

## Section 12 Guide

### Purpose of this Guide

This Guide is for employees who are considering bringing a complaint against their union under [Section 12](#) of the [Labour Relations Code](#) (the “Code”). It describes Section 12 and the process for making a Section 12 complaint. It will also help you understand whether your complaint is something that can be considered under Section 12.

Please note that a Section 12 complaint is about how the union represented you. It is not a complaint against the employer. Also, Section 12 does not apply to non-union employees, or employees in federally regulated sectors (e.g., banking or airlines). It also does not apply to matters such as WCB (see “[Representation](#)” in this Guide).

### Introduction

When a workplace is unionized, the employees have chosen the union as their “exclusive bargaining agent”. This means the union has the authority to represent the employees in all matters relating to the collective agreement that governs their employment. The union has the right to make all decisions about [grievances](#) against the employer, with or without the [grievor’s](#) consent.

Section 12 allows employees to bring a complaint to the Labour Relations Board (the “Board”) about their union representation in some circumstances. Those circumstances are very limited. Section 12 is not an “appeal” of a union’s decision. You cannot file a complaint just because:

- you think the union’s decision was wrong or unfair;
- you don’t think the union is doing a good job of representing you; or
- you disagree with the union’s decision to refuse to proceed with your grievance (or to settle your grievance).

Rather, the Labour Relations Board can act only if you show in your complaint that the union represented you in a manner that was “**arbitrary**”, “**discriminatory**” or “**in bad faith**”.

This Guide will help you understand these concepts, and the requirements for bringing a complaint under Section 12. It will help you decide whether or not to file a complaint. If you decide to file one, this Guide will help you prepare it.

Some common terms are defined at the end of this Guide in a Glossary. Many of these terms also have a “mouse-over” definition in places where they are used in the Guide (where they are marked in blue – e.g., “[bargaining unit](#)”). For those using a paper copy, the definitions are also in the Glossary. This Guide also has a left-hand index to make it easier to navigate. If it has not opened automatically, click on the “Bookmarks” icon.

If you are not familiar with the nature of union representation and unionized dispute resolution, you may wish to begin by reading [Appendix “A”](#), which explains the relevant principles.

This Guide also uses examples to illustrate things. In particular, two examples of unionized dispute resolution are set out in [Appendix “B”](#). Parts of these examples will be used to illustrate various concepts throughout this Guide. It may be helpful to read the examples in Appendix “B” before reading the rest of the Guide.

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## Quick Summary

**If you just want to know the basic requirements in filing a Section 12 complaint, here they are:**

**Try to fix the problem with your union first. You must complete any [internal union appeal procedures](#) before filing your complaint. Then file your complaint in a timely way, preferably within a few weeks, and no later than three months, after the conduct complained of (or the decision in your last appeal).**

**To file your complaint, fill out a copy of [Form 12](#). In the space under the heading “HOW DID THE TRADE UNION’S ACTIONS VIOLATE SECTION 12(1)”, set out the relevant background and the *specific facts* that show that the union’s representation was arbitrary, discriminatory or in bad faith. Explain why these facts show that the union’s representation was arbitrary, discriminatory or in bad faith. Attach any relevant documents. Then file your complaint with the Labour Relations Board: see [Filing and Delivering the Complaint](#).**

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If you are confident that you already know what “arbitrary, discriminatory or bad faith representation” means and how to set out the specific facts that establish it, that may be all the information you need. However, this Guide contains valuable information intended to help you understand these concepts.

### **Disclaimer**

This Guide is not law. If there is any conflict between this Guide and the Board’s decisions, the Board’s decisions prevail. The Guide is not binding on individual adjudicators.

This Guide offers general information, not legal advice. Deciding what to do in your particular circumstances is your responsibility. Proving your case of a violation of Section 12 is also your responsibility. For advice as to your rights and responsibilities in your particular circumstances, you may wish to consult a lawyer.

## Sections of this Guide

### 1. Section 12 of the Labour Relations Code

This section describes Section 12 [generally](#), and the grounds for complaint in it: [arbitrary](#), [discriminatory](#) and [bad faith representation](#).

### 2. The Section 12 Complaint Process

This section explains [how](#) to prepare a complaint, [when](#) to file a complaint, and the requirement to [complete internal appeals first](#). It then describes the [remainder of the process](#), if your complaint discloses an apparent contravention of Section 12.

### 3. Other points

[Communicate and co-operate with the union in your representation](#)

[Hiring a lawyer](#)

[Labour Relations Code](#) and [Labour Relations Board Rules](#)

[Privacy and Access to Information Policy](#)

[Settlement](#)

[Other sources of rights for unionized employees](#)

## Appendix “A”: Basics of Union Representation and Dispute Resolution

This Appendix sets out the basic principles of union representation, and illustrates how they relate to Section 12.

## Appendix “B”: Examples

Two hypothetical examples of unionized dispute resolution are given that illustrate the principles from Appendix “A”. Portions of these examples are used throughout this Guide, to illustrate the scope of Section 12 and how to prepare a Section 12 complaint.

## Appendix “C”: Common arguments in Section 12 complaints that overlook the nature of union representation

This Appendix sets out some common arguments that overlook the nature of union representation (and therefore do not establish a violation of Section 12).

**Appendix “D”: Glossary of Common Terms**

**Appendix “E”: *Judd* and summaries of other Board decisions**

## 1. Section 12 of the Labour Relations Code

For the most part, union representation is a matter between unions and the employees who choose them as their representative. (The general nature of union representation is described in [Appendix “A”](#).) However, Section 12 of the Code puts some limits on how unions may exercise their authority in relation to individual employees. These limits apply regardless of what the employees as a group may agree.

### Origins of the duty

The “duty of fair representation” began in *Steele v. Louisville Railroad* (1944), 323 U.S. 192. In that case, the union used its exclusive bargaining agency to require the employer to sign an agreement that racially discriminated against employees the union represented. The U.S. Supreme Court held that the union must use its authority for relevant workplace reasons, and not in a way that was arbitrary, discriminatory or in bad faith. Later, this duty was incorporated into labour [legislation](#).

### The grounds: arbitrary, discriminatory and bad faith representation

[Section 12](#) of the Code prohibits representation that is arbitrary, discriminatory or in bad faith. (It prohibits *only* these three forms of representation. Although its shorthand title is “Duty of Fair Representation”, it does not give the Board any other jurisdiction to decide whether representation was “fair”.)

In a case called *James W.D. Judd* (“*Judd*”), the Board described the [general nature of union representation](#), [Section 12](#), [bad faith](#), [discriminatory](#) and [arbitrary representation](#), and the [Section 12 complaint process](#). You should read these excerpts, which address these concepts in more detail than this Guide. Essentially, a union is prohibited from *misusing* its [exclusive bargaining agency](#) in any of these three ways. As long as it makes its decisions for relevant workplace reasons, then the union is not misusing its authority. In that case, the union’s decision does not violate Section 12, and the Board has no authority to intervene.

In simple terms, arbitrary representation is where the union makes a decision for no good reason, or without considering the relevant information. Discriminatory representation is where the union treats different employees in the same situation differently for no good reason (or for reasons prohibited by human rights legislation). Bad faith representation is where the union makes its decision for improper reasons.

Each of these three grounds will be illustrated below, with examples taken from the facts of [Example #1](#) and [Example #2](#) in [Appendix “B”](#).

### **Discriminatory**

It is discriminatory representation for a union to treat one employee differently than another in the same situation, for no legitimate reason. Take the facts of [Example #2](#) (set out in full in Appendix B):

*The Union agreed to the Employer transferring Vanessa, because she also got involved in conflicts with the other employees in the office group, and because June had experience which made her essential to the functioning of the office. Vanessa claims discriminatory representation, because the Union represented her differently than June.*

This is not discriminatory representation, because there were legitimate reasons for the Union’s agreement to transfer Vanessa and not June.

Now assume that the facts are different:

*The Employer wants to transfer Vanessa, because she also got involved in conflicts with the other employees in the office group, and because June had experience which made her essential to the functioning of the office. Vanessa goes to the Union office and complains about this to the Union representative, Susan. She tells Susan she likes working in the main office, and does not want to leave. She asks Susan as a favour to require the Employer to transfer June instead. Susan does so, and as a result, the Employer transfers June. June complains of discriminatory representation.*

June’s complaint would likely be discriminatory representation, because June and Vanessa are in the same situation – both don’t want to leave the main office – and the Union preferred Vanessa’s interests over June’s, *without* any legitimate reason. (This would probably be arbitrary representation as well, particularly if the Union made its decision without ever speaking to June about the situation.)

Where a complaint is primarily about representation that is discriminatory contrary to the *Human Rights Code*, the Board’s policy is generally to [defer](#) to the Human Rights Tribunal: see *Judd* at para. 55.

## Arbitrary

As described in *Judd* at para. 61, the obligation on a union not to engage in arbitrary representation basically encompasses three requirements. The union must:

- (i) ensure it is aware of the relevant information;
- (ii) make a reasoned decision; and
- (iii) not carry out representation with “blatant or reckless disregard”.

A complaint alleging arbitrary representation should establish that the union did not meet at least one of these requirements. In other words, it should show that the union:

- (i) did not consider important and relevant information;
- (ii) did not make a reasoned judgment; or
- (iii) carried out representation with “blatant or reckless disregard”.

## Examples

For example, take the facts of Martin’s situation in [Example #1](#) (which is set out in full in Appendix “B”). Here, we will assume those facts are different:

*Martin’s supervisor Linda had told him this particular day it was OK to use his own food-washing procedure, in order to save time. Martin told the Union this, and said another employee had heard it too. However, the Union ignores this, and agrees to the Settlement Agreement (including a one-month suspension) without considering his allegation that the Employer had given him permission that day.*

This could be arbitrary representation, because the Union overlooked the Employer’s permission. That is a critically important fact: it means that, this time, Martin had done nothing wrong. The Union would have to agree with that. But it overlooked that fact, agreeing to severe employment consequences, when he had done nothing to deserve any employment discipline.

Here is another example of arbitrary representation:

*Martin’s co-worker Raymond does not use the Employer’s food-washing procedure. As a result, the Union and the Employer agree to put both Raymond and Martin on a one-month suspension. Martin had done nothing wrong.*



In both of the above situations, the union (i) failed to consider important information; (ii) didn't make a reasoned judgment; and (iii) acted with "blatant and reckless disregard".<sup>1</sup>

It is important to note that these examples involve significant employment consequences. Unions are expected to exercise more care in dealing with very important employee interests: see *Judd*, para. 59-60 and 64.

Union has the right to to disagree with grievor, if it considers the relevant information

How are the above two examples different from the facts of [Example #1](#) (in Appendix B)? In that case, too, Martin told the Union he had not done anything wrong. Why wasn't the Union arbitrary in that example too?

The difference is that in the examples above, the Union *did not consider* critically important information when it made its decision about Martin's representation. In [Example #1](#), on the other hand, the Union reasonably considered the information, and it decided Martin *had* done something the Employer would be entitled to discipline him for. It simply *disagreed* with Martin on that point. The Union's job is to consider the information and make its own decision – not to see things the same way the [grievor](#) does.

In [Example #1](#), the Union disagreed with Martin on the law (i.e., whether he could be disciplined for using what he thought was a better procedure). A union can also disagree with a grievor on the facts. For example, what if Martin told the Union that Linda had given him permission, but the Union investigated and decided that was likely not true? The Union found that: (a) Linda and Raymond both said Linda had not given Martin permission; and (b) after Linda found out that Martin had used his own procedure and reprimanded him, Martin hadn't said anything about Linda giving him permission. On that basis, the Union concludes Linda probably did not give Martin permission. The Union is entitled to make that conclusion, and to refuse to proceed with a grievance.

In that case Martin would be incorrect if he argued that the Union "did not consider" his allegation that Linda had given him permission. The Union did consider it, it conducted a proper investigation, and it ultimately did not accept Martin's version of events. A union does not have to accept a grievor's version of events. It reasonably considered the relevant facts, and made a reasoned judgment. That is what the employees have chosen the Union to do.

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1. It is not necessary for the Union to violate *all three* of these requirements to violate Section 12; one is enough. In fact, it is not strictly necessary for the complaint to specify *any* of these requirements. Ultimately, the question is simply whether the union is guilty of *arbitrary representation*. These three requirements are a way of explaining this concept in more understandable terms.

### Section 12 is not an “appeal” of union decisions

Section 12 is not an “appeal” of union decisions: it does not allow the Board to decide whether the union’s decision was right or wrong. (A union may have its own [appeal process](#): this is discussed in Section 2 of this Guide.)

Similarly, the overall nature and quality of union representation is a matter for the employees and their unions. It is not determined by the Board. Some employees may believe their union should be more aggressive, and spend more on [litigation](#) (taking grievances to arbitration). Others may believe their union should be more constructive and cooperative, and should not spend more of their dues on litigation. This is a choice for the employees, not the Board. Employees can address such issues at union meetings, by becoming active in the union, in selecting the union’s leadership, and in selecting unions. They can even form their own union if they are dissatisfied with the ones available. What sort of union representation the employees should have is up to the employees, not the Board.

As well, unions often use volunteers or staff representatives rather than outside law firms to deal with issues. This is not a ground for a Section 12 complaint: employees are free to organize themselves the way they think best.

### **Bad faith**

Bad faith representation is, generally, representation with an improper purpose. For example:

*Martin supports a rival union, the Produce Workers’ Association (PWA). He has been campaigning for the employees to be represented by PWA, arguing they will provide better representation. The incident occurs where he again uses his own food-washing procedure without permission, and the Employer dismisses him. In discussing whether to grieve his termination, the Union officials refer to his “disruptive” activities in supporting PWA. The Union ultimately decides not to grieve his termination. He files a Section 12 complaint, arguing that his support of PWA was one of the factors in the Union’s decision to grieve.*

Martin’s support of PWA is not a proper reason for not pursuing a grievance. The Board may find that the Union’s decision not to grieve Martin’s termination *was* in part because of his support of PWA. (This will largely depend on the *specific facts* Martin has set out in his complaint: see Section 2 of this Guide.) In that case, that would be bad faith representation: the representational decision was made in part for an improper purpose.

## Representation

Section 12 is limited to a union's *representation*: i.e., the way in which it uses its [exclusive bargaining agency](#). That is the authority given to it by the Code, and Section 12 only covers the union's use of that authority. It does not otherwise apply to a union's conduct. Section 12 is not a forum for complaints about union staff being impolite, or failing to respond promptly to a member's correspondence. The Board is not the equivalent of a "Better Business Bureau" for unions – it only has the authority given to it by the Code.

You can make a Section 12 complaint if you are in a bargaining unit represented by the union, even if you are not a union member. Because Section 12 concerns the union's exclusive bargaining agency, it applies to all employees in the bargaining unit, regardless of whether they are members or not.

Section 12 does not apply to voluntary "representation" (i.e., advocacy on behalf of an employee) by a union in matters outside the union's exclusive bargaining agency, such as complaints to the Workers Compensation Board. There, the union is not the employee's exclusive bargaining agent. The employee has "self-agency" and can make his or her own complaint, and does not have to rely on the union to do so. Accordingly, the basis for the Section 12 duty does not apply. (See [Tom Smith](#), BCLRB No. B15/2004 (Leave for Reconsideration of BCLRB No. B218/2003).)

Note that, in addition to "representation" (Section 12(1)(a)), Section 12 also prohibits arbitrary, discriminatory or bad faith conduct in the "referral of persons to employment" (Section 12(1)(b)). "Referral" refers to the situation where the union is in charge of selecting members for employment (such as a "hiring hall" situation).

## 2. The Section 12 complaint process

### Overview

A Section 12 complaint is a legal allegation against the union, like a claim in court. (See *Judd* at paras. 71-88.) It is different than a court case, in that it is a more informal process: most complaints are conducted in writing. But it is similar to a court case, in that it is up to you to “make your case”. The Board does not “investigate” your complaint. It reviews the details you set out in your complaint and the attached documents. Your complaint can only succeed if it shows that the union has represented you in a manner that is arbitrary, discriminatory or in bad faith. The most important thing is setting out in your complaint the *specific facts* and explaining why they show the union has violated Section 12.

### Preparing your complaint

To prepare your Section 12 complaint you must fill out the information on [Form 12](#). The section under the heading “HOW DID THE TRADE UNION’S ACTIONS VIOLATE SECTION (12)(1)” is where you must “make your case” that the Union has violated Section 12. You must provide the *specific facts* (often referred to as “particulars”) that establish that the union has represented you in a manner that is arbitrary, discriminatory or in bad faith, in your particular situation. You must also explain why these facts establish arbitrary, discriminatory or bad faith representation.

If your complaint does not do this, it will be dismissed. Under [Section 13](#) of the Code, the Board must dismiss a complaint that does not set out sufficient evidence to show an apparent contravention of Section 12. So, if you have not set out the specific facts, then the Board must dismiss the complaint. Similarly, if you have set out specific facts, but those facts would not establish that the union violated Section 12, then the Board must dismiss the complaint.

#### Specific facts, not just opinions or conclusions

Assume that in their Section 12 complaints, Martin alleges:

*I was fired for no reason, and the Union was completely incompetent in its representation.*

and Vanessa alleges:

*The conflict in the office was entirely the other employee’s fault.*

Without supporting details, these are just *opinions* or *conclusions*, not *facts*. Facts are the details about what specifically happened – not someone’s overall judgment about it. While there is nothing wrong with making assertions such as the above *in addition* to the facts, it is the facts that will determine if the complaint is successful.

For example, assume a judge needed to decide which of two drivers was at fault in a car accident. It would not be enough for both drivers to say: “It was the other driver’s fault”. The judge would need to hear the *specific facts* about *what exactly happened*. In the context of a Section 12 complaint, these specific facts must be set out in the complaint.

#### Address the reality of the situation

Similarly, the complaint must address the reality of the situation. Neither of the above arguments does so. The Employer had some reason for firing Martin and that was the reason the Union was challenging. What was the reason the Employer gave? Why did Martin tell the Union it was not a good reason? And what did the Union do in response? These specific facts are necessary to establish that the Union’s representation in response to Martin’s termination was arbitrary, discriminatory or in bad faith.

For example, assume that Martin complains:

*I was fired and the Union didn’t even interview any witnesses with respect to the incident that led to my termination.*

On its own, this does not say anything about whether the Union’s representation was arbitrary, discriminatory or in bad faith. What witnesses were there? What could they have said, and how could it have helped? In Example #1, where Martin used his own procedure without permission, interviewing witnesses would not have helped at all. On the other hand, in the example where the Employer gave him permission (under “Arbitrary” representation, p. 8), then if it denied doing that, one would expect the Union to interview witnesses who may have heard it. That would be a relevant fact – it could make a difference to his dismissal. If you are alleging the union didn’t obtain certain facts, you must indicate why those facts may make a difference.

#### Attach any relevant documents

You must also attach to your complaint any relevant documents, such as the Employer’s disciplinary letter, the Union’s response, and any correspondence between you and the Union about your representation. If the Union has given you a written explanation for the circumstance you are complaining about (e.g., a decision not to proceed with a grievance), you must attach that letter to your complaint. You should indicate in your complaint anything in the letter that you disagree with or say is untrue and why.

*Example: The Union wrote to me by letter dated January 28, and told me it was not proceeding with my grievance. That letter is attached. It says that after interviewing all the relevant witnesses, the Union had decided my grievance had no merit. But the fact is, it did not interview all the relevant witnesses. I told the Union that my supervisor, Linda had told me it was OK to use my own food-washing procedure that day. But the Union did not even ask Linda if that was true. I checked with Linda after receiving the Union's January 28 letter and she said they had never asked her about that.*

Address the union's representation, not just what the employer did

Section 12 is not a complaint against the employer. Assume that Martin complains:

*I was fired for using my own food-washing procedure, but this is unfair: my supervisor Linda told me that on that day, because we were behind, it was OK.*

On its own, this does not establish anything about the Union's representation. In this example, Martin would need to go on and address the Union's conduct in these circumstances – e.g., what he told the Union and what the Union did in response. The Board does not decide the “merits” of the grievance – whether the Employer was right or wrong to fire Martin. Section 12 concerns the Union's representation.

An effective complaint

The following is an example of an effective complaint, using Martin's example given earlier under the heading of “Arbitrary Representation”:

*Martin Smith  
#1 - 234 Main Street  
Vancouver, BC  
Tel: (604) 555-5555*

*This is a complaint against the Fruit and Vegetable Workers Union, Local 33 (the “Union”). I work for Laura's Fresh Fruits and Vegetables (the “Employer”), as a production worker, in a bargaining unit represented by the Union. I have been working with the Employer in that position for two years.*

*Part of my job involves washing the fruits and vegetables. On January 11, my Employer dismissed me for using my own procedure to wash the fruits and vegetables on January 7. (See letter from the Employer dated January 11, attached.) As noted in the letter, I had been disciplined for doing this in the past. But on January 7, my supervisor, Linda, told me I could use my procedure, because it saves time and we were behind that day. When I got*

*the termination letter, I asked the Union to grieve my termination. I met with the Union representative Jerry on January 15, at 2:00 pm in his office. I told him that Linda had given me permission and that my co-worker, Raymond, was there at the time. I said I should receive no discipline at all, because the Employer had given me permission.*

*The Union did file a grievance, but agreed with the Employer to settle it with a Settlement Agreement (attached). The Settlement Agreement gives me a one-month suspension and warns that if I fail to follow the Employer's lawful directions again, even once, I can be fired. It leaves me much worse off than I was before. I complained to the Union there was no basis to do that, because I had the Employer's permission. The Union replied in writing by letter dated January 22 (attached). It says that I should not have used my own procedure, the last incident cost the Employer a lot of money, and the Settlement Agreement will ensure I don't do that anymore. But that ignores the fact that the Employer had given me permission, so there was no basis to suspend me.*

*I talked to Linda and my co-worker Raymond Lee – who was also there when Linda gave me permission – and the Union never spoke to either of them about it. The Union clearly agreed to the Settlement Agreement without even considering the fact that the Employer had given me permission. This was critical information: it meant I had not committed any disciplinary offence, and therefore, there was no basis for the suspension.*

*The Union's representation was arbitrary because: (1) they did not consider critical information – i.e., that the Employer gave me permission to use my own procedure; and (2) they acted in blatant and reckless disregard for my interests by agreeing to the Settlement Agreement when I had done nothing wrong.*

*I have completed the internal union appeal procedure: a copy of that procedure, my appeals and the decisions are attached.*

*As a remedy, I ask that the Board declare void the Settlement Agreement. [Alternatively](#), I ask that the Board order the Union to take my grievance to arbitration.*

*Yours truly,*

*Martin Smith*

*cc Fruit & Vegetable Workers Union, Local 33 (by fax)  
Laura's Fresh Fruits & Vegetables (by fax)*

In June's circumstances (set out under “Discriminatory” representation at p. 7), an example of an effective complaint would be:

*Appendix "A" to Form 12: Why the Union's Representation Violated Section 12*

*1. My contact information is set out in Form 12. I have been working for the Employer for eight years, the last three as an Accounts Receivable Clerk in the Main Office. Because of a conflict with my co-worker Vanessa Smith, I was transferred to a clerical position in the Employer's Retail Sales operation.*

*2. The details of the conflict are set out in the letter from the Employer dated August 23 (attached), which informs me of the transfer. I disagree with a number of things the Employer says about the conflict between Vanessa and me, but those points are not relevant to my Section 12 complaint. My Section 12 complaint concerns the fact that the Employer initially wanted to transfer Vanessa, but the Union Representative, Susan Mitchell, agreed to require the Employer to transfer me instead, as a favour to Vanessa.*

*3. On Monday, August 19, the Office Manager Brenda told me that the Employer and the Union had been discussing the conflict between Vanessa and me. The Employer had disciplined both of us in the past, and Brenda said they had been considering firing one or both of us. However, she said they were now going to resolve the problem by transferring Vanessa to the retail sales operation. Brenda said they would transfer Vanessa because she got in conflicts with the other employees in the Main Office as well, and my experience in Accounts Receivable is indispensable to the Main Office.*

*4. The next day, my co-worker Brian told me that Vanessa went to talk to the Union representative, Susan about it, and asked her to require the Employer to transfer me instead, as a favour to her. Vanessa and Susan are friends. Then, on Friday August 23, I got the letter from the Employer saying that because of the conflict, I would be transferred.*

*5. I asked Brenda why the Employer had changed its position but she wouldn't talk about it, she just said the Employer had "had enough trouble". I complained to the Union, and in its letter to me dated August 28, the Union says the Union and the Employer are entitled to agree to settle the issue. But the Union didn't make its decision for relevant workplace reasons. The Employer had said Vanessa was the most logical person to transfer, because of her other conflicts and because of my experience in the Office. No one has ever suggested otherwise. I allege that what Brian told me is true: the Union representative Susan required the Employer to transfer me instead, as a favour to Vanessa.*

*6. I say that in requiring the Employer to transfer me, the Union represented me in a discriminatory way: it made its choice based on personal favouritism. The facts in support of that allegation are set out above. It also represented me in an arbitrary way, because it did not make a reasoned decision based on relevant workplace reasons, and acted with blatant and reckless disregard for my interests.*



*7. I appealed the Union's decision, unsuccessfully: I have attached a copy of the union's appeal procedure, and my appeals and the decisions.*

*8. As a remedy, I ask that the Board declare void the Union's agreement to transfer me.*

The differences in style between Martin's and June's complaint do not matter (e.g., one uses numbered paragraphs, the other does not; one is a letter, the other is done as "Appendix 'A' to Form 12"; you can also use the space in the online Form 12 in Word format). Those things are up to you. The important thing is that both complaints set out the relevant background, address the reality of the situation, say how the union is alleged to have violated Section 12 (e.g. "the Union's representation was arbitrary because..."), and set out the specific facts that establish that. They also attach any relevant documents.

The most important thing is clearly setting out the relevant facts in an organized way. Chronological order (i.e., from earliest to latest) is often a clear and effective way. A simple Section 12 complaint may be a few pages; a more complex one may take several pages to describe (plus the attached relevant documents).

Sometimes people making legal arguments try to use as many legal terms as possible. This is generally not helpful. What is most important is clearly and fully describing the facts.

Similarly, it is not necessary to cite other cases (i.e., refer to them in your complaint). You are welcome to do so, but it will usually only be helpful if the facts of those cases are very similar to yours. The same is true of the Examples in this Guide. They are included for your understanding, not to use in argument in your complaint. If you cite (i.e., refer to) these Examples or other cases in your complaint, and the facts are clearly different from yours, you should not expect the Board's decision to expressly point out those differences. Generally, the facts of each case are different. The issue is whether *your* facts establish arbitrary, discriminatory or bad faith representation.

You may find it helpful to review other Section 12 decisions for your own understanding. The Board's decisions are posted on its website at [www.lrb.bc.ca](http://www.lrb.bc.ca). Although Section 12 decisions are not listed separately from the Board's other decisions, decisions beginning with the name of an individual (as opposed to a union or employer) are usually Section 12 decisions. There is also a [Summary of Key Board Decisions](#) at the end of this Guide.

What if I am unhappy with my union's representation, but it doesn't fit into one of those three categories?

The Board only has jurisdiction (i.e., the authority) to act where the complaint establishes representation in one of those three categories. A complaint that does not establish arbitrary, discriminatory or bad faith representation will be dismissed.

In the Board's (and other labour boards') experience, there are many cases where a union makes decisions the individual grievor may strongly disagree with, but very few that are arbitrary, discriminatory or bad faith. As a result, very few Section 12 complaints are successful. The tips in this Guide can help you describe your own facts *clearly*, so that if the Union *has* represented you in a way that is arbitrary, discriminatory or in bad faith, you can be sure to establish it in your complaint. However, if the union has not represented you in one of those ways – if it has made a reasoned decision, based on relevant factors, and you just strongly disagree with it – then no amount of skilful writing or creative argument will create a valid complaint where there isn't one.

Your best chance of having your union make the decision you want it to, is to give it all the information in favour of that decision up front, before it makes the decision (rather than trying to overturn the decision after it is made). Also, internal union appeals are not as limited as the grounds in Section 12. These are discussed in the next section.

### **Completing internal union appeals**

Many unions have an internal right of appeal. This is usually set out in the union's constitution and bylaws. A right of appeal may be broader than the rights under Section 12 – an appeal may not be limited to only whether the union acted in a manner that was arbitrary, discriminatory or in bad faith. It may address those issues and more as well. Accordingly, an internal union appeal may resolve the problem without the need for a Section 12 complaint.

Therefore, employees must “exhaust” internal union appeals – i.e., complete any internal union appeals that are available to them -- before filing a Section 12 complaint. The only exceptions to this are where exhausting internal union appeals would be impractical, unfair, or incapable of providing an adequate remedy. You must describe in your complaint the steps you have taken to exhaust your internal appeals, and attach any relevant decisions, appeals, and correspondence to and from the union.

*Example: When Martin first joined the Union, they gave him a booklet entitled: “Constitution and Bylaws of the Fruit & Vegetable Workers Union”. He looks through it for a right of appeal and finds Article 10, which says:*

*(1) A member dissatisfied with the Union's decision concerning his or her representation can appeal that decision in person at the monthly meeting of the Union Local Executive.*

*(2) If the member's appeal under subsection (1) is unsuccessful, the member may appeal in writing to the Union Ombudsman.*

*(3) If the member's appeal under subsection (2) is unsuccessful, a final appeal of the Union's decision may be made in person to the President of the National Union at its Annual General Meeting in Toronto, Ontario.*

Before filing a Section 12 complaint, Martin would be required to appeal under subsection (1) and, if that is unsuccessful, subsection (2). He would describe in his Section 12 complaint what appeals were available, and what he did. He would attach to his Section 12 complaint his appeals, the Union's decisions, and any correspondence on the matter.

Martin would not have to appeal under subsection (3), because that would be impractical: it can only be made in person, in Toronto, and only once per year when the Union has its Annual General Meeting. He would explain these reasons for not appealing under subsection (3) in his Section 12 complaint.

Exhausting internal union appeals is important. If Martin filed a Section 12 complaint without using his appeals under subsections (1) and (2), then he risks having his complaint dismissed and missing the time limits for those appeals.

### **Timeliness: When to file your complaint**

Because Section 12 concerns the union's representation, the complaint should be made after the representation that you are complaining about. Ideally, it should be made as soon as possible after (e.g., within weeks), to increase the chances it can be resolved by agreement. But in any event, the complaint *must* be filed within a reasonable time: if it is filed more than three months after the conduct complained of, it must set out the reasons for the delay (i.e., why it took so long). If there is more than three months' delay and the reasons for the delay are not provided, or if those reasons are not compelling, then the complaint may be dismissed for unreasonable delay. Note: if the delay is more than one year, the complaint will generally be dismissed unless very compelling reasons for the delay are provided.

If you are pursuing internal union appeals, then the complaint must be filed within a reasonable time after you have exhausted (finished) those appeals.

## Summary: timing of complaint and internal appeals

Try to fix the problem with your union first. You must exhaust internal union appeal procedures before filing your complaint (see above). Then file your complaint in a timely way – preferably within weeks, and no later than three months, after: (a) the conduct complained of, or (b) (if there is an internal union appeal procedure) the decision in your final appeal.

## Filing and Delivering the complaint

### Filing

You must file your complaint with the Board, by either completing Form 12, "Duty of Fair Representation Complaint (Section 12(1))", or by providing a written application (i.e., a letter with all the necessary information). (Rules 2(2) and 3(3), *Labour Relations Board Rules*.)

You can obtain a copy of Form 12 from the Board's office, or from the Board's website, at: [www.lrb.bc.ca/section\\_12/form12.pdf](http://www.lrb.bc.ca/section_12/form12.pdf)

If you provide a written application, it **must** contain the same information that is requested on the form, preferably in substantially the same order.

Once you have completed the form or written application, you may fax it, mail it, or deliver it to the attention of the Registrar at the Board's office (Rule 5(1)).

Labour Relations Board  
Suite 600, Oceanic Plaza  
1066 West Hastings Street  
Vancouver B.C. V6E 3X1  
Phone: 604 660-1300  
Fax: 604 660-1892

You must also pay a fee of \$100 to file your complaint. (*Labour Relations Board Fees Regulation*, B.C. Reg. 395/3003).

## **Review for Completeness and Delivery**

The Board will review your complaint to determine whether it is complete. Once the Board decides the complaint is complete, it will accept it for filing.

At that time, you will have to deliver a copy of your complaint to the respondents (the union and the employer) (Rules 5(2) and 6(2)). You can deliver your complaint by:

- 1) leaving a copy of the complaint at the respondent's place of business during normal business hours, or
- 2) leaving a copy of the complaint at the respondent's address for delivery, or
- 3) faxing the complaint to the respondent.

When you deliver the complaint to the Respondents, it must include the complaint and all the documents submitted by you that the Board has accepted for filing.

You must inform the Board once you have delivered your complaint to the respondents. Once that is done, the next step in the process is described below.

## **If the complaint discloses an apparent contravention**

After you have filed your complaint in the proper form, a **Vice-Chair** of the Board will review it. If your complaint does not establish an “apparent contravention” of Section 12, the Code requires the Board to dismiss it (see Section 13), and a Vice-Chair will issue a decision dismissing the complaint. An “apparent contravention” means that your complaint discloses sufficient details to establish that the union violated Section 12.

Note that this is assessed only on the basis of your complaint – the union does not yet get a chance to tell its side of the story. Accordingly, an “apparent contravention” does *not* mean that the Union *did* violate the Code. The union gets to tell its side of the story – and then you get a final reply – before that is decided.

If your complaint *does* disclose an apparent contravention, then **submissions** (letters setting out a party’s facts and argument) will be invited from the respondents (the union and the employer) in response to your complaint.

### Respondents’ submissions

The respondents’ submissions may allege additional relevant facts, and provide argument as to why your complaint does not establish a violation of Section 12. The respondents must provide you with a copy of their submissions. After the Board has received them, it will send you a letter setting a deadline for your final reply.

Your final reply

You then have an opportunity to make a final reply submission (a letter setting out any facts or arguments in reply to the respondents' submissions). Your final reply is your opportunity to *reply* to any new matters raised in the respondents' submissions. If they have alleged facts you disagree with, this is your opportunity to say what you disagree with and why. (Otherwise, those facts can be accepted as true.) It is not sufficient to say: "I deny everything". You must say what in particular you disagree with, and why.

The final reply is not an opportunity to *add* new allegations to your case of violation of Section 12 that you could have put in your original complaint. Such allegations are not properly part of the final reply and may be disregarded.

For example, the complaint says:

*The Union didn't interview relevant witnesses, Dennis and Joanne. Their evidence was relevant because... [etc.]*

The Union's submission says:

*The Union did interview Dennis. While it didn't interview Joanne, it interviewed the witnesses it thought were relevant, and it didn't believe Joanne's evidence was relevant... [etc.]*

An example of proper reply would be:

*The Union says it interviewed Dennis. That is not accurate. I spoke to Dennis on Tuesday, February 23, after the Union made its decision about my grievance, and he confirmed the Union never spoke to him... [etc.]*

An example of improper reply would be:

*The Union says it interviewed the witnesses it thought were relevant. That is not accurate. Besides Dennis and Joanne, the Union also didn't interview Jamie and Phil... [etc.]*

If the complainant's case was that the Union was arbitrary because it didn't interview Dennis and Joanne *and Jamie and Phil*, then particulars of those allegations should have been in the complaint. There is no reason the complainant could not have put those allegations in the complaint. The Board may not consider these allegations if they are made for the first time in the final reply, because the other parties will not have had an opportunity to address them. You should assume that any allegations in the final reply submission that are not proper reply may be disregarded.

You must provide a copy of your final reply to the other parties as well as the Board, and indicate how you are providing it.

The Board must consider the complaint again after the close of submissions: Section 13(1)(b)(ii).

### Unsolicited submissions

In order to ensure an orderly and efficient process, the Board requests submissions where appropriate and does not generally consider unsolicited submissions (i.e. new letters that the Board hasn't asked for). If you believe you have a valid reason for sending in an unsolicited submission (for example, it is about something that is relevant to the complaint but that only just happened, so you *couldn't* have put it in the complaint), then you should send in a letter saying why the Board should consider it.

### Oral hearings

Oral hearings are generally only held where the Vice-Chair determines there are “[material facts](#) in dispute” – e.g., where it is necessary for the Vice-Chair to decide whose version of a particular event is true, in order to decide whether the union violated Section 12. The Board's experience has been that very few cases need oral hearings. Most often the material facts are not in dispute and the Vice-Chair renders a written decision based on the submissions of the parties.

### Publication of decisions

Note that the Board is required by the Code to publish its decisions. This means that the circumstances of a Section 12 complaint may be summarized in a written decision which is sent to the parties, posted on the Board's website, and otherwise made available to the public. Decisions on the Board's website are not accessible by internet search engines such as Google.

The Board's [Privacy and Access to Information Policy](#) sets out what to do if you believe that the publication of your name or the inclusion of certain personal information in a published decision would be harmful to your privacy or security interests.

### Costs

Unlike the courts, the Board does not generally award “costs” against the losing party in a case. In the usual case, the \$100 filing fee (plus any of your own costs such as photocopying or lawyers' fees) is the only cost associated with filing a complaint.

### Remedy

If your complaint is successful in establishing the union violated Section 12, it is up to the Board (specifically, the Vice-Chair adjudicating your complaint) to decide what sort of [remedy](#) is appropriate. You should specify in your complaint the remedy you are asking for if your complaint succeeds. (There is a space provided for this on the form.) The Board is not required to award the remedy you specify.

The common principle that is applied in determining an appropriate remedy is: “What position would the complainant be in, if the union had not violated Section 12”? For example, if the union violated Section 12 in its decision over whether to take the grievance to arbitration, the Board may order that the union take the grievance to arbitration and the grievance time limits be waived. Or, depending on the nature of the violation, the Board may order that the union consider the issue again, taking into account the additional information that it overlooked.

### Settlement

The Board may contact the parties to offer assistance in settling a case (e.g. mediation). However, the parties can always settle the complaint by agreement themselves, without the Board’s assistance. (For more information see “[Settlement](#)”, below.)

### Reconsideration

Either party can apply for reconsideration of the Board’s decision, on limited grounds. See the [Information Bulletin on Reconsideration of Board Decisions](#)



### 3. Other points

#### Communicate and co-operate with the union in your representation

If there is information you believe your union should consider, it is important that you communicate it to them at the relevant time. This will increase the chances that the union will decide to act in your favour.

Also, if the union doesn't act in your favour, and you make a Section 12 complaint, then having given it the information at the relevant time will put you in a better position than if you hadn't done so. The issue of whether a union represented an employee in violation of Section 12 is assessed based on the information reasonably available to the union at the time.

If you want the union to take some kind of action, you are responsible for communicating the problem and your request to the union. Similarly, if the collective agreement requires a grievance to be filed by the individual employee (not the union), then you are responsible for filing a grievance.

You should co-operate with the union in its efforts to represent you. Certainly, you should not deliberately make the union's representation harder – for example, because you disagree with the union's decisions: see *Judd* at para. 94.

#### Hiring a lawyer

Whether or not to hire a lawyer is up to you. The following information may assist you.

##### *Representation in a Section 12 complaint*

You can choose to be represented by a lawyer, but there is no requirement that you do so. A lawyer can help prepare your complaint in an organized, persuasive way. You may also want to consider having a friend help you.

##### *Union representation at the grievance stage*

With respect to union representation at the grievance stage, the party to the collective agreement is the union, not the employee. Accordingly, the choice of representation is up to the union. It may choose to use a lawyer or its own in-house staff.

### *Advice*

You can always get legal advice from a lawyer. Board staff can provide general information, but cannot give you advice on your particular situation.

### *Hiring a lawyer*

The Canadian Bar Association (CBA) Lawyer Referral service will help you find a lawyer who will meet with you for 30 minutes for \$25, plus taxes. (Fees after that are agreed between you and the lawyer.)

[http://www.cba.org/bc/Public\\_Media/main/lawyer\\_referral.aspx](http://www.cba.org/bc/Public_Media/main/lawyer_referral.aspx)

604-687-3221 in the lower mainland and 1-800-663-1919 elsewhere in BC.

### *Pro bono (free) legal advice*

*Pro bono* (free) legal advice is also available in limited amounts (there may also be eligibility requirements):

#### **Access Pro Bono**

604-878-7400 or toll-free 1-877-762-6664

<http://www.accessjustice.ca>

### *Using a lawyer*

Regardless of whether you hire a lawyer or receive *pro bono* advice, it is helpful if you organize your documents and the facts of your case ahead of time. That way you make the best use of your time. For example, you may wish to write out a document ahead of time that sets out all the relevant facts in chronological order. You should also bring any relevant documents (or copies) to your meeting with the lawyer. If the lawyer is not already experienced in labour law, you should also bring a copy of this Guide and the [Judd decision](#).

## Labour Relations Code and Rules

The [Labour Relations Code](#) establishes the process for employees to choose union representation, regulates the relationship between unions and employers, and also contains Sections 12 and 13, discussed in this Guide.

The [Labour Relations Board Rules](#) apply to all proceedings under the Code, including Section 12 complaints.

## Settlement

Settlement of your Section 12 complaint by agreement is always an option at any time – before or after the complaint is filed. Consider what your objectives are and options as to how the dispute might be resolved. Any party can initiate settlement discussions with the other parties. When parties send correspondence to each other relating to settlement, it is common for them to write “Without Prejudice” at the top. This is intended to ensure that the letter cannot be used as evidence in adjudication of the issue.

The Board may contact the parties to arrange a Settlement Conference (like [mediation](#)). However, the parties do not need the Board’s assistance to settle a complaint. Often a settlement involves the complainant withdrawing the complaint in exchange for some sort of consideration or payment. Obviously, settlement will be more likely if you are realistic in your objectives and your assessment of the situation.

## Other sources of rights for unionized employees

There are other important sources of rights of unionized employees. Some are noted in the section below. It does not describe all of them, nor describe any of them comprehensively. Rather, it is just intended to give you an idea of some of the major areas.

[Internal union appeals](#): These are discussed above.

[The union’s constitution and bylaws](#): These set out the “contract” between the union and each member. If a member believes the union has breached this contract, he or she can bring a claim in court. Note that the courts may also require employees to exhaust internal union appeals.

[Section 10 of the \*Labour Relations Code\*](#): A person can also file a Section 10 complaint to the Board if the union, in applying its constitution, has acted in a way that is discriminatory or contrary to “natural justice” (generally, fair procedure), or has issued a penalty for refusing to contravene the Code: see Section 10 and the [Information Bulletin on Section 10](#).

[Human Rights Code](#): This statute protects employees from discrimination in employment on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of a person or because a person has been convicted of a criminal or summary conviction offence unrelated to employment. Unions can potentially file grievances concerning violation of the *Human Rights Code* by an employer, or the employee can potentially make a complaint to the [Human Rights Tribunal](#) as an individual. It depends on the circumstances. You may wish to obtain legal advice. See [Canpar Industries v. I.U.O.E., Local 115](#), 2003 BCCA 609

If you believe your union has represented you in a way that is contrary to the Human Rights Code, see [Judd, para. 55](#). If your union has discriminated against you contrary to the *Human Rights Code* in some other way than representation or Section 10, then that is solely a matter for the Human Rights Tribunal. As described earlier, Section 12 only gives the Board jurisdiction over discriminatory *representation*.

## Appendix “A”: Basics of Union Representation and Dispute Resolution

Section 12 is about union representation. This section outlines some of the basics of union representation and labour relations dispute resolution. This will help you understand how Section 12 applies.

### “Exclusive bargaining agency”: The employees choose the union as their group representative

When employees choose to be represented by a union under the Code, the union becomes the “exclusive bargaining agent” for the [bargaining unit](#). This means the union is the employees’ exclusive representative in everything relating to the collective agreement that governs their work. The union negotiates the collective agreement and may file grievances alleging the employer has breached it. If a grievance cannot be resolved, the union may choose to take the matter to [arbitration](#).

### Grievances are the union’s

The collective agreement is an agreement between the union and the employer. It is the union, not the individual employee, that decides whether or not to proceed with a [grievance](#) alleging the employer has violated the collective agreement. Simply put, the “owner” of the grievance is the union, not the individual employee. The employee must still meet his or her responsibilities, including bringing his or her complaint to the union’s attention, or initially filing the grievance if that is the employee’s responsibility. (In some collective agreements, the individual [grievor](#) must initially *file* the grievance, but it is the union that decides whether to proceed with it further after that.)

*Example: The collective agreement says promotions should be awarded to the most senior qualified employee. The Employer gives the job to Sandra. Jim believes the job should be his. He has more seniority than Sandra and believes he is qualified for the job, and therefore he has the right to it under the collective agreement. The Employer disagrees: it says Jim is not qualified.*

*If Jim wants the Union to take action on this, he must make the union aware of it and file a grievance if necessary (within the time limit under the collective agreement). It is then up to the Union whether to pursue a grievance over the Employer’s decision to hire Linda. The Union may decide, after looking at the information given to it by Jim and the Employer, that a grievance on behalf of Jim would be unlikely to succeed. Accordingly, the Union may decide not to proceed with a grievance. Or, the Union may decide that Jim has a good case, and pursue a grievance.*

## Labour relations dispute resolution

### Early settlement of grievances

If the union decides to proceed with a grievance against the employer, there are a number of options for resolving the dispute – ranging from early **settlement** by agreement, all the way to litigation at arbitration. The union and employer may try to resolve disputes by early settlement, without **litigation**. (“Litigation” in this context means going to arbitration.)

Litigation has a number of drawbacks, as a way of resolving workplace disputes. Collective agreements contain many rights that are engaged on a regular basis in the workplace. Litigation is a costly and time-consuming way of resolving disputes over these rights. It can cause hard feelings, the outcome is unpredictable, and it can take a long time to resolve, leaving the dispute as a source of tension and conflict in the workplace. Accordingly, unions and employers usually try to settle disputes early by agreement, if they can.

*Example:*

*The union alleges overtime is payable for certain work done by employees, totalling \$8,000. The employer says no overtime is payable: it has already paid for the work correctly, at straight time.*

*Litigation option: Taking the dispute to arbitration would cost the parties thousands of dollars each, and lost time, effort and delay. They would spend time and energy arguing with each other. They do not know what the outcome will be, and it may be months away.*

*Early settlement option: The parties agree to settle the dispute on the basis that the Employer pays the employees \$4,000, and changes the way it assigns the work in the future, so that the problem no longer arises. They have resolved the dispute.*

In labour relations, the parties’ ongoing relationship may help them resolve disputes quickly by agreement. The disadvantages of litigation apply to both sides. When each side knows the other party *could* litigate an issue if it wanted to, but will accept a reasonable settlement if one is offered, then there is incentive for both sides to agree to a timely and reasonable settlement, without litigation.

A union may be able to resolve many employees’ grievances by early settlement at the same cost as it would take to fully litigate the grievance of one employee. The union’s ability to make these choices allows the employees as a group to get timely, affordable

access to justice – i.e., enforcement of their collective agreement rights. The trade-off in this system is that the employees have chosen the union to make the decisions about individual grievances. The union may refuse to proceed with a grievance, or settle it, even where the individual employee wants it to go to arbitration.

### **Efficient dispute resolution, where settlement not possible**

If the union and employer cannot settle the dispute by agreement, they may still try to resolve it as efficiently as possible. There are a variety of different approaches they may choose, depending on the nature of the dispute. They may engage in an “**alternative dispute resolution**” (ADR) process, such as **mediation** or **mediation/arbitration**. Where litigation *is* necessary, they may “narrow” the issues in dispute, by agreeing on whatever they can. They may **concede** some points, and litigate only what is really in dispute. They may also have an “Agreed Statement of Facts”, rather than calling witnesses. This sort of cooperation is encouraged by the Code.

### **The union represents the *group* of employees**

The union represents the interests of all the employees, not just the individual grievor. The employees’ interests include conserving the union’s resources (its financial resources, and its credibility with the employer), to be used where they are most effective, rather than on grievances where the union doesn’t think they have a good case. The employees as a group have given the union the right to exercise its judgment about what to do with each grievance. The union may refuse to proceed with a grievance, if it believes the grievance does not have enough merit. It may also settle a grievance, if it believes that the settlement is reasonable, and pursuing the issue further would not be worthwhile. The Board does not second-guess unions when they make these types of decisions.

### **The individual grievor does not have a veto over how the union resolves the grievance**

Settling disputes often requires compromise. Both parties to a dispute often cannot get everything they want. The same is true of adjudication. But to settle a dispute by agreement, the parties must decide to make compromises themselves, rather than waiting for an adjudicator to impose a resolution. Parties often believe such compromise is worthwhile, to resolve the dispute by agreement and avoid the cost, delay and uncertainty of litigation.

The individual employee involved in the grievance, however, may disagree with the settlement his or her union is considering making with the employer. The grievor may prefer to litigate the matter. But the employees as a group have chosen the union to make

these decisions. Thus, while the union is expected to get the individual employee's input, it is ultimately the union's decision to make.



## Appendix “B”: Examples: Dispute Resolution in a Unionized Workplace

Described below are two examples of workplace conflicts and how those disputes might be resolved in a unionized workplace. These examples illustrate some of the principles described above in Appendix “A”. The facts of these examples (or variations on those facts) are used throughout this Guide to illustrate the scope of Section 12, how to prepare a Section 12 complaint, and other topics.

### Sample Workplace: Laura’s Fresh Fruits & Vegetables

*Laura’s Fresh Fruits & Vegetables (the “Employer”) is in the business of preparing and packaging a variety of fruit and vegetable products, which it sells to grocery stores. It has a bargaining unit of 40 employees, who have chosen to be represented by the Fruit and Vegetable Workers Union, Local 33 (the “Union”). Some of the employees in the bargaining unit are production employees who prepare and package the product, and some work in office and sales jobs. In addition, there is a separate small retail operation that sells fruits and vegetables directly to consumers.*

### Example #1: Dismissal for just cause

#### Dispute

*Martin, a production worker, did not follow the procedure in the Employer’s Handbook for washing the vegetables. He instead used his own procedure, which he felt was better and more efficient. He had been disciplined for doing this in the past. The Employer had warned him not to do it again, and to use only the procedure specified in its Handbook. However, on this particular day, he was frustrated because he was very busy and he felt other employees were not pulling their weight, so he decided to use his own procedure to save time.*

*By the time the Employer found out, it had packaged a number of products and loaded them for delivery. It decided it had to unload the products and repackage them after re-washing them using its standard procedure. That was the procedure it said it would use, when it was certified for safe food handling.*

*In light of Martin’s history of similar incidents, the Employer decided to dismiss Martin from employment. Martin had only worked for the Employer for two years and these problems had persisted, in spite of [progressive discipline](#). The incidents had become costly and risked the Employer’s reputation. The Employer fires Martin.*

### Resolution

*The Union files a grievance, alleging there was not “just and reasonable cause” for Martin’s dismissal. The Union talks to Martin and his supervisor, Linda. Linda says Martin is otherwise a good worker, but the Employer cannot continue to tolerate his refusal to follow its directions. It cannot afford to supervise Martin all the time, and does not want to risk another incident.*

*During the course of the grievance procedure, the Union suggests the Employer could address its concern with a one-month suspension and a warning that if Martin fails to follow the Employer’s lawful directions once more, he may be fired. The parties agree they would be prepared to settle the grievance on these terms (the “Settlement Agreement”).*

*Martin will not agree to the Settlement Agreement. He wants the grievance to go to arbitration. He says his food washing procedure is better and more efficient than the Employer’s, and the Union can verify this. In Martin’s view, an arbitrator would never uphold dismissal for using a better procedure. The Union disagrees with Martin: it recognizes that as a matter of labour law, the Employer was entitled to direct Martin to follow its procedure. His refusal to do so was insubordination. Given Martin’s fairly short length of service, previous disciplinary history, and his continued insistence on doing things his own way, the Union decides his case is unlikely to succeed at arbitration.*

*Accordingly, the Union and the Employer agree that Martin’s employment will be **reinstated** on the basis of the Settlement Agreement.*

## **Example #2: Interpersonal conflict**

### Dispute

*At the same workplace, two office employees – Vanessa, a Sales Assistant, and June, an Accounts Receivable Clerk -- have developed a chronic, ongoing interpersonal conflict. It has now escalated to the point where they no longer cooperate in their jobs, and each accuses the other of harassment. The Employer has attempted to resolve the conflict, without success. The conflict is disrupting the work of the office and causing stress among the other employees. The Employer has issued a Letter of Reprimand to each employee. That did not end the conflict and difficulties in the workplace. It is considering firing one or both of them if the conflict cannot be resolved.*

### Resolution

*Vanessa and June each blame the other for the conflict, and each wants the Union to file a harassment grievance on their behalf. The Union talks to the Employer and the other office employees, who say the conflict is very stressful for them and is seriously disrupting work in the office.*

*The Union and Employer discuss possible solutions. There is a vacancy for a clerical position in the Employer's adjacent retail sales operation. Neither Vanessa nor June wants to transfer into that position, which involves less responsibility and lower pay. However, the Employer suggests transferring one of the employees there, as an alternative to possibly dismissing one or both of them. It suggests transferring Vanessa, because she also got involved in conflicts with the other employees in the office group, and because June had experience which made her essential to the functioning of the main office.*

*After negotiation with the Employer, the Union says it is prepared to agree to Vanessa's transfer, on the condition that she keep her current rate of pay in the new position. Vanessa does not agree with this. She points out that under the collective agreement, an employee is entitled to retain her position. She wants to keep working in the office, and strongly believes the conflict to be June's fault. She wants to go to arbitration. Ultimately however, the Union agrees to a settlement agreement with the Employer. The agreement provides that Vanessa will be transferred to the retail sales position, but will retain her current pay and benefits. In light of the transfer, the Union refuses to proceed with Vanessa and June's harassment grievances against each other, since it should no longer be an issue.*

The above examples are situations where the grievors may be unhappy with the outcome, and may file Section 12 complaints. However, both examples are situations where there is no violation of Section 12. It is common for unions and employers to resolve disputes by agreement, without litigation.

## Appendix “C”: Common arguments that overlook the nature of union representation

The examples below will illustrate common arguments that overlook the nature of union representation and do not establish a violation of Section 12. (How to write an *effective* complaint is explained in [Section 1](#) and [Section 2](#) of this Guide.)

In Example #1, Martin may file a Section 12 complaint arguing:

*I was fired even though I had done nothing wrong, and the Union didn't represent me at all. The Union is my representative and they didn't even take my side. In fact, they conspired with the Employer against my interests. They made an agreement with the Employer without my consent that gives me a one-month suspension and leaves me one step away from termination. I want justice. I ask the Board to send my dismissal grievance to arbitration: I am entitled to my "day in court".*

Vanessa in Example #2 may file a Section 12 complaint arguing:

*The Union didn't represent me at all. It agreed with the Employer to transfer me, against my will, into a different job, contrary to the collective agreement. And it also discriminated against me: nothing happened to the person who harassed me, June, who got to stay in her job.*

### “The Union didn't represent me at all”

Both complainants argue that the Union “didn't represent them at all”. By that they mean the Union did not act to advance their interests. But a union is not an individual representative, like a lawyer or real estate agent. It is not necessarily required to pursue the individual's interests (e.g. by taking a matter to arbitration) in any given case. It is free to use its judgment as to the best course of action in an individual case.

### “The Union didn't take my side”

Both complaints also describe things in a way that sees the situation only from the complainant's perspective. Martin says he had “done nothing wrong”. Vanessa says June was the one at fault in their conflict.

Everyone may have a different perspective in a dispute. The Union must take those *different* perspectives into account, if it is going to resolve the dispute. While Martin believes he never should have been disciplined, Linda, his supervisor, may believe he should not still be employed with the Employer. The Union and Employer may decide

that an arbitrator would be likely to decide in the middle of these two perspectives – with a result something like the Settlement Agreement – and they may agree to resolve the dispute on that basis. Martin may see that as the Union “not taking his side”. But the Union is not required to see things only from one person’s side – in fact, it couldn’t resolve the dispute if it did.

Vanessa makes a similar argument to Martin’s: she says the Union “didn’t represent her” because it didn’t act in her interests. But the Union is the representative of Vanessa *and* June, *and* all the other employees, and it is free to agree to a solution it believes is in everyone’s interests, in this case solving the problem without litigation and further conflict.

**“The Union reached an agreement with the Employer contrary to my interests”**

Both complainants also object to the fact that the Union has reached an agreement with the Employer. As noted earlier, this is a common feature of union representation. It helps the employees as a group resolve many more disputes, far more efficiently.

The complainants argue that the agreements are “contrary to their interests”. But in reality, this argument simply reflects the fact they have a different perspective on the Employer’s disciplinary allegations against them. The agreements represent a “middle ground” between the Employer’s perspective and the complainants’ perspective. As noted earlier, this is often necessary to resolve a dispute. Even if the Union and the Employer agree on a different view than the grievor, that does not mean it is a “conspiracy” or the Union has violated the Code. The employees as a group have chosen the Union to use its own judgment as to the merits of the grievance.

**“I am entitled to my ‘day in court’”**

Martin argues he is “entitled to his day in court”. But in a unionized environment, individual employees cannot insist that a matter be litigated (i.e., taken to arbitration). That decision is up to their union.

**“The Union contravened the collective agreement”**

Vanessa also argues her transfer was contrary to her rights under the collective agreement. But the collective agreement is an agreement between the Employer and the Union. While they must consider the terms of the collective agreement, those parties are free to reach a settlement despite its terms, for legitimate reasons. In that way, they can be creative in finding common-sense solutions to problems.

### **“The Union didn’t argue the grievance fully or properly”**

What if the Union *did* take Martin’s grievance to arbitration, but he says they didn’t argue it fully or properly? For example, assume the facts in Example #1 are different:

*The Union and Employer cannot agree on a settlement regarding Martin. The Employer is not prepared to take him back under any circumstances. The Union takes his dismissal grievance to arbitration, in order to argue that dismissal is too harsh a penalty.*

*Martin also wants the Union to call evidence that his cleaning procedure was better than the Employer’s. The Union believes that, in light of Martin’s specific prior warnings for not using the Employer’s procedure, this evidence is not worth calling. It believes that getting into that issue would expand the length and cost of the hearing, and would not help the case. It decides to argue only the issue of whether dismissal was too harsh a penalty.*

Martin may argue:

*The Union didn’t even argue the central issue in the case: the fact that the procedure I used was in fact better than the Employer’s.*

It is up to the Union to decide *how* to litigate a case, as well as *whether* to litigate it. As noted earlier, it is common for unions and employers to “narrow” the issues so that they litigate only what needs to be litigated. Here, the Union believed an arbitrator would find that the Employer was entitled to direct Martin to use its own procedure and that he should have. The only real issue, in its view, was whether dismissal was too harsh a penalty. It decided not to call evidence about Martin’s cleaning procedure because it would increase the length and cost of the arbitration without really advancing Martin’s case. Those are legitimate reasons. Thus, it is a judgment the Union is entitled to make.

### **Conclusion**

As the above examples show, a union is entitled to refuse to proceed with a grievance, or withdraw or settle a grievance without the grievor’s consent. As long as it considers the relevant information and takes these steps for legitimate workplace reasons (such as a grievance’s lack of merit, or its effect on other employees), the Board cannot interfere. The Board can only interfere if a Section 12 complaint establishes that the union used its authority in a way that is arbitrary, discriminatory or in bad faith. These concepts are discussed in [Section 1](#) of this Guide.

## Appendix “D”: Glossary of Common Terms

The following are terms you may see used in this Guide, in the Board’s Section 12 decisions, in arbitration decisions, or by unions and employers dealing with a dispute.

**allege / allegation:** saying that a certain fact is true. (*“The Union alleges that I failed to co-operate in their investigation of my grievance. I dispute that allegation, for the following reasons....”*)

**alternative dispute resolution (“ADR”):** Different ways of resolving a dispute besides adjudication – such as mediation.

**alternatively, or in the alternative:** a party may use these terms to set out a number of differing positions. It says its first position, but – if the adjudicator does not accept that – then “alternatively” or “in the alternative”, its second position. (*“The Union was arbitrary because it failed to consider the other job options I had told it were available. Alternatively, if it did consider them, it was arbitrary because it never discussed any of them with me.”*)

**adjudication:** a way of resolving disputes where a neutral person (the adjudicator) decides the issue after hearing the arguments of the parties. Court, arbitration and Labour Relations Board decisions are all examples of adjudication.

**apparent contravention:** under Section 13 of the Code, the Board must dismiss a complaint that does not set out sufficient evidence to establish an apparent contravention of Section 12. An “apparent contravention” means that the details set out in the complaint, *without any response from the union*, would establish that the union breached Section 12. It is sometimes referred to in legal terms as a “*prima facie* case”.

**arbitration:** an adjudication process, similar to a court but less formal, in which a neutral person (the arbitrator) decides the dispute based on the evidence and argument of the parties.

**argument:** the reasons why a party says the adjudicator should reach a certain conclusion. (*“The facts are set out above. Here is my argument as to why the Union’s representation violated Section 12.”*)

**bargaining agent:** see “exclusive bargaining agent.”

**bargaining unit:** the group of employees represented by the union.

**Case Administrator:** a person at the Board who deals with processing cases. You may receive a telephone call, or a letter requesting submissions, from a Case Administrator.

**complaint:** an allegation that a certain section of the Code (such as Section 12) has been violated.

**complainant:** the person who brings a complaint under the Code.

**concede:** to decide not to contest something; to accept the other party's position. *(The Union conceded that the grievor was late for his shift, but argued it was for reasons beyond his control.)*

**culpable:** blameworthy. **non-culpable:** not blameworthy, but may still have employment consequences. *(The parties argued over whether the grievor's addiction-related behaviour was culpable or non-culpable.)*

**defer:** to allow another body to make the decision.

**Deputy Registrar:** a Board official who may contact you about your complaint.

**discipline:** employment consequences imposed as a penalty for employment misconduct, such as a suspension or letter of reprimand. See also: progressive discipline.

**discretion:** freedom to choose from a variety of possible decisions. *(Unions have a broad discretion in deciding what to do with a grievance.)*

**distinguishable:** not similar in some important way. Usually used to refer to a prior legal decision, to say that it is not similar enough to the present case to be useful in deciding it. *(That case is distinguishable, because the grievor in that case had prior warnings for the same offence.)*

**exclusive bargaining agent:** the union is the employees' "exclusive bargaining agent": the representative of the employees, in all matters relating to the collective agreement governing their work. *(The employer cannot settle a grievance directly with an employee; it must deal with the union, as the employees' exclusive bargaining agent.)*

**exclusive bargaining agency:** the union's authority to represent the employees in all matters relating to the collective agreement (and potentially in relation to some other employment-related statutes, such as the Code).

**exhaust internal appeals** or **exhaust internal remedies** – complete any internal union appeals that are available.



**expeditious:** reasonably quickly.

**latitude:** see “discretion”.

**legislation:** laws enacted by the Legislature.

**litigate:** to engage in litigation – i.e., the adversarial process leading up to resolving a dispute by adjudication. (*If the parties cannot settle the issue, they will have to litigate it at arbitration.*)

**litigation:** the process where a dispute is resolved by opposing parties presenting evidence and argument in adjudication. Lawsuits in court, grievances going to arbitration, and complaints to the Board under the *Labour Relations Code* are examples of litigation.

**grievance:** a complaint that the collective agreement has been breached.

**grievance procedure:** the process set out in the collective agreement for dealing with grievances. Pay particular attention to any time limits in the grievance procedure.

**grievor:** the employee who is claiming a breach of the collective agreement in a grievance. It is the union, not the grievor, that has the right to decide whether to pursue a grievance. Some collective agreements allow employees to initially *file* a grievance without the union’s approval, but it is the union’s decision whether to pursue it after that. (*An employee is dismissed, and files a grievance (or asks the union to file a grievance) over the dismissal. That employee is the grievor.*)

**infer, inference:** a conclusion about a fact, based on other facts. (*“The Union says I should infer, from the fact that the complainant rejected the last offer, that he would have rejected this one too. The complainant says I should not make that inference, because the two offers were different.”*)

**Information Officer:** A person at the Board who responds to general inquiries and provides general information about the Code, the Board, and its processes. Neither the Information Officer, nor other Board staff, is responsible for giving you advice as to what to do in your specific situation. For advice, you may wish to consult a lawyer.

**just and reasonable cause:** the Code requires that every collective agreement contain a provision requiring just and reasonable cause for discipline and dismissal. (A different standard may apply during an employee’s initial probationary period.) It is up to the union to decide whether to proceed with a grievance alleging that an employee’s discipline, or dismissal, is without just cause.

**material facts:** facts that the Vice-Chair decides are important to his or her decision. If there are “material facts in dispute”, then the Vice-Chair may hold an oral hearing, to decide what version of the facts is most likely true, based on the evidence presented.

**mediation:** where a neutral third party assists the parties to the dispute to try and resolve the dispute by agreement.

**mediation/arbitration:** the parties try to resolve the dispute through mediation, but if they can't, then the mediator becomes an arbitrator, and adjudicates the dispute.

**merit, merits:** (1) whether a party's case is likely to succeed or not. (*The Union decided the grievance did not have enough merit to proceed.*) (2) The substance of a dispute. (*The Board does not decide the merits of a grievance on a Section 12 complaint.*) (“*The Union says the complaint should be dismissed on the basis of timeliness, as well as on the merits.*”)

**mitigating factors:** facts of a case that would indicate a lesser penalty is appropriate. “**aggravating factors**” are the opposite: facts that would indicate a greater penalty is appropriate.

**particulars:** specific, detailed facts of what a party alleges. (“*The complainant says the Union failed to adequately investigate his grievance. However, he has not provided particulars of that allegation, such as what in particular the Union failed to investigate and how it could have made a difference in his grievance.*”)

**party:** a person or organization with legal rights to participate in a dispute. (*The employer is a party to a Section 12 complaint, because it may be affected by the remedy if the complaint is successful.*)

**premature:** too early. For example, a Section 12 complaint that is filed before the union has actually made its decision may be rejected as “premature”.

**progressive discipline:** increasing penalties for repeated misconduct.

**prima facie case:** see “apparent contravention”.

**provision:** a part of a law, a contract or other legal document. (*The provisions of Article 10 of the collective agreement deal with absence for medical reasons.*)

**reinstatement:** being put back in a job. (*The grievor alleges his dismissal was without just and reasonable cause, and seeks reinstatement.*)

**relevant:** tending to prove something in the dispute. (*The grievor was dismissed for repeatedly being late, based on his time-cards. Whether the Employer's time-card system may be inaccurate is relevant. Whether the Employer treats its employees poorly and pays them too little is irrelevant.*)

**remedy:** what an adjudicator awards if the complaint, grievance or lawsuit is successful.

**settle, settlement:** to resolve a dispute by agreement.

**statute, statutory:** a statute is legislation. "Statutory" means relating to a statute. (*Section 12 contains three statutory restrictions on a union's representation.*)

**submissions:** the facts and argument that a party wishes the adjudicator to consider. (*"In response to the Union's submissions, I wish to make the following points. In paragraph 3, the Union submits I was unavailable, and therefore it could not get the relevant information from me. That is not the case: I had given my cell number...."*) All submissions to the Board must be sent to the other parties (e.g., the respondents) as well.

**untimely:** A complaint that is not submitted within a reasonable time may be dismissed as "untimely". See p. 19.

**Vice-Chair:** Board adjudicators who adjudicate issues under the Code, including Section 12 complaints.

**unsolicited submission:** A submission that the Board has not requested. In order to ensure an orderly and efficient process, the Board requests submissions where appropriate and generally does not consider unsolicited submissions.

## **Appendix “E”: Judd and Summaries of Other Board Decisions**

### [Judd decision](#)

Extracts:

[Union representation](#)

[Scope of s. 12 generally](#)

[Bad Faith Representation](#)

[Discriminatory Representation](#)

[Arbitrary Representation](#)

[The Section 12 complaint process](#)

[Summary of Key Section 12 decisions](#)