ALBERTA LABOUR RELATIONS BOARD

INFORMATION BULLETIN

#25 REVIEW OF ARBITRATIONS - TRANSITIONAL

I. INTRODUCTION

Most collective agreements provide for grievance arbitration as the method for resolving disputes over the meaning or application of the collective agreement. Grievance arbitration decisions by an arbitrator or arbitration panel are final and binding on the parties. However, section 145 of the *Labour Relations Code* provides for review of grievance arbitration decisions/proceedings by the Labour Relations Board on limited grounds. Review by the Board replaces judicial review by the Court of Queen's Bench.

In most respects, applications to the Board under section 145 are similar to judicial review. The Board considers the rationale for the move from the courts to the Board is to ensure the expeditious resolution of reviews and to ensure grievance arbitrations are reviewed by a tribunal with labour relations expertise. The Board's processes are established with these goals in mind.

The Board's powers under section 145 come into effect on September 1, 2017, and apply to an award or proceeding of an arbitrator or arbitration panel made on or after that date (see *Fair and Family-friendly Workplaces Act*, S.A. 2017, c. 9, s. 136(2)).

This transitional Information Bulletin primarily discusses the procedures utilized by the Board. These procedures will be reviewed by the Board on an on-going basis, and the Board welcomes comments from stakeholders about these procedures.

II. APPLICATION

Applications under section 145 must be filed with the Board no later than 30 days after the date of the decision or proceeding, or the reasons in respect of it (if any), whichever is later: *see s.145(2)*. The Board's authority to extend its general time limit under section 16(2) of the *Code* does not apply to these applications.

In most cases, the parties to the arbitration are the union and the employer. Absent a unique provision in a collective agreement, or ruling by the arbitrator, the employee is not normally a party to the arbitration, and has no standing to apply for Board review. Indeed, allowing an employee to apply for review would offend the union's exclusive right of representation. Issues concerning a union's decision not to apply for Board review of an arbitration decision must be dealt with under the Board's duty of fair representation processes: *see Information Bulletin #18*.

Application Form

Parties applying for review under section 145(2) must utilize the mandatory form, and provide all information required by that form. Where the decision or order to be reviewed was in writing, or written reasons were provided, these must be attached with the application.

The applicant must generally describe the ground upon which review is sought, with sufficient description of the nature of the alleged breach or error to allow the party opposite and the Board to understand what is at issue. The allowable grounds for review are:

- The party to the arbitration was denied a fair hearing; or
- The award is unreasonable because of a lack of intelligibility or transparency, or because it falls outside the range of possible acceptable outcomes that are defensible in respect of the facts and law.
  (see section 145(3))

The application does not require the full argument concerning the alleged breach or error. Detailed argument should be reserved for the written briefs. The applicant shall also indicate the remedy sought.

If only a portion of the full arbitration Record is necessary to determine the issues raised by the application, the applicant may request in the application that the Record be limited. Any limits on the Record are subject to the discretion of the Board. *See "Filing of the Record", below.*

Any applicant wishing to introduce evidence outside the Record must seek permission of the Board in its application. The applicant must advise what evidence is sought to be introduced and why it falls under an exception discussed below. *See "Evidence Outside the Record", below.*

The applicant shall specify whether it consents to the review being heard by a Chair/Vice-Chair of the Board sitting alone.

The applicant shall serve the application upon all parties to the arbitration and upon the arbitrator or arbitration chair (referred to hereafter as the "Arbitrator"). Where the application raises a constitutional question, applicants are reminded of their obligation to serve a notice of question of constitutional law pursuant to the *Administrative Procedures and Jurisdiction Act.*

Initial Reply

An initial reply by the respondent(s) is only required if any of the following matters need to be addressed:

- Proposed limitations on the Record;
- Proposed use of evidence outside the Record; or
- If the applicant has consented to review by a Chair/Vice-Chair alone, whether the respondent so consents.

If required, the initial reply is due one week after the application. The respondents' initial reply must be served upon all parties to the arbitration and upon the Arbitrator.

III. THE RECORD

Review by the Board must be "on the record": *see s. 145(4)*.

Definition of the Record
Pursuant to the Board's Rules, the Record includes:

- The documents commencing the arbitration, including the grievance;
- Any evidence and exhibits filed in the arbitration, including any transcript or recording of the evidence in the possession of the arbitrator or arbitration panel, if any;
- The written record, if any, of the decision, order, directive, declaration or ruling under review;
- The written reasons, if any; and
- Anything else in the possession of the arbitrator or arbitration panel which is:
  - relevant to the decision, order, directive, declaration, ruling or proceeding under review, and
  - relevant to the grounds for review raised by the applicant.

The Record does not include:

- Copies of case law submitted by the parties in the arbitration.
- Notes of the arbitrator or arbitration panel, and other privileged documents or communications, including those covered by deliberative secrecy.

The Board will accept photocopies of documents when the Record is filed. However, Arbitrators may be subsequently required to provide the Board with originals of exhibits, if necessary as best evidence for the Board's review.

Filing of the Record
The Record shall be filed by the Arbitrator, including the Board's mandatory form of Table of Contents. One copy of the Record shall be filed with the Board. The Arbitrator need not copy the Record for the parties. The Arbitrator shall serve each party with a copy of the Table of Contents, so the party may assemble a copy of the Record from its own arbitration file. Copies of documents from the Record are available to the parties upon request to the Board Officer.

If neither party has proposed any limitation upon the contents of the Record, the Arbitrator shall file the Record with the Board no later than 30 days from the date of the Application.

If either party has proposed limiting the contents of the Record, the request will be brought before a Chair/Vice-chair, who may determine the issue based upon the written submissions or may hold a Case Management Conference. In these cases, the Board will notify the Arbitrator once any limits have been determined, and the Record shall be filed no later than 30 days after that notification.

The Board presumes Arbitrators may, depending on the practice of the Arbitrator, bill one or both parties to the arbitration for preparation of the Record. The Board may, in appropriate cases, utilize its authority to award costs to ensure the cost of the Record rests upon the unsuccessful party to the section 145 application.

Evidence Outside the Record

No evidence other than the Record may be referred to in a review, except by prior order of the Board. An applicant seeking to introduce evidence outside the Record must seek permission of the Board in its application. The applicant must advise what evidence is sought to be introduced, and why the evidence falls under an exception discussed below.

Evidence outside the Record is only permitted in exceptional circumstances, namely where the alleged breach or error would not be apparent from the Record. An example is a breach of procedural fairness not shown on the Record. In some circumstances, evidence outside the Record may be permitted to establish evidence that was before the arbitrator or arbitration panel but which is not apparent from the Record.

Evidence outside the Record is never permitted to supplement or alter the factual record before the arbitrator or arbitration panel. Fresh evidence is never admissible.

Requests to introduce evidence outside the Record will be brought before a Chair/Vice-chair, who may determine the issue based upon the written submissions or may hold a Case Management Conference. Where permitted, the Board will specify what evidence will be permitted and how, including any evidence which will be permitted in reply and any right of cross-examination. Typically evidence outside the Record will be received by statutory declaration.

IV. HEARING AND BRIEFS

Once preliminary matters (if any) are decided, the Director of Settlement will schedule a hearing for oral argument. Unless the Board agrees otherwise, hearings will be scheduled for ½ day. Scheduling may occur in consultation with the parties. Scheduling will take into account that the applicant requires the Record (and any other permitted evidence) to be complete before preparing its written brief. Presumptively, hearings should be scheduled for a date approximately 45 days after the deadline for filing the Record.

The parties shall prepare written briefs of argument.

The applicant's brief shall be filed with the Board and served upon the respondent no later than 4 weeks prior to the scheduled hearing. The respondent's brief shall be filed with the Board and served upon the applicant no later than 2 weeks prior to the scheduled hearing. The Board may amend these timelines in appropriate cases. Failure to meet these deadlines may be dealt with through the Board's authority to award costs in appropriate cases.

Written briefs shall be no longer than 25 pages without prior permission of the Board, 8 ½" x 11", single sided, 1 ½ or double spaced, 1" margins. The page limit does not include copies of Authorities or Key Evidence.

Briefs are not required to address standard of review in detail, if at all. The standard of review to be applied by the Board to the merits of arbitration decisions is statutorily set by the *Code* as "reasonableness". The Board has no authority to apply any other standard of review. Nor does the Board require fulsome written argument on the meaning of the "reasonableness" standard, which it will apply as applied by the courts in judicial review.

The Board will publish a Standard Book of Authorities for use in section 145 applications, including cases concerning the meaning of the "reasonableness" standard of review, which parties may refer to in written briefs. The Board's Standard Book of Authorities will be published on the Board's website, and will be updated from time to time. Parties may assume the Board is aware of these cases. Parties are not to attach copies of these cases in their Authorities.

While parties should assume the Board has read the written briefs in preparation for the hearing, parties should assume the Board will not review the Record (or other permitted evidence) in its entirety before the hearing. Parties who wish to draw the Board's attention to specific documents in the Record (or other permitted evidence) may provide copies of those documents as Key Evidence with their brief.

As with all Board hearings, the composition of Board panels is subject to section 9 of the *Code*, and the Board's Code of Conduct. Board Members or part-time Vice-chairs who maintain active practices as arbitrators or arbitration chairs will not be empaneled for section 145 applications.

V. STATUTORY APPEAL TO THE COURT OF APPEAL

Board decisions under section 145 may be appealed to the Court of Appeal on a question of jurisdiction or law after permission to appeal has been obtained. An application for permission to appeal must be filed with the Court of Appeal and served within 30 days of the date of the Board's decision. *See section 145.1.*

See also the Board's Rules of Procedure

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

Director of Settlement
Labour Relations Board
501, 10808 99 Avenue
Edmonton, Alberta T5K 0G5
Telephone: (780) 422-5926

Manager of Settlement
Labour Relations Board
308, 1212 31 Avenue NE
Calgary, Alberta T2E 7S8
Telephone: (403) 297-4334

Email: alrb.info@gov.ab.ca
Website: alrb.gov.ab.ca