, or in bad faith. This duty applies when unions are deciding whether or not to proceed with grievances alleging a violation of an employee's ESA rights. If an employee believes that their union has acted in a manner that is arbitrary, discriminatory or in bad faith in relation to their claim that their ESA rights have been violated, they can file a duty of fair representation complaint against the union with the Ontario Labour Relations Board. See page 39 for a description of the unions' duty of fair representation and information on how to file a complaint.

**What can an employee who is not covered by a collective agreement do if they believe that their ESA rights are being violated?**
They can file a claim with the Ministry of Labour. See page 2 for a listing of the Ministry's Regional Offices. The Ministry may suggest that you speak to your employer directly before filing a claim. Once a claim is filed, an Employment Standards Officer is assigned to investigate it. During the investigation, the Employment Standards Officer will usually contact you and your employer, inspect your and your employer's records and talk to witnesses. After the investigation is complete, the Employment Standards Officer decides whether or not the ESA was violated.

**What if someone disagrees with the decision of the Employment Standards Officer?**
They can file an application for review with the Board.
**How does someone file an application for review?**
The application is made on a form supplied by the Board, Form A-69. The application must be received by the Board within 45 calendar days of the date on the Order to Pay or the letter refusing to issue an Order to Pay. Employers or directors who are seeking to review an Order to Pay must pay the amount ordered to the Director of Employment Standards in trust, or provide the Director of Employment Standards with an acceptable letter of credit.

Applications for review can be filed with the Board using any method other than Registered Mail, e-mail or fax.

**What kind of information goes into the application?**
The application must include a copy of either the Order to Pay or the letter refusing to issue an Order. It must also include a general statement of the issue or reason you are requesting a review, as well as a concise statement of the facts and events upon which you rely to support your request for review.

**What happens after an application is filed?**
The Board sends a copy of the application to the other workplace party and the Ministry of Labour. In most cases, one of the Board's mediators (called Labour Relations Officers, or "LRO's") will contact you to set up a mediation meeting. The purpose of the meeting is to try help the parties reach an agreement to settle the application and avoid the need for a hearing. The meetings are usually held in the Regional Center (Ottawa, Sault Ste. Marie, Sudbury/North Bay, Thunder Bay, Timmins, Toronto, Windsor) closest to the workplace. The Officer may meet with the employee and employer separately, or at the same time. The LRO may also try to settle the matter over the telephone.

The Board does not have the Employment Standards Officer's file or any of the documents you gave her or him during the investigation. You must bring all of the documents and materials that support your position to the mediation meeting and the hearing.

**What does the Labour Relations Officer do?**
Labour Relations Officers do not decide the case. They do not represent any of the parties, nor do they act as advisors to any of the parties, including the Ministry of Labour and the Employment Standards Officer.

The role of the Officer is to help the parties reach a settlement of the application. In order to encourage frank and open discussion between the parties and the Officer and increase the likelihood of settlement, Officers do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair who will be hearing and deciding the case. All communication between the Officer and the parties remains confidential. This includes documents that are given to an Officer. If a party wants a document to be considered by the Vice-Chair that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.
During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

**What happens if the case doesn’t settle?**
If no settlement is reached, a hearing is held in the Regional Center closest to the workplace. The Board sets the date of the hearing without consulting the parties.

**What if the employee or employer isn't available on the hearing date?**
If it is impossible to attend the hearing on the date it is scheduled, you can ask the Board to adjourn the hearing to a different date. The adjournment request should be made as soon as you realize that you are not available on the scheduled date. Except in extremely urgent situations, you must ask the other parties to consent to the adjournment before you ask the Board.

If the other parties do not consent, you have to put the reasons for your request in writing and send a copy of it to the Board and the other parties, who will have an opportunity to respond. The Board considers all of the parties' position and will issue a decision.

**What happens at a hearing?**
Each party will have an opportunity to present their case. You must bring four copies of any documents you have that support your position, and you must arrange to have any witnesses you intend to call on at the hearing. If you are unsure whether a witness will come to the hearing, you can serve them with a summons that you get from the Board, ordering them to attend and to bring with them whatever documents you describe in the summons. The summons has to be served in person along with the required payment for travel and attendance, and it must be given far enough ahead of the hearing date so that the person is able to make it to the hearing. If you fail to ensure the witness's attendance, the hearing may proceed without their evidence.

If you do not attend the hearing, it will proceed without you and your ESA rights and obligations will be determined in your absence.

**Do you need a lawyer?**
A lawyer is not required. However, since a hearing is a legal proceeding that affects your legal rights, it may be a good idea to discuss the matter with a lawyer. People who hire lawyers are responsible for their own legal costs. If you do not have a lawyer, you may wish to contact one through the Law Society's Lawyer Referral Service (416-947-3330 or 1-800-268-8326). This service will refer you to a lawyer who has agreed to conduct a one-half hour consultation with prospective clients for free. You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. As well, Community Legal Clinics are located throughout the
province. Consult your local telephone directory for the location of the clinic closest to you.

In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the *Employment Standards Act*.

**Are there any other costs associated with filing an application for review or attending a hearing?**

The Board does not charge any application filing fees or service fees for a mediation or hearing in applications for review under the ESA. However, other costs associated with the case (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

**Can the Board's decision be appealed?**

The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier. See pages 101 and 99 for more information on judicial reviews and the reconsideration power.

Applications for review under the *Employment Standards Act* are:
- made on Form A-69
- dealt with by Parts I & II and Rules 107-112 of the Board's *Rules of Procedure*
- described in detail in Information Bulletin #23
E. THE OCCUPATIONAL HEALTH AND SAFETY ACT

What is the Occupational Health and Safety Act?
The Occupational Health and Safety Act ("OHSA") is the primary workplace health and safety legislation in Ontario. Its purpose is to promote the health and safety of workers, which it does by setting out safety standards and establishing methods to identify and correct situations that may be dangerous.

Who administers the OHSA?
The Occupational Health and Safety Branch of the Ministry of Labour is primarily responsible for administering the OHSA. Questions about the OHSA can be directed to any of the Ministry of Labour's Regional offices (see page 2 for a listing). Or, you can visit the Ministry's Website at http://www.gov.on.ca/lab/ohs/ohse.htm.

What is the relationship between the Ministry of Labour and the Ontario Labour Relations Board?
The Board operates at arms' length from the Ministry of Labour and does not represent the Health and Safety Inspector or the Ministry of Labour. This ensures the fairness and neutrality of consultations and hearings into OHSA matters.

The Ontario Labour Relations Board has two functions under the OHSA:
1. To hear complaints that a worker has been penalized for enforcing their OHSA rights, and
2. To hear appeals of Orders made by Health and Safety Inspectors.

1. Complaints Of Unlawful Employer Reprisals

What kind of complaint is this?
The OHSA prohibits employers from dismissing, disciplining, suspending, penalizing, intimidating or coercing a worker, and from threatening to do any of those things, because the worker has acted in compliance with or sought the enforcement of the OHSA or its Regulations. [s. 50(1)] Among other things, the OHSA gives workers the right to refuse to perform unsafe work or work that they believe to be unsafe. [s. 43]

A worker who complains that an employer has violated s. 50(1) can have the matter dealt with by arbitration under a collective agreement, if there is one, or they can file a complaint with the Board. [s. 50(2)]

How does someone file a complaint with the Board?
The application is made on a form supplied by the Board, Form A-53.

Before the application can be filed with the Board, a copy of it, a blank response form (Form A-54), a Notice of Application (Form C-26) and a copy of
Information Bulletin #14 must first be delivered to the employer and any other person potentially affected by the application. The deliveries can be made by hand, courier, facsimile transmission, or regular mail.

After the deliveries have been made, the worker files five copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries. If the application is not filed in this time, it will not be processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

**What kind of information goes into the application?**
All of the facts that the worker is relying on to support the allegation that the employer unlawfully penalized her or him must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Workers who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the hearing. [Rule 42]

**Is there a time limit for filing an application?**
While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

**What happens after an application is filed?**
The application is first reviewed by the Board to see if it complies with the Board's Rules of Procedure and if it makes out an arguable case. If it doesn't, the application may be dismissed without being processed. If this happens, a Decision setting out why it was dismissed will be sent to the worker. If the application is processed, a Labour Relations Officer will normally be assigned to meet with the worker and employer to try to reach an agreement that will settle the application. The Officer may meet with the worker and employer separately, or at the same time.

**What does the Labour Relations Officer do?**
Labour Relations Officers do not decide the case. The role of the Officer is to help the parties reach a settlement of the application. In order to encourage frank and open discussion between the parties and the Officer and increase the likelihood of settlement, Officers do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair or panel who will be hearing and deciding the case. All communication between the Officer and the parties remains confidential. This includes documents that are given to an Officer. If a party wants a document to
be considered by the panel that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.

During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a hearing and evaluate the settlement proposals, and are not to be taken as legal advice.

**What happens if the case doesn’t settle?**
If no settlement is reached, a hearing with a Vice-Chair or panel of the Board is held. The hearing date is set without consulting the parties.

**What if the worker or employer isn't available on the hearing date?**
If it is impossible to attend the hearing on the date it is scheduled, you can ask the Board to adjourn the hearing to a different date. The adjournment request should be made as soon as you realize that you are not available on the scheduled date. Except in extremely urgent situations, you must ask the other parties to consent to the adjournment before you ask the Board.

If the other parties do not consent, you have to put the reasons for your request in writing and send a copy of it to the Board and the other parties, who will have an opportunity to respond. The Board considers all of the parties' position and will issue a decision.

**What happens at a hearing?**
Each party will have an opportunity to present their case. The employer must prove that no part of its decision to discharge or discipline the worker was because the worker exercised his or her OHSA rights. [s. 50(5)]

You must bring three copies of any documents you have that support your position, and you must arrange to have any witnesses you intend to call on at the hearing. If you are unsure whether a witness will come to the hearing, you can serve them with a summons that you get from the Board, ordering them to attend and to bring with them whatever documents you describe in the summons. The summons has to be served in person along with the required payment for travel and attendance, and it must be given far enough ahead of the hearing date so that the person is able to make it to the hearing. If you fail to ensure the witness's attendance, the hearing may proceed without their evidence.

If you do not attend the hearing, it will proceed without you and your OHSA rights and obligations will be determined in your absence.

**Do you need a lawyer?**
A lawyer is not required. However, since a hearing is a legal proceeding that affects your legal rights, it may be a good idea to discuss the matter with a lawyer. People who hire lawyers are responsible for their own legal costs. If you do not have a lawyer, you
may wish to contact one through the Law Society's Lawyer Referral Service (416-947-3330 or 1-800-268-8326). This service will refer you to a lawyer who has agreed to conduct a one-half hour consultation with prospective clients for free. You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. As well, Community Legal Clinics are located throughout the province. Consult your local telephone directory for the location of the clinic closest to you.

In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the Occupational Health and Safety Act.

Are there any other costs associated with filing an application or attending a hearing?
The Board does not charge any application filing fees or service fees for a mediation or hearing in Occupational Health and Safety Act applications. However, other costs associated with the case (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

Can the Board's decision be appealed?
The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier. See pages 101 and 99 for more information on judicial reviews and the reconsideration power.

What happens if the Board rules that the employer violated s. 50 of the OHSA?
The Board has broad remedial powers. For example, it can order the employer to stop contravening the OHSA, require the employer to reinstate a worker and compensate the worker for lost wages and benefits resulting from the unlawful termination or suspension, order that a disciplinary notation be removed from a worker's record, and direct the employer to sign and post notices in the workplace stating that it was found in violation of the OHSA and that it undertakes to comply with the OHSA in the future.

Unlawful reprisal applications under s.50 of the Occupational Health and Safety Act are:
• made on form A-53
• dealt with by Parts I & II of the Board's Rules of Procedure
• described in detail in Information Bulletin #14
2. Appeals Of Orders Made By Health And Safety Inspectors

Who can file an appeal of an order made by a Ministry of Labour Health and Safety Inspector?
Any employer, constructor, licensee, owner, worker or trade union who considers themselves aggrieved by an order of a Ministry of Labour Health and Safety Inspector can appeal to the Board.

Can someone file an appeal if an Inspector refused to issue an order?
Yes. The procedures described below apply to both appeals of an order and appeals of a refusal to issue an order.

How does someone file an appeal with the Board?
The application is made on a form supplied by the Board, Form A-65. The application must include the names, addresses, and phone and fax numbers of any people, unions or companies that may be affected by the appeal. It must also include a copy of the Order(s) (Field Visit/Report) that is being appealed. You must describe the circumstances that resulted in the Inspector's Order or refusal to issue an order, (what happened, when and where it happened and who was involved), and outline the reasons you think the Inspector was wrong. The processing of the appeal may be delayed if some of this information is missing.

The appeal can be filed with the Board using any method except Registered Mail, e-mail or fax.

Is there a time limit for filing an appeal?
The appeal must be received by the Board within 30 calendar days after the order was made. The Board has no authority to extend the 30-day time limit.

What happens after an appeal is filed?
The Board sends a copy of the appeal to the other parties, then assigns a Labour Relations Officer ("LRO") to try to reach an agreement that will settle the appeal. The Officer may meet with the parties separately, or at the same time.

What does the Labour Relations Officer do?
Labour Relations Officers do not decide the case. The role of the Officer is to help the parties reach a settlement of the appeal. In order to encourage frank and open discussion between the parties and the Officer and increase the likelihood of settlement, Officers do not communicate the contents of the settlement discussion or their perceptions of the strength of the parties' positions to the Vice-Chair who will be hearing and deciding the case. All communication between the Officer and the parties remains confidential. This includes documents that are given to an Officer. If a party wants a document to be considered by the panel that hears the case, the party must submit it themselves -- the Officer will not do so on behalf of the party.
During the settlement discussions, the Officer may explain the Board's case law. These comments are directed at helping parties realistically assess their chances of success at a hearing or consultation and evaluate the settlement proposals, and are not to be taken as legal advice.

**What happens if the case doesn’t settle?**
If no settlement is reached, a consultation or a hearing with a Vice-Chair of the Board is held. The consultation or hearing date is set without consulting the parties.

**What if the worker or employer isn't available on the consultation or hearing date?**
If it is impossible to attend the consultation or hearing on the date it is scheduled, you can ask the Board to adjourn it to a different date. The adjournment request should be made as soon as you realize that you are not available on the scheduled date. Except in extremely urgent situations, you must ask the other parties to consent to the adjournment before you ask the Board.

If the other parties do not consent, you have to put the reasons for your request in writing and send a copy of it to the Board and the other parties, who will have an opportunity to respond. The Board considers all of the parties' position and will issue a decision.

**What happens at a consultation?**
A consultation is different than a hearing. The goal of a consultation is to allow the Vice-Chair to expeditiously focus in on the issues in dispute and make any interim or final orders she or he considers appropriate. A consultation is meant to be more informal and less costly to the parties than a hearing, and the Vice-Chair plays a much more active role in a consultation than in a hearing.

While the precise format of a consultation varies depending on the nature of the case and the approach of the individual adjudicators, there are some universal features. To draw out the relevant facts and arguments, the Vice-Chair may:
- question the parties and their representatives,
- express views,
- define or re-define the issues, and
- make determinations as to what matters are agreed to or are in dispute.

The giving of evidence under oath and the cross-examination of witnesses are normally not part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board.

**What happens at the end of the consultation?**
A consultation normally lasts no longer than one day, and a decision containing brief reasons is made at the consultation or is issued afterwards. The decision will have one of four results. The Board may:
exercise its discretion not to inquire further into the appeal,
• dismiss the appeal on its merits
• grant the appeal, or,
• in limited circumstances, schedule the appeal for a full hearing before the Vice-Chair.

What happens at a hearing?
Each party will have an opportunity to present their case. You must bring four copies of any documents you have that support your position, and you must arrange to have any witnesses you intend to call on at the hearing. If you are unsure whether a witness will come to the hearing, you can serve them with a summons that you get from the Board, ordering them to attend and to bring with them whatever documents you describe in the summons. The summons has to be served in person along with the required payment for travel and attendance, and it must be given far enough ahead of the hearing date so that the person is able to make it to the hearing. If you fail to ensure the witness's attendance, the hearing may proceed without their evidence.

If you do not attend the hearing, it will proceed without you and your OHSA rights and obligations will be determined in your absence.

Can an Inspector's Order be suspended while an appeal is being dealt with?
Yes. You can ask the Board to do this by filing Form A-67 after or at the same time as you file the appeal. The application for a suspension can be filed by fax, and must answer the following questions:

• how will the health and safety of workers be assured if the Order is suspended?
• will the refusal to suspend the Order have a negative effect on you?
• are you more likely than not to succeed on your Appeal?
• are there good reasons to vary the Inspector's Order at this time?

Because of the inherent urgency of most suspension applications, the Board usually deals with them on the basis of the written submissions. Because of this, it is very important that the parties' submissions be as full and complete as possible.

Do you need a lawyer if you are a party to a OHSA appeal or suspension application?
A lawyer is not required. However, since these are legal proceedings that affects your legal rights, it may be a good idea to discuss the matter with a lawyer. People who hire lawyers are responsible for their own legal costs. If you do not have a lawyer, you may wish to contact one through the Law Society's Lawyer Referral Service (416-947-3330 or 1-800-268-8326). This service will refer you to a lawyer who has agreed to conduct a one-half hour consultation with prospective clients for free. You may also qualify for legal aid if you fulfill the financial and other requirements of the Legal Aid Plan. As well, Community Legal Clinics are located throughout the province. Consult your local telephone directory for the location of the clinic closest to you.
In order to maintain its impartiality and in order to ensure that it is seen by the parties as impartial, the Board is unable to provide advice as to the rights or obligations under the *Occupational Health and Safety Act*.

**Are there any other costs associated with filing an appeal or attending a consultation or hearing?**
The Board does not charge any application filing fees or service fees for a mediation, consultation or hearing in *Occupational Health and Safety Act* appeals or suspension requests. However, other costs associated with the case (for example, the cost of photocopying documents that you want the Board to read) are your responsibility. The other parties are responsible for their own costs. It is not the Board's practice to have the "loser" pay the "winner's" costs.

**Can the Board's decision be appealed?**
The Board's decisions are not subject to appeal, and are subject to judicial review only on very narrow grounds. The Board has the power to reconsider any of its decisions but will generally only do so if one of the parties presents it with new and relevant information that could not reasonably have been presented earlier. See pages 101 and 99 for more information on judicial reviews and the reconsideration power.

Applications to appeal an Order of a Health and Safety Inspector are:
- made on Form A-65
- dealt with by Appendix C of the Board's *Rules of Procedure*
- described in detail in Information Bulletin #21

Applications to suspend an order or decision of a Health and Safety Inspector are:
- made on Form A-67
- dealt with by Appendix C of the Board's *Rules of Procedure*
- described in detail in Information Bulletin #22
F. CROWN EMPLOYEES COLLECTIVE BARGAINING ACT, 1993

What role does the Board play under the Crown Employees Collective Bargaining Act?

The Crown Employees Collective Bargaining Act, 1993 ("CECBA") establishes the collective bargaining regime for Crown employees working for either the government of Ontario or a Crown agency. With some exceptions, some of which are noted below, the system of collective bargaining applicable to Crown employees is the same as it is under the Labour Relations Act ("LRA"). A description of the Labour Relations Act starts at page 8 of the Guide.

CECBA contains specialized provisions establishing the bargaining unit structure, content of central and local collective agreements, and the grievance/dispute resolution process for Crown employees.

CECBA also contains additional requirements that must be met in order for a strike or lock-out to be lawful. Before a lawful strike or lock-out can begin, the union and employer must have an agreement on the delivery of essential services during the strike or lock-out. If the parties are unable to reach an essential services agreement, either the union or the employer can apply to the Board for a determination. The Board is empowered to determine what types of services are essential services, what employee positions are necessary to enable the employer to provide essential services, which employees will be required to work (in the event of a strike or lock-out) to enable the employer to provide essential services, and so on. An application can also be made to the Board to enforce the essential services agreement or to amend the essential services agreement.

Applications regarding essential services agreements under the Crown Employees Collective Bargaining Act are:

- made on Form A-90
- dealt with by Parts I & II and Rules 76-77 of the Board's Rules of Procedure
G. PUBLIC SECTOR LABOUR RELATIONS
TRANSITION ACT, 1997

What responsibilities does the Board have under the Public Sector Labour Relations Transition Act?

The Public Sector Labour Relations Transition Act, 1997 ("LRTA") addresses the labour relations consequences of restructuring that is taking place in the hospital, municipal and education sectors. The LRTA sets out specific rules governing bargaining units, bargaining rights, seniority, and the application of collective agreements. Under the LRTA, the Board is given exclusive jurisdiction to, amongst other things, determine the number and description of new bargaining units following restructuring, and to determine who the bargaining agents should be in those bargaining units. In most cases, these determinations are made through representation votes conducted by the Board.

Applications under section 21, 22 and/or 23 of the Public Sector Labour Relations Transition Act, 1997 are:
• made on Form A-61
• dealt with by Parts I & II and Rules 76-77 and 101-106 of the Board's Rules of Procedure

Applications under the Public Sector Labour Relations Transition Act, 1997 (other than under sections 21, 22 or 23 of the Act) are:
• made on Form A-63
• dealt with by Parts I & II and Rules 76-77 and 101-106 of the Board's Rules of Procedure
H. HOSPITAL LABOUR DISPUTES ARBITRATION ACT

What jurisdiction does the Board have under the Hospital Labour Disputes Arbitration Act?

Hospital and nursing home employees are governed by both the Hospital Labour Disputes Arbitration Act ("HLDAA") and the Labour Relations Act ("LRA"). For most purposes, these employees are subject to the collective bargaining provisions of the LRA. However, because of the nature of the work they perform, hospital and nursing home employees have no right to strike and cannot be locked out of their workplace by their employer. Instead, collective bargaining disputes are resolved through an interest arbitration regime that is set out in HLDAA. Complaints of unlawful strikes or lockouts are heard by the Board.

The Board is also responsible for providing advice to the Minister of Labour when asked whether an institution is a hospital within the meaning of HLDAA.
I. COLLEGES COLLECTIVE BARGAINING ACT

What responsibility does the Board have under the Colleges Collective Bargaining Act?

The Colleges Collective Bargaining Act ("CCBA") governs collective bargaining in community colleges. Under the CCBA, the Board has the power to deal with:

- applications for certification and termination of bargaining rights
- applications concerning whether persons are employees for purposes of the CCBA
- unfair labour practices
- the union's duty of fair representation
- illegal strikes and lock-outs
- applications for religious exemption

With some exceptions, some of which are noted below, CCBA matters are dealt with in much the same way as applications made under the Labour Relations Act ("LRA"). For information on:

- Applications for certification and for termination of bargaining rights → see pages 12 and 49 of the Guide. Note that, unlike in the LRA, security guards are not treated differently from other employees under the CCBA.

- Determining whether persons are employees for purposes of the CCBA or if they exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations → see page 10 of the Guide.

Applications regarding employee status are:

- made on Form A-41

- The union's duty of fair representation → see page 39 of the Guide.

- Illegal strikes and lock-outs → see page 62 of the Guide.

- Applications for religious exemption → see page 31 of the Guide. There are some differences between the LRA and CCBA religious exemption provisions:
  - There is no CCBA requirement that the application be made during the first collective agreement that contains the union security provisions, nor is there a requirement that the employee be employed at the workplace before the union security provisions were negotiated.
  - The CCBA exemption applies only to the payment of union dues, not to union membership.
Unfair Labour Practices → see page 35 of the Guide. Note that the CCBA contains its own list of actions that constitute an unfair labour practice. Also note that, unlike the LRA, the CCBA does not impose the onus of proof on the employer in cases dealing with discharge for union activity.

Unfair labour practice applications under the CCBA are:
- made on Form A-51
- dealt with by Parts I & II of the Board's Rules of Procedure
J. THE ENVIRONMENTAL BILL OF RIGHTS ACT

What jurisdiction does the Board have under the Environmental Bill of Rights Act?
The Board handles applications by employees who complain that their employer has imposed an unlawful reprisal on them in violation of s.105 of the Environmental Bill of Rights Act ("EBRA").

Section 105 of the EBRA prohibits employers from dismissing, penalizing, coercing, intimidating, harassing, or attempting to coerce, intimidate or harass employees because the employee in good faith did or may do any of the following things:

- participated in decision-making about a provincial government ministry's statement of environmental values, policy, Act, regulation or instrument,
- applied to the Environmental Commissioner for a review of a government policy, Act, regulation or instrument,
- applied to the Environmental Commissioner for an investigation into an allegation that a prescribed Act, regulation or instrument has been contravened,
- complied with or sought the enforcement of a prescribed Act, regulation or instrument,
- gave information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument, or
- gave evidence in a proceeding under the EBRA or a prescribed Act.

How does someone file a complaint with the Board if they believe their employer violated s. 105 of the EBRA?
The application is made on a form supplied by the Board, Form A-59.

The application must describe fully and in an organized way all of the facts that are being relied on to support the allegation that the employer imposed an unlawful reprisal on the employee.

Before the application can be filed with the Board, a copy of it, a blank response form (Form A-60), a Notice of Application (Form C-29), and a copy of Information Bulletin #15 must first be delivered to the employer and to any other person potentially affected by the application. The deliveries can be made by hand, courier, facsimile transmission, or regular mail.

After the deliveries have been made, the employee files five copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries. If the application is not filed in this time, it will not be
processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

**What kind of information goes into the application?**

All of the facts that the employee is relying on to support the allegation that the employer unlawfully penalized her or him must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Employees who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the hearing. [Rule 42]

**Is there a time limit for a filing an application?**

While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

**What happens after an application is filed?**

The same procedures apply in unlawful reprisal applications under the EBRA that apply in unlawful reprisal applications under s.50 of the Occupational Health and Safety Act. Please see page 77 for a description of these procedures.

**Unlawful reprisal applications under s.105 of the Environmental Bill of Rights Act are:**

- made on form A-59
- dealt with by Parts I & II of the Board's Rules of Procedure
- described in detail in Information Bulletin #15
K. THE ENVIRONMENTAL PROTECTION ACT

What jurisdiction does the Board have under the Environmental Protection Act?
The Board handles applications by employees who complain that their employer has imposed an unlawful reprisal on them in violation of s.174 of the Environmental Protection Act (“EPA”).

Section 174 of the EPA prohibits employers from dismissing, disciplining, penalizing, coercing, intimidating, or attempting to coerce or intimidate an employee because the employee has done or may do any of the following things:

- has complied with the Environmental Assessment Act, Environmental Protection Act, federal Fisheries Act, Ontario Water Resources Act or the Pesticides Act, or a regulation, order, term or condition, certificate of approval, licence, permit or direction under one of those Acts,
- has sought the enforcement of one of those Acts or a regulation under one of those Acts,
- has given information to the Ministry of the Environment or a provincial officer designated under the EPA, or
- has been or may be called upon to testify in a proceeding related to one of those Acts or regulations under one of those Acts.

How does someone file a complaint with the Board if they believe their employer violated s. 174 of the EPA?
The application is made on a form supplied by the Board, Form A-57.

The application must describe fully and in an organized way all of the facts that are being relied on to support the allegation that the employer imposed an unlawful reprisal on the employee.

Before the application can be filed with the Board, a copy of it, a blank response form (Form A-58), a Notice of Application (Form C-28), and a copy of Information Bulletin #16 must first be delivered to the employer and to any other person potentially affected by the application. The deliveries can be made by hand, courier, facsimile transmission, or regular mail.

After the deliveries have been made, the employee files five copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries. If the application is not filed in this time, it will not be processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]
What kind of information goes into the application?
All of the facts that the employee is relying on to support the allegation that the employer unlawfully penalized her or him must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Employees who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the hearing. [Rule 42]

Is there a time limit for filing an application?
While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

What happens after an application is filed?
The same procedures apply in unlawful reprisal applications under the EPA that apply in unlawful reprisal applications under s.50 of the Occupational Health and Safety Act. Please see page 77 for a description of these procedures.

Unlawful reprisal applications under s.174 of the Environmental Protection Act are:
• made on form A-57
• dealt with by Parts I & II of the Board's Rules of Procedure
• described in detail in Information Bulletin #16
L. SMOKING IN THE WORKPLACE ACT

What jurisdiction does the Board have under the Smoking in the Workplace Act?
Employees who claim that their employer has imposed an unlawful reprisal on them in violation of s.8 of the Smoking in the Workplace Act ("SWA") can file an application with the Board. (If there is a collective agreement in place, the employee can choose to have the matter dealt with through the grievance/arbitration process instead.)

Section 8 of the SWA prohibits employers from dismissing, disciplining, suspending penalizing, coercing, intimidating or attempting to dismiss, discipline or suspend an employee because the employee has acted in compliance with or sought the enforcement of the Smoking in the Workplace Act.

How does someone file a complaint with the Board if they believe their employer violated s. 8 of the SWA?
The application is made on a form supplied by the Board, Form A-55.

The application must describe fully and in an organized way all of the facts that are being relied on to support the allegation that the employer imposed an unlawful reprisal on the employee.

Before the application can be filed with the Board, a copy of it, a blank response form (Form A-56), a Notice of Application (Form C-27), and a copy of Information Bulletin #17 must first be delivered to the employer and to any other person potentially affected by the application. The deliveries can be made by hand, courier, facsimile transmission, or regular mail.

After the deliveries have been made, the employee files five copies of the application with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries. If the application is not filed in this time, it will not be processed and the matter will be terminated. The application can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

What kind of information goes into the application?
All of the facts that the employee is relying on to support the allegation that the employer unlawfully penalized her or him must be described fully and in an organized way. This includes all of the circumstances (what, where and when the alleged violation took place) and the names of the people who are said to have acted improperly. [Rule 26]

Employees who do not provide all of this information in the application may not be allowed to present any evidence or make any representations about those facts at the hearing. [Rule 42]
Is there a time limit for filing an application? While there is no statutory time limit for filing an application, excessive delay without a good explanation may cause an application to be dismissed.

What happens after an application is filed? The same procedures apply in unlawful reprisal applications under the SWA that apply in unlawful reprisal applications under s.50 of the *Occupational Health and Safety Act*. Please see page 77 for a description of these procedures.

Unlawful reprisal applications under s.8 of the *Smoking in the Workplace Act* are:
- made on form A-55
- dealt with by Parts I & II of the Board's Rules of Procedure
- described in detail in Information Bulletin #17
M. PUBLIC SERVICE ACT

What jurisdiction does the Board have under the Public Service Act?
The Public Service Act ("PSA") sets out the political activities that Crown employees are and are not allowed to engage in. Crown employees who are not covered by a collective agreement and who do not fall within the PSA's definition of "public servant" can file a grievance with the Board if they believe they have been unfairly disciplined under the PSA.

The Board has the power to order a remedy if it determines that an employee did not violate the PSA, that the employee should not have been disciplined, or that a lesser penalty than the one imposed by the employer would be more appropriate.

As there is no specific form for filing this type of application, anyone who wants to file an application under the PSA should contact the Board's Registrar.

Applications under the Public Service Act are:
• made in writing (there is no specific Board form)
• dealt with by Parts I & II of the Board's Rules of Procedure
N. EDUCATION ACT

What jurisdiction does the Board have under the Education Act?
Part X.1 of the Education Act ("EA") governs collective bargaining for teachers who meet the definition of a Part X.1 teacher. A Part X.1 teacher is defined as a teacher employed by a board to teach, but does not include a supervisory officer, principal, vice-principal or instructor in a teachers training institution. [s. 277.1(1)]

The EA establishes a statutory bargaining structure consisting of four bargaining units for each district school board. These four units can be consolidated into one unit if the bargaining agent is the same for all units. Parties can also agree to discontinue a consolidated bargaining unit and revert back to the separate bargaining units. [ss. 277.3, 277.7(1)] The EA also designates which bargaining agent will hold bargaining rights for each bargaining unit. These bargaining agents cannot be displaced by another union, and termination applications cannot be brought to terminate the bargaining rights of these designated agents. [ss. 277.3, 277.8(3), (4)]

With certain exceptions, including these certification and termination of bargaining rights provisions, the system of collective bargaining applicable to teachers is the same as it is under the Labour Relations Act. A description of the Labour Relations Act starts at page 8 of the Guide.
O. FIRE PROTECTION AND PREVENTION ACT, 1997

What role does the Board play under the Fire Protection and Prevention Act, 1997?
Part IX of the Fire Protection and Prevention Act, 1997 ("FPPA") sets out the collective bargaining regime for firefighters, and includes a prohibition on strikes and lock-outs. The Board's responsibility for firefighters is:
• to deal with parties' request for consent to terminate a collective agreement early. See page 29 of the Guide.
• to determine whether a person exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, subject to an employer's discretion to designate a person as such with the person's consent.

Applications regarding employee status are:
• made on Form A-41
• dealt with by Parts I & II and Rules 76-77 of the Board's Rules of Procedure.
P. RECONSIDERATION

Can the Board reconsider its decisions?
The Board has the power to reconsider any of its decisions on the request of a party or on its own motion. However, because the Board's decisions are intended to be final and conclusive for all purposes, the Board will reconsider its decisions only in very limited circumstances.

Under what circumstances will the Board reconsider its decision?
The Board will not reconsider a decision unless:

- there is new evidence that would be practically conclusive of the case and that the requesting party could not have reasonably obtained earlier, or
- the requesting party has new objections or arguments that it had no opportunity to raise earlier.

Because of the need for finality in labour and employment relations matters, the Board does not treat its reconsideration power as either a tool for a party to repair the deficiency of its case nor as an opportunity to reargue it. If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will not normally reconsider its decision.

How does someone file a request for reconsideration?
The request is made on a form supplied by the Board, Form A-49. The person making the request must include complete written representations in support of the request. [Rule 94]

Before the request for reconsideration can be filed with the Board, a copy of it and a Notice of Request for Reconsideration (Form C-24) must be delivered to the other parties in the case. The deliveries can be made by hand, courier, facsimile transmission, or regular mail. [Rule 21]

After the deliveries have been made, the person making the reconsideration request files five copies of the request with the Board. The filing must take place within five days (not including weekends, statutory holidays or any other day the Board is closed) after making the deliveries. If the request is not filed in this time, it will not be processed and the matter will be terminated. The request can be filed in any way other than facsimile transmission, e-mail or registered mail. [Rules 15-17]

Is there a time limit for filing requests for reconsideration?
Yes. The request must be filed with the Board no more than 20 days (not including weekends, statutory holidays or any other day the Board is closed) after the date of the decision. The request will not be considered if it is filed more than 20 days after the date of the decision except with the permission of the Board. [Rule 96]
What happens after a request is filed?
The Board reviews it to see if it raises any new matters upon which a decision to reconsider could be based. If it doesn't, or if it was filed too late, the request may be dismissed by the Board. If this happens, the parties are sent a Decision that explains why it was dismissed. If the request does raise matters upon which a reconsideration could be based, and if it was filed on time, the Board may direct the other party involved in the case to file a response. The Board then reviews all of the submissions and will grant or dismiss the request. The Board usually does not hold an oral hearing when deciding requests for reconsideration.

Who deals with reconsideration requests?
The panel of the Board that decided the case originally is usually the panel that decides the reconsideration request. This is because the reconsideration power is not an "appeal" where the entire matter is reheard. The issue is whether there is any new information, and the panel that heard the case originally is in the best position to make that determination.

Requests for reconsideration are:
• made on Form A-49
• dealt with by Parts I & II and Rules 94-96 of the Board's Rules of Procedure
• described in detail in Information Bulletin #19.
R. JUDICIAL REVIEW

What is a judicial review?
Decisions of the Board are protected by "privative", or finality, clauses. These clauses express the Legislature's intention that the Board's decisions be final and conclusive for all purposes and mean that there is no appeal to a court from the Board's decisions.

Despite this, however, courts do have a role, albeit limited, in reviewing the Board's decisions. The courts have an inherent supervisory power over administrative tribunals and will review a decision of the Board if the Board has either breached the rules of natural justice or exceeded its jurisdiction. This process is called judicial review, and is initiated by filing an application for judicial review with the Divisional Court, a branch of the Ontario Superior Court of Justice.

What happens at a judicial review?
The court does not rehear the case. Judicial review is restricted to examining the Board's decision to determine whether it acted within its jurisdiction. If the court finds that the Board acted within its jurisdiction, the court will not overturn the decision unless it is "patently unreasonable". Essentially, the Board has the right to be wrong, and may even make serious errors without attracting the court's scrutiny. Considerable deference is paid to decisions of the Board, particularly where it is operating within the scope of its special expertise, is adjudicating a policy-driven question, or where the relevant Act expressly confers upon it a broad-ranging discretion. This is especially so in respect of findings of fact: a court will not assess whether the Board's findings were well-founded. It will only intervene if it can be established that there was no evidence on which to make the finding.

The courts may also overturn a decision of the Board on "natural justice" grounds, such as where it has not provided each party the right to participate in the proceeding, or to fully present its case. However, in this area as well the courts provide the Board considerable leeway, recognizing that it must have a considerable discretion in determining the nature of its procedure, and in determining the form and content of the evidence it will hear.