INTERIM DIRECTIVES

INTRODUCTION

Sections 12(2)(f) and 17(1) give the Board power to make orders and issue directives as the final step in adjudicating a dispute. Disputes, however, are not static—especially in labour relations, where parties are in an ongoing relationship and interact every day. Issues develop and change over time. The relative strengths of the parties are in constant flux. A labour relations dispute often moves too quickly for the Board to properly address it by a full hearing culminating in a comprehensive, final decision. The passage of time usually benefits one party to a dispute. In some cases, the time involved in the hearing process can deprive the winning party's remedy of value.

Courts long ago addressed this kind of problem by developing the *interim order*, especially the interim injunction pending a trial. The *Labour Relations Code* gives the Board the power to issue interim orders and directives. The interim directive is useful in reconciling the Board's duty to hear disputes fully with the need to act swiftly in volatile labour relations situations. This policy discusses:

- the statutory provisions;
- what is an "interim" directive;
- types of interim directives;
- tests for granting an interim preservative directive;
- the uses of interim remedial directives; and
- processing requests for interim relief.

STATUTORY PROVISIONS

Section 12(2)(e) sets out the Board's general power to make interim directives:

> 12(2) The Board may for the purposes of this Act (...)
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> > (e) make or issue any interim orders, decisions, directives or declarations it considers necessary pending the final determination of any matter before the Board, (...)

Section 17(1)(a) adds the power to make interim remedial directives:

> 17(1) When the Board is satisfied after an inquiry that an employer, employers' organization, employee, trade union or other person has failed to comply with any provision of this Act that is specified in a complaint, the Board may issue a directive to rectify the act in respect of which the complaint was made and, without restricting the generality of the foregoing,
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> > (a) may issue a directive or interim directive to the employer, employers' organization, employee, trade union or other person concerned to cease doing the act in respect of which the complaint was made; (...)

WHAT IS AN INTERIM DIRECTIVE?

An "interim" order or directive carries two different but overlapping meanings. In its broadest sense, an interim directive is any directive that is not intended to be the final disposition of a dispute. An interim directive contemplates there may be further proceedings and perhaps further orders issuing in relation to the dispute. The Board, by making an interim directive, avoids the impression that it has finished dealing with the dispute. It also avoids the common law rule that a tribunal that makes an order adjudicating the merits of a dispute is *functus* (exhausted of jurisdiction) and so cannot make any further order.

In its narrower sense, an "interim" directive is used to mean a *temporary* directive. This means a directive that does not adjudicate the merits of the dispute, but imposes a state of affairs upon the parties pending another event. This other event is usually a final Board adjudication of the dispute. In this sense, an interim directive is the Board's counterpart to the interim injunction used by the Courts.

TYPES OF INTERIM DIRECTIVE

The interim directives that the Board may issue fall into two types that reflect the two senses of the word "interim." The Board may issue interim *preservative* directives under Section 12(2)(e). These are temporary directives that seek to preserve a satisfactory state of affairs between the parties while the Board hears and decides the issue between them. The Board may also issue interim *remedial* directives. Interim remedial directives reflect that there has been a violation of the Code, but preserves the Board's power to add to or modify its remedies depending on events or the Board's further consideration.

The Alberta Board best explained the two types of directives in the leading case of *UFCW 280-P v. Gainers Inc.* [1986] Alta. L.R.B.R. 323. It said (at 333):

> It appears to the Board, that in looking at the general s. 8 power to make interim directives (or for that matter to make any orders ... it considers necessary) the Board is empowered in appropriate circumstances to make rulings that, like interim injunctions, are designed to be temporary and preservative in nature. The section 142(5) power is expressly to rectify the act found to have been a violation; its purpose is remedial. It is like a permanent injunction. If this is so, why does s. 142(5) need to contain any reference to interim directives? We believe the reason for both an interim and final rectification power in s. 142(5)(a) is that very frequently in labour relations the appropriate remedy for a breach of the Act may involve several stages. It may be a cease and desist order followed by damages. It may be an order to provide an employee with fair representation under s. 138(i) followed by compensation if the earlier absence of such representation ultimately causes damage. It may be an order to draw up bargaining proposals and subsequently to meet and bargain in a certain specified way. The labour board reports are full of such staged remedies.
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> We believe it also serves ... to let the Board provide a stop-gap remedy for conduct which amounts to a breach, but which is either amenable to settlement or is sufficiently uncertain in scope that the fashioning of a final remedy would be premature.

INTERIM PRESERVATIVE DIRECTIVES

The purpose of an interim preservative directive is to establish the rights of the parties to a dispute pending some other event, usually the issuance of the Board's decision on the merits of the case. It may be designed to stabilize a labour relations situation to keep the dispute within reasonable bounds while the Board hears it. Or it may be designed to preserve a meaningful remedy for a complaining party if it succeeds in its case. Examples of interim preservative orders include:

- An order that an employer not wind up or remove surplus funds from a pension plan pending the hearing of an unfair labour practice complaint about the pension plan. See: [*UFCW 280-P v. Gainers Inc., above*].
- An order extending a statutory freeze pending hearing of a complaint. See: [*UFCW 401 v. European Cheesecake Factory Ltd.* [1993] Alta. L.R.B.R. 301].
- An order reinstating a union organizer pending hearing of a complaint that the employer dismissed the organizer to stall the organizing drive. See: [*UFCW 175/633 v. Loeb Highland* [1993] O.L.R.B. Rep. Mar. 197].
- An order suspending union discipline, such as payment of a fine or suspension of union membership, pending a discriminatory union discipline complaint. See: [*Kennedy v. Sheet Metal Workers 280*, B.C.I.R.C. No. C46/91, February 28, 1991].
- An order that a respondent not pay out or remove funds needed to satisfy any compensation order from a successful complaint. See: [*Fast Car Co. Inc. et al v. IATSE 669 et al* [1992] 14 C.L.R.B.R. (2d) 44 (B.C.I.R.C.)].

When a party asks the Board to grant an interim preservative directive, it is asking it to grant relief without fully considering the merits of the case, or often without hearing all the evidence. This is an extraordinary power that the Board exercises cautiously. Though its power to issue interim preservative orders is broad, the Board observes several principles governing the use of interim relief:

- **There must be some evidentiary basis for the order:** The Board must have some basis to conclude that an interim order is "necessary." It cannot issue an interim order in a vacuum. The basis may be, for example, oral evidence, agreed facts, or an officer's report.
- **The Board's investigation into the dispute need not be complete:** It is enough to support an interim order that the Board has taken a preliminary look at the dispute and concluded that interim relief is advisable. It does not need to hear both sides of the case or all of the evidence on a point. For example, oral evidence of one witness without cross-examination or an officer's report based on information gathered by phone might suffice.
- **The Board must satisfy itself that the party seeking interim relief has a case of some substance:** A party should not have its rights restrained, even on a temporary basis, unless there is a credible basis for the claim made against it. Courts and Boards have variously said that the applicant must present a "strong prima facie case," that there is a "serious" or "fair" question to be tried, or that the claim is not "frivolous or vexatious."

- **The Board must consider the relative harm that may result from issuing or not issuing the order:** An interim preservative order should issue only to avert real harm to the party seeking the relief. But what if averting harm to an applicant might equally cause harm to the respondent if the applicant fails in its case? After all, at the stage of an interim order the Board has not yet found the respondent in breach of the Code.
- **Any interim relief should bear some connection to the violation alleged and to the consequences of that violation on the applicant:** The interim relief should bear some relationship to the ultimate remedy sought. It should not put the applicant in a better position than it would have been either before the violation or after a successful conclusion to its complaint. It must not be so unrelated to the harm caused by the alleged violation that a Court might consider it a punitive measure against the respondent. See: [*Re National Bank of Canada and RCIU* [1984] 9 D.L.R. (4th) 10 (S.C.C.); *Remedies, Chapter 19(d)*].

INTERIM REMEDIAL DIRECTIVES

Gainers, above, notes that the power to issue interim *remedial* directives allows the Board to grant "staged" remedies. The Board often delivers its remedies in stages. When it finds a respondent to have violated the Code, some remedies may be more urgent than others. For example, if a union organizer is unlawfully terminated during an organizing drive, it may be most urgent to make a declaration of the violation and post it in the work place, to stop the chilling effect of the termination on organizing. Almost as urgent might be a reinstatement of the organizer. Less urgent might be an order for monetary compensation. If the Board cannot decide on all remedial issues quickly and at the same time, it could make interim orders for posting and reinstatement while reserving on the issue of compensation.

Another common reason for staging remedies is to allow the parties to settle certain remedial issues without a Board order. The Board routinely issues declarations of a violation or a reinstatement order and allows the parties an opportunity to agree on the amount of the compensation due. In any case where there is a reasonable likelihood that the parties can bargain and settle one remedial aspect of an unfair labour practice complaint, the Board is likely to issue an interim remedial order and allow the parties a chance to negotiate the remaining issues.

Finally, an interim remedial directive may be appropriate if the labour relations situation is in flux and an intervening event may determine what the appropriate final remedy is. This might be the case, for example, where one union files a bad faith bargaining complaint while another union's raid is proceeding. The result on the representation issue could make certain remedies unnecessary.

Any interim remedial directive issued in these circumstances preserves the Board's ability to issue further remedial orders. It should be noted that Section 17(1)(a) only gives the Board power to issue an interim remedial directive to cease violating the Code. Although Section 12(2)(e) appears to be broad enough to support interim remedial as well as interim preservative orders, the Board has not yet had to answer the question whether its general power in Section 12 allows it to make interim remedial orders to do something other than cease contravening the Code.

PROCESSING INTERIM RELIEF APPLICATIONS

Parties usually apply for interim preservative relief because they fear imminent harm if an interim order is not made. Indeed, parties who do not pursue interim relief quickly and with a sense of urgency may demonstrate that the relief is unnecessary. The Board presumes applications for interim relief to be urgent. Board staff enter the interim relief application as a separate matter in the Board's database. The Director of Settlement immediately contacts the Chair and canvasses the parties for an early hearing date. If time permits, an officer may be appointed to help mediate a settlement or secure agreement on facts to put before the Board.