

## #26 TRANSITIONAL MARSHALLING OF PROCEEDINGS

### I. INTRODUCTION

Amendments to the *Labour Relations Code* in 2017 gave the Labour Relations Board new authority to “marshal” legal proceedings concerning employment. This is the first legislation of its kind in Canada. There are no near precedents to draw upon about when and how this authority should be exercised. Much of the early guidance that the Board can give the labour relations community about marshalling of proceedings will therefore take the form of published orders and decisions as the Board develops its approach. The purposes of this Transitional Bulletin are to acquaint the community with the concept of marshalling of proceedings; to outline the legislative provisions that apply; and to state in preliminary form the process that the Board will follow in applications that invoke the power to marshal proceedings.

This Bulletin addresses the following topics:

1. What is marshalling?
2. What is the problem that marshalling is designed to address?
3. To what proceedings does the power to marshal apply?
4. What tribunals and other decision-makers may be affected?
5. What can be contained in a marshalling order?
6. What is the process that the Board will follow in an application to marshal proceedings?

This is a Transitional Bulletin about new legislative powers. Any guidance it gives must be considered provisional and incomplete. The Board will review the topic of Marshalling of Proceedings on an ongoing basis with a view to issuing amended Transitional Bulletins and ultimately a permanent Information Bulletin on this topic.

### II. MARSHALLING: THE CONCEPT AND THE OBJECTIVES

#### A. *Marshalling Described*

To marshal proceedings is to regulate access to the many decision-makers that can decide employment-related disputes in the collectively bargained workplace. It can involve staying proceedings or placing conditions on the conduct of proceedings.

The overall objectives of marshalling are to achieve efficiencies in complex employment cases involving multiple forums and to prevent abuse of legal processes, while protecting the rights and interests of all parties.

## **B. *The Problem Addressed***

The problem that marshalling addresses is that jurisdiction to resolve employment-related disputes is divided among many decision-makers. This lends itself to confusion over which forum to turn to in order to address a problem. It can result in duplicative proceedings; interlocutory disputes over which forum and what process should govern; sometimes abuse of process; and the expense and delay that comes from all these things. Until now, there has been no single tribunal with authority to supervise and co-ordinate the many adjudicative processes that can come into play in a workplace dispute.

Some employment tribunals have a power to “defer” or suspend their own proceedings when another decision-maker can deal or is dealing with the dispute: see, e.g., *Labour Relations Code*, s. 16(4)(d); *Alberta Human Rights Act*, s. 22(1.1). The concept of marshalling proceedings goes further. It involves giving one employment tribunal the authority to direct whether, when and under what conditions it *and other decision-makers* will exercise their powers to resolve and decide employment-related disputes. The legislative choice was to give that power to the Labour Relations Board.

## **C. *Employment tribunals affected by Marshalling***

Employment rights can be individual or collective. They may be contractual, statutory or a blend of both. Different decision-makers exist to enforce these rights:

*Labour relations boards* are the statutory tribunals that regulate the creation and dissolution of collective bargaining relationships, oversee and regulate the process of collective bargaining, and enforce the legislated rules about unfair labour practices – including the obligation of trade unions to fairly represent the employees in their bargaining units.

*Grievance arbitrators* are decision makers created by contract, although in response to a statutory direction to create a way of resolving contract disputes. Arbitrators are given the power to hear and decide disputes over the interpretation, application and alleged violation of collective agreements. This includes things like wage disputes, benefit entitlements, promotions, and whether discipline or dismissal was for just cause.

*Human rights commissions* are statutory tribunals that investigate and enforce anti-discrimination statutes in areas like employment, access to services customarily available to the public, and tenancy. Historically, by far the largest number of discrimination complaints arise in the area of employment. Human rights statutes typically create *hearing tribunals* separate from the investigative arm of the commission to make binding decisions on complaints that are not settled.

*Employment standards* branches are government offices staffed by investigators who receive and investigate complaints that one or more of the minimum employment standards applicable to all employees – like minimum wages, vacation entitlements, overtime premiums and termination pay – have not been observed. Employment

standards statutes create independent *umpires* who sit on appeal from employment standards orders. Employment standards laws apply to unionized as well as non-unionized employees.

*Workers Compensation Board and Appeals Commission:* These are bodies created to administer the statutory insurance scheme to protect and compensate employees for work-related illness and injury. The Board administers the complex insurance scheme and determines entitlement to benefits at first instance. The Appeals Commission hears appeals from determinations of the Board.

*Occupational Health and Safety (“OHS”) Officers* investigate and enforce statutory duties to provide a safe workplace and ensure the health and safety of workers. The *Occupational Health and Safety Council* hears appeals from orders of OHS Officers.

*Office of the Privacy Commissioner:* This is the statutory officer who administers and enforces both privacy legislation and public access to information. Many disputes over privacy play out in the context of the employment relationship.

*School Act Board of Reference:* The Board of Reference is a statutory arbitration body created before the development of modern collective bargaining legislation, that applies only to teachers and their employers. It hears appeals from termination or suspension of a teacher, or removal of a designation (like a principalship).

These are only the tribunals that most often exercise decision making powers in relation to employment. This list is not meant to close the categories of tribunals that might be addressed by a marshalling order.

The marshalling provisions of the *Code* do not apply to civil proceedings in the Courts. The *Code* also specifically excludes from the scope of marshalling orders:

- Professional disciplinary proceedings;
- Proceedings under the *Provincial Offences Procedure Act*; and
- Proceedings under the *Ombudsman Act*.

#### ***D. Examples of Multiple Proceedings Amenable to Marshalling***

There are many fact situations where two or more decision-makers can have complementary, overlapping or even alternative authority to make a decision in the case. Examples of common situations include:

- An employee complaint about discrimination on the basis of gender could be a complaint under the *Human Rights Code* or a grievance under a “no discrimination” clause of a collective agreement (either an express clause, or one deemed to exist because the *Human Rights Code* is legally considered to be incorporated into the collective agreement).

- A claim for unpaid wages can be made under the *Employment Standards Code* or by a grievance alleging breach of a collective agreement wage schedule.
- A claim for unpaid disability benefits under a collective agreement can possibly involve a grievance, a human rights complaint alleging discrimination on the basis of disability, and claim evaluation and adjudication proceedings under the Workers' Compensation Act.

Many other fact situations can arise that raise the possibility of multiple proceedings.

***E. Individual and Collective Rights: Marshalling and the Duty of Fair Representation***

Another fact complicates the resolution of employment disputes among the many possible decision makers. Some employment rights belong to the individual employee, who has an individual right to seek enforcement. Human rights statutes create such individual rights, for example. Other employment rights are collective: the right either belongs to the collectivity of employees acting through their trade union, or must be enforced through the collective representative which can file, refuse to file, withdraw or settle the legal proceeding. Collective agreement grievances generally fall into this category. There is a third category of cases in which the right belongs to the individual employee, but trade unions voluntarily provide assistance and representation as a service to the employees in their bargaining units. This is sometimes the case in workers compensation matters.

When trade unions deal with employee grievances, they have carriage and control over the grievances. They are entitled to decide whether to file the grievance, whether to withdraw or settle it once it is filed, and how to best manage the grievance and arbitration procedure. The union either retains legal counsel to handle the case, or assigns the case to an experienced representative employed by the union. The union bears the expense of representing the employee and arbitrating the case. In doing this, the union is subject to a duty to fairly represent the employee (see *I.B. #18, The Duty of Fair Representation*).

In other proceedings, like complaints under the *Alberta Human Rights Act*, the employee is a party to the proceeding and so has the primary or exclusive right to direct, withdraw or settle the matter. Depending upon the forum, the employee may be represented by someone employed or retained by the government, or be self-represented, or be expected to instruct and pay for any lawyer or other representative that acts on their behalf.

In fact situations where multiple decision makers can be involved, there may be uncertainty about the extent of the trade union's power to direct the litigation, settle or withdraw the proceeding. Employers may be reluctant to resolve disputes if the trade union is unable to negotiate and compromise all elements of the workplace dispute. The *Code* contemplates that a marshalling order can be used to clarify the extent of the trade union's role and authority in representing a member of its bargaining unit where multiple decision makers are or could become involved.

## ***F. Marshalling and Issue Estoppel***

Marshalling orders make use of existing legal rules that restrict the relitigation of disputes. Marshalling orders can direct a dispute to one proceeding in the knowledge that a decision by one tribunal can result in an *issue estoppel*. Issue estoppel is a legal rule that prevents subsequent tribunals from hearing and deciding again the identical factual or legal issue between the identical parties. Marshalling proceedings will therefore try to identify the tribunal that can most appropriately or conveniently determine the issue for all the possible forums. Because issue estoppel will prevent the same issue from being re-litigated, however, the *Code* also emphasizes the need for affected employees to understand that proceeding by arbitration is likely to determine their rights in all the possible forums.

## **III. THE STATUTORY PROVISIONS**

### ***A. Scope of the Marshalling Power***

Marshalling is only available in “a workplace that is subject to a bargaining relationship between a bargaining agent and an employer or employers’ organization”, i.e., a unionized workplace: *s. 67.1(4)*.

Marshalling is available to regulate only “proceedings that arise out of common circumstances, including a common set of legal issues or factual circumstances, or both”: *s. 67.1(4)*. Whether or not two or more proceedings are legally and factually separate may often be a difficult issue to determine. Parties facing alternative or overlapping proceedings need to consider this requirement carefully and take care in satisfying the Board that the proceedings qualify for a marshalling order by this standard.

A marshalling order may be sought in respect of “any outstanding or anticipated proceedings”. An applicant therefore does not need to wait for all possible related proceedings to be commenced before seeking an order: *s. 67.1(2)*.

### ***B. Purposes***

The *Code* expresses the purposes of a marshalling order this way in section 67.1(3):

- To avoid duplicate or unnecessary proceedings,
- To ensure that any necessary preliminary issues are dealt with first and in the appropriate forum,
- To avoid the litigation or re-litigation of matters already decided in another forum or that can reasonably and fairly be determined in another forum, and
- To clarify the extent of the trade union’s duty of fair representation in relation to the various proceedings in issue as they proceed.

### **C. What Can Be in a Marshalling Order?**

The *Code* gives the Board power to do the following things in a marshalling order: s. 67.1(10):

- Direct that grievances or arbitrations arising out of common circumstances be consolidated and heard in one proceeding.
- Where an issue arises in a Board proceeding as well as in proceedings before one or more other decision-makers, the Board can direct the forum that the issue should be decided in, or direct which of several processes should go ahead first.
- Set conditions under which proceedings will continue. The *Code* says that such conditions can include an order or schedule of proceedings, but the scope of the conditions the Board can set is potentially very broad.
- Stay “any proceeding that will be effectively determined by an arbitration or other proceeding”. (See the discussion of issue estoppel, above.)
- Make any other directions agreed upon by the parties, or that are “just and equitable in the circumstances” in the order of the Board.

### **D. What Criteria should the Board apply in making a Marshalling Order?**

The *Code* expressly states certain things that the Board will consider or determine in making a marshalling order:

- That the purpose of marshalling is “to enhance the fairness, cost and efficiency of the proceedings in issue while ensuring that the interests of the parties are protected”.
- That marshalling should be “expeditious” and “not...a source of overall delay”.
- Whether the scope of a bargaining agent’s duty of fair representation, within the context of the proceedings in issue, needs to be addressed.
- Whether an affected employee has given sufficient instructions to the bargaining agent to carry and resolve an arbitration on the employee’s behalf, where the employee has access to other proceedings.
- Whether an affected employee understands that pursuing an issue through arbitration may preclude pursuing the issue elsewhere.
- Specific to arbitrations that might also be the subject of a complaint under the *Alberta Human Rights Act*, whether proceeding by arbitration subject to a duty of fair representation will appropriately investigate the issue and protect the employee’s interest.
- The *Code* also specifically notes that a marshalling order may not bind the Director of the Human Rights Commission in exercising the Director’s powers under section 22 of the *Alberta Human Rights Act* (i.e., to refuse or defer a complaint where another forum is dealing or can more appropriately deal with the issue). The *Code* acknowledges, however, that the Director “may be informed or influenced” by marshalling proceedings.

## **IV. PROCESS CONSIDERATIONS**

### **A. Statutory Provisions**

The *Labour Relations Code* contemplates marshalling as an expeditious process presided over by a Chair or vice-chair sitting alone and which does not add materially to the overall time required to resolve the parties' disputes. The *Code* expressly states the following elements of the procedure to be followed in a marshalling order application:

- Any party to a proceeding may apply for an order: s. 67.1(2);
- An applicant for a marshalling order must provide (s. 67.1(5)):
  1. Details of the proceedings to be encompassed by the order;
  2. Any initiating and responding documents already filed in respect of those proceedings;
  3. The parties and persons that may be affected by the application;
  4. A description of the relief sought; and
  5. "Any other information requested by the Board".
- On receipt of the application, the Chair is to assign the Chair or a vice-chair to hold a hearing: s. 67.1(8).
- The Board must notify affected persons or parties of the application: s. 67.1(6).
- The Board must notify other adjudicative bodies if a proceeding under that body's enactment would be affected by the marshalling order: s. 67.1(6). In the case of a matter under the *Alberta Human Rights Act*, the Board must notify the Director: s. 67.1(7).

### **B. Commentary**

It is expected that the most frequent applicants for marshalling orders will be employers affected by several alternative or overlapping proceedings, either in progress or anticipated. There may also be applications filed by trade unions that need to have the extent of their obligations clarified in a situation of multiple proceedings. In either case, the Board will require a high standard of information and disclosure in the application in order that it can meet its obligation to proceed expeditiously. It is expected that there will not be an extensive pre-hearing process in most cases.

Applications should be made by letter to the Board's Executive Director or Manager of Settlement. They should describe the parties to and persons affected by a dispute or group of related disputes and provide the Board with contact information for them, if that information is in the applicant's possession.

As s. 67.1(5) provides, the applicant must provide the Board with any initiating and responding documents in those proceedings underway that may be affected by the marshalling order sought. This is a minimum requirement. If applicable, the applicant should also supply any procedural directions, interim orders or decisions already made by the other body or bodies so that the Board has a complete picture of the proceedings in question.

The applicant must provide a “concise description of the common circumstances” that give rise to the proceedings to be marshalled. Often a chronology will be helpful. Conciseness, however, should not be at the expense of informativeness. Within reason, the application should afford the Board a full picture of the entire litigation situation, current or anticipated, that the marshalling order is sought to regulate.

It is expected that when a marshalling application is received, the Board will appoint an Officer to the file to assist the hearing Chair or vice-chair, to ensure that the application is complete, to ensure that all affected parties, persons and adjudicators have notice of the application, and to coordinate any pre-hearing process that the particular application demands. The hearing Chair or vice-chair will examine the application as soon as possible after receipt to determine whether and what additional information may be required and to decide upon the appropriate approach to management of the marshalling application.

The Board may, but need not, seek a reply from any of the persons or parties affected by the application. The Board will balance the need for information against its requirement to proceed expeditiously. It is expected that in many cases, a reply will be sought in order to supplement or correct the information in the application and to determine whether or not other persons or parties affected oppose aspects of the application.

Parties can anticipate that marshalling hearings will be set on ambitious time frames, and that dates will usually not be delayed significantly to accommodate the parties’ or their counsel’s calendars

The type of hearing used in a marshalling application is in the discretion of the hearing Chair or vice-chair. The hearing Chair or vice-chair may direct that the hearing will be of the informal type similar to the Board’s existing Resolution Conference procedure.

The Board may, through its Officer or Chair and vice-chair, seek information from other tribunals as to its processes generally or as to the history of any affected proceedings before it.

It is possible that other affected tribunals may seek to provide information or submissions to the Board in the course of marshalling proceedings. Although the Board reserves its opinion on whether and to what extent other tribunals may be involved in any particular marshalling proceeding, it is expected that the Board will generally be willing to receive information from other tribunals that explains the tribunal’s rules and procedures or that places relevant statutory materials and jurisprudence before the Board to assist it. Tribunals may generally take guidance from the principles developed by the Courts as to the appropriate role of the tribunal in an application for judicial review.

Like other Board decisions, marshalling orders are amenable to variation by use of the Board’s reconsideration power. Particularly where it is unclear what course certain proceedings may take or what contingent events may occur that affect the litigation, the Board may proceed cautiously. Where appropriate, the Board may elect to make interim or partial marshalling orders with the intent of revisiting and, if necessary, varying them later.