ALBERTA LABOUR RELATIONS BOARD

INFORMATION BULLETIN

#6 APPLICATIONS FOR RECONSIDERATION, JUDICIAL REVIEW AND STAYS

On September 30, 2022, the Board released its decision in *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd. / MM Limited Partnership and Mikisew Fleet Maintenance / MFM Limited Partnership*. This decision provides clarification and guidance on the Board's exercise of its reconsideration powers in applications where a substantial factual or legal error is alleged. The Board is in the process of preparing an updated version of *Information Bulletin #6*. In the meantime, the Board encourages parties who are contemplating a reconsideration application to review this decision.

I. INTRODUCTION

The Board has a general power to reconsider its decisions. It may do so either on its own motion or on the application of a party. This Bulletin outlines the circumstances in which the Board may exercise that reconsideration power. The procedures outlined apply to both timely reconsiderations of decisions issued or to reconsideration of certificates or other Board orders. *See: Section 12(4); Bulletin 22*.

A party unhappy with a Board decision may also apply to the court for judicial review of the Board's decision. This bulletin also outlines the timing and form of the application, the categories of errors that justify court intervention and the standard of review generally applicable to these categories of errors.

Applications for reconsideration or judicial review do not stop compliance with the Board's decision. Parties seeking stay a stay of a Board decision must apply to the Board or to the court. *See: Spray Lake Sawmills v. IWA-Canada Local 1-207 [1989] Alta.L.R.B.R. 414*.

II. REASONS FOR RECONSIDERATION

The circumstances prompting reconsideration include cases where:

- one of the original parties seeks to present new evidence. This evidence must be significant and on point and not reasonably available at the earlier hearing. *See: Section 18(4), (5); IWA Canada Local 1-207 v. Zeidler Forest Industries [1989] Alta.L.R.B.R. 397*.
- accidental slips or mistakes need correction. A formal hearing is not normally held in these cases.
- the Board's interpretation of the *Labour Relations Code* or the *Public Service Employee*

Relations Act conflicts with earlier decisions of the Board not presented to or considered by it in the recent decision. *See: Sections 45 to 49; PSERA Sections 65 to 66*.

- another statute was not considered or the Board's interpretation of another statute conflicts with court decisions. The statute must be important to the outcome of the decision. This ground will not apply if the argument was heard and dealt with in the original decision.
- correction of substantial errors of fact or errors of law is necessary. *See: Timeu Forest Products v. IWA Local 1-207 [1997] Alta.L.R.BR. 430*.
- a fundamental change has occurred in the employer's operation making the current certificates functionally inoperable.
- the name of a party to a certificate or registration certificate has changed. This does not include cases requiring a successor rights application.

A party's failure to cite related case authority during a hearing is not adequate grounds for reconsideration. Similarly, a failure to present available evidence is not a sufficient ground.

III. FORM OF APPLICATION

Parties normally use a letter to apply for reconsideration. Applications must include detailed reasons for the request. *See: Rules of Procedure, Rule 6*.

The specifics needed in the application, where applicable, are:

- names, addresses, phone numbers and contact persons for all parties;
- a statement of the grounds relied upon in support of the application;
- an outline of any new evidence to be introduced and the reasons why it was not available at the earlier hearing;
- references to earlier Board decisions conflicting with its recent decision;
- copies of court decisions or statutes conflicting with the Board's decision;
- details of any certificates affected by the application;
- details of any fundamental change making the current certificates functionally inoperable;
- evidence of support from the affected employees or employers if the application seeks to amend a current certificate or registration certificate; *See: CLRA v. Finch Labour Contractors et al. [1987] Alta. L.R.B.R. 401; Rules of Procedure, Rules 5.1, 6*.
- remedy desired; and
- a statement in a form prescribed by the Board, confirming the application has been served in a manner approved by the Board, on any parties known to be affected by the proceeding or subsequently added by the Board.

IV. TIMING OF APPLICATION

Applications must be timely. The Board discourages the use of reconsideration applications as a substitute for untimely Court proceedings. *See: Section 19; IBEW Local 424 v. TNL Industrial Contractors [1996] Alta.L.R.B.R. 194*.

Unexplained or unreasonable delays by the parties may result in the Board refusing to consider the application. It is up to the applicant to prove that it has acted with reasonable

speed.

The Board weighs the reasons for any delay against the need for Board decisions to be final. It may refuse the application where it determines that finality of the process is more important.

V. DISPOSITION OF THE APPLICATION

The Director of Settlement reviews the application for completeness. When it is complete, the Director may:

- encourage the parties to meet and attempt to resolve the matters or to discuss agreed statements of fact and documents;
- put the matter to a panel on the basis only of the application to reconsider and any reply. This will normally occur when the grounds for reconsideration appear weak, or where there is a parallel judicial review application. The panel may decide not to reconsider or to direct further hearings or submissions. *See: Section 16; Bulletin 4*.
- direct the parties to provide preliminary submissions on the questions of timeliness. This could be at an initial hearing, but more often would be by a request for written submissions on that point.
- advise the parties to provide further submissions in writing so that the Board can decide the case based on those submissions, but usually without a further oral hearing. In such cases the Director of Settlement tells the parties what to address in their submissions, and sets dates for replies and any counter replies. The Chair will assign a panel to review the submissions, once completed and make a decision. The Chair, with the Director of Settlement will decide whether written submissions should address only whether the Board should embark on a reconsideration, or whether they should address that point as well as the merits of the decision under review.
- schedule a hearing into the question of whether the Board should reconsider, leaving the merits of the question to be addressed at a later hearing if necessary. In this case the Chair will give directions to the Director of Settlement on who should sit on the reconsideration panel.
- schedule a hearing into the whole matter. In this case the Director of Settlement's letter to the parties should make it clear that they should attend the hearing prepared to deal with the merits of the case as well as any preliminary arguments about whether the Board should reconsider.

See: Rules of Procedure, Rule 22(1)(k); Bulletin 2; U.A. Local 488 v. Fish Int'l [1985] Alta.L.R.B.R. 85-073.

After considering the submissions or following a hearing, the Board declines to reconsider the matter or varies, confirms or overturns the previous decision.

VI. RECONSIDERATION WITHOUT APPLICATION

The Board usually initiates reconsiderations for three major reasons:

- to correct accidental slips or mistakes. Sometimes the Board notices these mistakes during the processing of a file.

- as a result of judicial review applications. As a result of a successful judicial review, the Court may direct the Board to reconsider or rehear a matter. In other cases, the Chair may direct that the matter be reconsidered by the Board as a result of the Chair's review of each application for judicial review. For example, the Chair may direct reconsideration where natural justice has been denied. The Chair may consider the seriousness of the dispute between the parties and determine that reconsideration could deal with the dispute more quickly than judicial review.
- for major bargaining unit reviews. From time to time the Board determines that it is necessary to conduct a major bargaining unit review. Such a review looks at the bargaining units so as to make them functional. For example, the Board initiated the review of the municipal bargaining units in the City of Edmonton. In such cases, the Board provides notice to the affected parties and usually schedules a hearing to receive their submissions. *See: Re: City of Edmonton Bargaining Units et al [1993] Alta.L.R.B.R. 362*.

If the Board initiates the reconsideration process, it decides whether or not to hold a hearing. If there is a hearing, the parties can bring evidence and argue to vary, revoke or affirm the previous decision. Alternatively, the Board may ask for written submissions from the parties and decide the matter without a hearing. *See: Section 12(4).*

VII. JUDICIAL REVIEW

Judicial Review of Labour Board Decisions

A party having lost before the Board may apply to the Court of Queen's Bench for judicial review of the Board's decision. The application is made pursuant to section 19 of the Code which allows applications seeking a court order in the nature of certiorari (a remedy requesting the Court examine the record before the Board for errors) or mandamus (a remedy seeking the Court direct the Board take certain action).

As with reconsideration applications, a judicial review application does not stay the Board's decision under review. A party seeking to stay the effect of the Board's decision must apply to either the Board or the Court for an order staying the effect of the Board's decision.

Timing and Form of a Judicial Review Application

Section 19(2) of the Code requires that applications for judicial review be filed and served on the Board no later than 30 days after the date of the decision, order, directive, declaration, ruling or proceeding, or reasons in respect of it, whichever is later. Applications are made by way of Originating Notice.

Reasons for Granting Judicial Review and Standard of Review

A party seeking judicial review must demonstrate to the Court that the Board erred in reaching its decision and that such error justifies action by the Court. These errors generally fall into one of four categories each attracting a different level of deference from the Court.

The first category of errors are those arising from the interpretation and application of the Code's provisions to the facts of a specific case including the Board's interpretation of the evidence before the Board. These errors must generally rise to the level of being unreasonable. In judicial review, reasonableness is concerned mostly with the existence of

justification, transparency and intelligibility within the decision-making process. To a lesser degree it is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. As a general rule, the courts have been slow to overturn Board decisions on the basis they are unreasonable.

The second category of errors are breaches of the rules of natural justice. These errors affect the fairness of the proceedings conducted by the Board. They generally fall into two categories. The first is the ability of a party to reasonably understand the case that must be met and the ability to respond to that case. The second is the right to have a decision made by unbiased and independent decision maker. These errors can include such things as failure to give proper notice, failure to provide adequate disclosure of the case to be met, failure to provide adequate opportunity to meet the case to be met, and failure to ensure the panel hearing the matter consists of unbiased and independent members.

The third category of jurisdictional errors are errors which are constitutional in nature. They are typically errors relating to the interpretation and application of the provision of Charter as well as division of power issues. Generally the Board's decisions in this area are reviewed by the Court using a correctness standard. That is, the Court may overturn the Board's decision where it disagrees with the Board's conclusions. Put another way, the Board will generally be entitled to no deference on constitutional issues.

The final category of errors are those which have been described as true questions of jurisdiction or *vires*. True jurisdictional questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. A tribunal must be correct in making such determinations. Courts are to be slow in characterizing as jurisdictional questions or issues which are doubtfully so.

VIII. STAY APPLICATIONS

A party may file a reconsideration application or an application for judicial review. Such applications do not automatically stay a Board decision. A party wanting a stay must file a separate application with the Board.

The form of the application is similar to that for reconsideration. In addition, the applicant must address the three principles summarized in *United Brotherhood of Carpenters and Joiners of America, Local Union No. 1325* v. *Permasteel Construction* [2000] Alta.L.R.B.R. 291:

- Does the applicant's challenge to the Board's order raise a sufficiently strong case that the Board should suspend its process? This enquiry is variously referred to as a search for a "prima facie case," a "strong prima facie case", or a "serious question to be tried". In the context of a Board order, it must be remembered that the question is "rarely preliminary and tentative"; the Board has heard evidence and argument and rendered a decision, and will not be overturned unless it has committed a jurisdictional error or made a patently unreasonable decision. This consideration will generally make a Board stay of its own order more difficult to obtain than an interlocutory injunction, where the issue has not yet been adjudicated in any way.

- Does operation of the Board's process threaten irreparable harm to the party seeking the stay? This means harm not easily compensated in damages or not susceptible of adjustment through collective bargaining solutions.

- Does the "balance of convenience" favour stay of the Board's process? This involves an assessment of the comparative risks or prejudice faced by the applicant and the respondent if they fail in the interim stay application but succeed in the substantive challenge to the Board's decision. In assessing the balance of convenience, the NADP (No. 2) decision particularly emphasizes that time is of the essence in labour relations matters; that parties in labour relations matters often must co-exist after their dispute is resolved; and that there is a public interest in the timely resolution of workplace disputes. See: Miscellaneous Teamsters 987 v. Alberta Brotherhood of Dairy Employees and Driver Salesmen and Northern Alberta Dairy Pool (#2), [1991] Alta.L.R.B.R. 159.

The applicant must satisfy the Board on all three grounds in order to be successful.

The Board handles a stay application in a similar fashion as a reconsideration application. It may put the matter to a panel only on the basis of the application and any reply. Or it may schedule a hearing into the matter. After considering the submissions or following a hearing, the Board may decline to stay its decision or it may stay the decision or part of it.

See also:

Information Bulletins 1 and 4
Rules of Procedure

For further information or answers to any questions regarding this or any other Information Bulletin please contact:

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