RECONSIDERATION

INTRODUCTION

The *Labour Relations Code* gives the Board broad power to reconsider any of its decisions, orders, directives or rulings.

> 12(4) The Board has exclusive jurisdiction to exercise the powers conferred on it by or under this Act and to determine all questions of fact or law that arise in any matter before it and the action or decision of the Board thereon is final and conclusive for all purposes, but the Board may, at any time, whether or not an application has commenced under section 19(2), reconsider any decision, order, directive, declaration or ruling made by it and vary, revoke or affirm the decision, order, directive, declaration or ruling.

Parties ask the Board to use this power for two main reasons:

- **Reconsiderations that are like appeals:** Parties dissatisfied with a decision can ask the Board to take a second look at a decision.
- **Reconsideration because circumstances have changed:** When the parties to bargaining relationships change, or the circumstances of bargaining change, parties may ask the Board to vary their certificates using the power of reconsideration.

The Board itself can also initiate a reconsideration. This policy describes:

- principles governing reconsiderations;
- appeal-like reconsiderations;
- changed-circumstance reconsiderations;
- Board-initiated reconsiderations;
- remedies; and
- stays.

Additional information on reconsiderations is set out in Information Bulletin #6.

PRINCIPLES GOVERNING RECONSIDERATIONS

Reconsideration involves a review by the Board of the merits of a previous decision, order or directive. When the Board reconsiders a decision, it may set aside or amend all or part of the first decision. The resulting order could substantially change the original order's nature and effect.

Reconsideration is not an appeal of the first decision, although some applications resemble appeals. The Board limits the grounds for reconsideration. Reconsideration is not judicial review either. See: [*Judicial Reviews, Chapter 36*].

The Board's reconsideration power enables it to address changes within the labour relations community or in a bargaining relationship. The reconsideration power also enables the Board to correct mistakes or errors. It allows the Board, in certain cases, to hear new evidence without requiring the parties to seek a Court order directing it to do so.

The Board will not, using its reconsideration power, do indirectly what it cannot do directly. For example, the Board will not grant a certification without a representation vote. Reconsideration is also not a substitute for specific sections available under the Code, such as certification, revocation, modification of bargaining rights, sales, leases or transfers, spinoffs, changes to governing bodies, or successorship. See: [*Modification of Bargaining Rights, Chapter 26*; *Certification, Chapter 21*; *Revocation, Chapter 23*]. While the Board will not do indirectly what it cannot do directly, the Board's reconsideration power is a "plenary independent power" that allows the Board to respond to fact situations not specifically addressed by the statute or outside the "normal operation" of other statutory processes including the ability to substitute for other statutory processes where it would accomplish the same thing but in a less time consuming or cumbersome fashion. *IBEW Local 424 v. Siemens Building Technologies Inc. and Brown & Marshall Electrical Limited* (April 2004).

APPEAL-LIKE RECONSIDERATIONS

These applications are similar to an appeal of a decision. Reconsideration is, however, discretionary. The Board limits its availability to specific situations. Mere disagreement with the original decision is not sufficient. The applicant must satisfy the Board that the application is justified. Grounds on which reconsideration may be available include:

- **A substantial error of fact or law:** The Board will reconsider if the first panel considered improper facts, or failed to consider relevant facts, or drew improper conclusions based on the facts. Alternatively, the applicant may ask the Board to reconsider an earlier decision because the panel seriously misinterpreted or misapplied the Code.
- **New evidence not available at the earlier hearing:** The new evidence must be on point and significant to the decision. It should not have been reasonably available at the earlier hearing. The Board will not reconsider a decision because a party forgot, or chose not, to call evidence at the earlier hearing. See: [*ATU 569 v. The City of Edmonton et al* [1984] Alta.L.R.B. 84-016].
- **Decision conflicts with earlier Board decisions on the same issue:** Consistency of interpretation and application of the Code is important. The Board is not strictly bound by its previous decisions and assesses the facts of each case. The Board will not reconsider a decision just because the applicant failed to cite relevant case authority at the hearing. See: [*IWA-Canada 1-209 v. Zeidler Forest Industries Ltd.* [1989] Alta.L.R.B.R. 397].
- **Decision does not consider another relevant statute or interpret that statute consistently with the Courts:** For example, the applicant may ask the Board to consider the interpretation of a similar word or phrase in the *Employment Standards Code* or the *Human Rights, Multiculturalism and Citizenship Act* in a reconsideration application. Alternatively,

the applicant may allege Board's interpretation of the other statute (if the Board relied on that interpretation in the decision) does not coincide with an interpretation of the same section by the Courts. The other statute must be important to the Board's consideration of the issues. If the statute was argued and dealt with in the first decision, the Board will not normally reconsider its decision.

- **Correcting slips or errors in decisions.**

Timeliness of Applications

Although there are no time limits on reconsideration, applications should be filed within a reasonable time of the decision. The Board in *IBEW Local 424* v. *TNL Industrial Contractors Ltd.* [1996] Alta. L.R.B.R. 194 stated the Board would consider a reconsideration application timely if filed within 90 days of the either the original decision or the commencement of judicial review proceedings. Reconsideration is not a substitute for an untimely judicial review application. The Board seeks a measure of finality to its decisions. An applicant seeking to file a delayed application must include the reasons for the delay to show they merit the Board hearing the matter. The Board weighs these reasons against the desire to have a final decision in the matter.

Processing Appeal-Like Applications

A party seeking an appeal-like reconsideration applies using a letter. See: [*Rule of Procedure 5*]. The applicant should serve the reconsideration application on the parties to the original decision. The applicant must include:

- the names, addresses, phone numbers and contact persons for all parties;
- a detailed statement of the grounds relied upon in support of the application;
- the details of any certificates affected by the application;
- the remedy desired;
- an outline of the new evidence (if any) to be introduced and the reasons why it was not available at the earlier hearing;
- copies of earlier Board decisions, if any, conflicting with its recent decision; and
- copies of court decisions or statutes, if any, conflicting with the Board's decision.

Board staff enter the matter in the database and open a process file. The Director of Settlement reviews the application for completeness. Bring any deficiencies to the applicant's attention immediately; request any missing information right away.

The Director brings such applications to the attention of the Chair and obtains preliminary directions about how to proceed. Once a process is determined, the Director also asks the other parties for a response to the application.

The Chair gives directions on which members should sit on a reconsideration. The choice of panel members will vary depending on the matters alleged.

- If the reconsideration application alleges a breach of due process, the Chair will usually schedule a totally independent panel—that is, one that had nothing to do with the earlier process.
- If the question involves an important question of law or policy, the Chair may schedule a "summit panel" including the Chair and one or more Vice-Chairs as well as members. This helps to ensure future consistency. (See: *IBEW Local 424 v. Siemens Building Technologies Inc. and Brown & Marshall Electrical Ltd.*)
- If the question involves a request to add evidence, or to correct an oversight in the previous decision, the Chair may schedule the same panel as heard the earlier decision.

The Director of Settlement and any officer dealing with a reconsideration file should exercise care to make sure the parties know clearly what is expected of them. Letters should specify exactly what process the Chair has directed be followed. Staff should not promise or imply that a hearing will take place unless and until one has been directed.

Reconsideration applications require the Board to address two questions:

1. Does the application warrant inquiry into its merits? This may include assessing whether the application is timely.
2. If so, should the Board exercise its discretion and vary the original decision?

The Board normally processes applications in one of three ways:

1. **Administrative panel:** Generally, the application and replies are first sent to an administrative panel of the Board for review. The panel answers question one (above). The panel may dismiss the application as being without merit, or being frivolous, trivial or vexatious. The panel may also choose to send the matter on to hearing on the merits of the application (i.e., question 2 above). At hearing, the Board hears evidence and argument and then makes a decision. The Board may then decline to reconsider the matter or the Board may vary, confirm or overturn the previous decision.
2. **Hearing:** Rarely, the matter is sent directly to hearing before the Board. At hearing, the Board hears evidence and argument and then makes a decision. The Board may then decline to reconsider the matter or the Board may vary, confirm or overturn the previous decision.
3. **Written submissions:** Question 1 (above) is almost always dealt with through written submissions. Where the parties agree, question 2 can also be dealt with by written submission and there is no hearing.

CHANGED CIRCUMSTANCES RECONSIDERATIONS

In these applications, a party asks the Board to alter a previous order as a result of a change in the circumstances. Such change in circumstances can include:

- a name change of a party affecting either a certificate or registration certificate; or
- a change in the bargaining unit description. An employer or trade union may apply to vary the unit description in the current certificate. For example, the union may seek to expand an industrial certificate by adding the office and clerical employees. See: [*Add-Un Units, Chapter 26(g)*].

Processing Changed Circumstances Applications

A party seeking a changed-circumstances reconsideration applies using a letter. See: [*Rule of Procedure 5*]. The applicant should serve the reconsideration application on the other parties to the original decision. The applicant must include:

- the names, addresses, phone numbers and contact persons for all parties;
- a brief statement of the grounds relied upon in support of the application;
- the details of any certificates affected by the application;
- the remedy desired; and
- an outline of the changed circumstances which prompt the application. The applicant must include all supporting information with the application.

A trade union seeking a name change uses the Board's application form. See: [*Trade Union Successorships, Chapter 33(c)*].

The Director of Settlement reviews the application for completeness. Bring any deficiencies to the applicant's attention immediately; request any missing information right away.

The officer contacts all the parties about the application. In order to inform affected employees of the application, the Board prepares Notices and directs the employer(s) to post them. The Notices give a brief description of the application in front of the Board. They ask affected employees who may have objections or comments to contact the Board by a certain date, usually within 14 days.

The Director of Settlement, usually with the officer, decides on a dispute resolution strategy. See: [*Dispute Resolution Initiatives, Chapter 19(c)*]. The dispute resolution strategy will vary with the grounds for the application. It can include obtaining a reply from the other parties, directing an officer's investigation, assigning an officer to mediate, or setting the matter to hearing and the officer then working with the parties. Advise the parties of the steps the Board will be taking.

Some specific considerations arise in processing certain types of changed circumstance reconsideration applications.

Name Changes

The officer reviews the application and accompanying documents and does the necessary searches to verify that the party's name is correct as proposed. Look at the appropriate documents including:

- Resolutions or minutes of the union's or REO's meeting showing the motion passed to change the name.
- The union's or REO's constitution and documents filed with the Board to ensure the party followed their constitution or bylaw procedures for name changes.
- The charter or prior certificates issued by the Board that show the correct legal name of the party.
- A Corporate Registries search to verify the legal name of the employer.

Many of these name change reconsiderations are concluded on the basis of an officer's report. The officer often works with the parties to resolve any disputed issues. In many cases, the parties consent to the name change.

In other cases, the officer may need to prepare an investigation report. The officer prepares the report outlining the relevant information and sends the report to the parties. If a party objects, and the officer is unable to resolve the dispute, the Director of Settlement sets the matter to hearing. See: [*Hearing and Scheduling, Chapter 34(a)*]. If there are no objections, or the objections settle, the officer presents the application and details to an administrative panel or Chair/Vice-Chair sitting alone for approval. In these cases, the Board may decide the matter without scheduling a hearing.

Change of Bargaining Unit Description

Reconsideration applications to amend a unit description generally occur during the term of a collective agreement that would normally bar a certification application. The time limits in Section 37 governing certification applications do not apply to reconsideration requests. See: [*CUPE 3023 v. Town of Claresholm* [1983] Alta.L.R.B. 83-047]. See: [*Add-On Units, Chapter 26(g)*].

In some cases, the particulars of these applications do not clearly reveal whether the officer should treat the application as a reconsideration or a modification under Section 45. For a discussion of Section 45 applications see: [*Modification of a Certificate, Chapter 26(a)*]. Discuss the matter with the parties to obtain any needed clarification.

Again, the Director of Settlement can develop a dispute resolution strategy using the full range of options. The officer should facilitate discussion between the parties including:

- Which employees, and how many, are added to the current unit? Will either the numbers of employees or their type of work significantly alter the existing unit?
- Whether the amended unit is appropriate for collective bargaining. See: [*Appropriate Bargaining Unit, Chapter 22(b)*]. If the amended unit is not appropriate for bargaining, recommend the Board refuse the application. If the scope of the amended unit is

fundamentally changed by the inclusion of the other employees, the officer may recommend the Board order a representation vote.

- Do the employees being added into the unit want to be included in the unit? Have the employees signed application for membership cards? Are they paying dues?
- Is it a true reconsideration or a certification application in disguise? Is the union seeking new representation or a fundamentally different unit (e.g., adding on a large group of new employees) from that which it now represents? If the union is attempting to obtain a certificate without going through the statutory tests for certification, the officer should recommend declining reconsideration in favour of a certification application. See: [*Add-On Units, Chapter 26(g)*].
- How do the term and content of the collective agreement affect the add-on group? Section 40 enables newly certified trade union's to serve notice and bargain a new collective agreement. Section 40 does **not** apply to reconsiderations. If the collective agreement is mid-term, does it contain an effective mid-term bargaining clause? Does the agreement adequately provide for the add-on employees' terms and conditions? If not, and it cannot be amended, will the add-on group effectively be without bargaining rights for the balance of the contract? The officer may recommend the Board dismiss the application as being untimely if the union is unable to negotiate terms and conditions of employment until the collective agreement expires. The officer may also recommend granting the application with conditions.

The officer considers similar issues if the application to reconsider involves removing a group from the unit description. Of particular concern is whether the application, if granted, would result in one or two units that are not appropriate for collective bargaining.

Amending a Registration Certificate

If a registration certificate is amended by adding another trade union, it usually means that several new employers will also be caught by the registration certificate because of their bargaining relationships with the new union. For this reason, the applicant must prove that the new employers want to be added into the registration certificate. See: [*Construction Registration, Chapter 25(b)*].

The officer should encourage discussion between the parties about:

- whether the union is properly part of the construction sector covered by the registration certificate;
- the union's bargaining relationships with one or more employers in the sector; and
- the relationship between the new union and the unions already covered by the registration. Will they be able to work together as a cohesive "group of trade unions."

Remedies

Reconsiderations involving changes to a bargaining unit description or the parties to a registration certificate raise several difficult questions including accretion, representation votes and the ability to

act upon newly acquired bargaining rights.

Generally, the Board will not reconsider a certificate to split out a small group of employees so they can form their own unit. This is because it creates a fragmented bargaining system. This process, called "Balkanization", is avoided where possible. The Board may, however, split an existing unit if the new units are appropriate for collective bargaining and each constitutes a standard bargaining unit. See: [*AARNA v. Smoky Lake General and Auxiliary Hospital* [1986] Alta. L.R.B.R. 472; *Finning Ltd. v. MAW 99*[1998] Alta.L.R.B.R. 440].

The Board may order a representation vote of some or all of the employees or employers to determine their wishes. One of the difficult questions arising in these applications concerns whether a vote should be conducted and, if so, who votes. The case law is not entirely settled in this area. In some cases, only the persons to be added in vote. In other cases, all affected persons vote. The Board's recent practice has been voting only the add-on unit. See: [*Add-On Units, Chapter 26(g)*].

There are two reasons the Board would consider ordering a vote:

- because the Board's powers of reconsideration are limited; and
- because employee wishes are important to the question.

First, the Board's reconsideration power does not enable it to do something under reconsideration which it could not do initially. The Board cannot certify a unit without evidence of 40% support with the application (and a favourable majority vote under the Code). Therefore, the Board must also be satisfied of the employee support in a reconsideration. See: [*Re CUPE 41, above*]. In most cases, if the add-on unit is small in comparison to the certified unit, it does not affect the overall majority.

Usually the Board will not order a vote of the current unit. Ordering a vote would call into question the majority support of the existing unit, which is presumed from the ongoing bargaining relationship. If, however, the reconsideration application is merely a disguised certification application for a much bigger unit, the Board may order a vote of the entire unit.

The Board also considers the wishes of the employees in the add-on group. If the evidence satisfies the Board that the employees clearly support the trade union, the Board may not order a vote. If the evidence does not satisfy the Board, a vote is likely among the add-on employees.

The Board may order a representation vote of the employers to be affected by an amendment to a registration certificate to determine their wishes. As well, the applicant must show that a majority of the existing employers support the variance to the certificate. See: [*CLRa Mechanical Trade Division v. Finch Labour Contractors Ltd. et al* [1987] Alta.L.R.B.R. 401].

BOARD-INITIATED RECONSIDERATION

The Board initiates reconsiderations for four major reasons:

- **Correcting slips or mistakes:** Sometimes the Board notices these mistakes during the processing of a file.
- **Follow-up:** The Board may reconsider existing certificates following the conclusion of another file. For example, a union may file a sale, lease or transfer application affecting a particular employer. Should the Board grant a successor employer declaration, the Board normally then identifies other certificates that may be affected by the declaration. The Board may then reconsider these certificates to bring them up to date.
- **Addressing successful judicial reviews:** 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. See: [*Judicial Review, Chapter 36*]. 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.
- **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].

Processing Board-Initiated Reconsiderations

The Chair usually directs Board-initiated reconsiderations. When the Board initiates a reconsideration, the Director of Settlement advises the parties. Treat the matter as any other application. Enter it in the database and open a process file. Show the Board as the applicant. The parties then provide written submissions or attend a hearing as directed by the Director of Settlement.

The Board usually deals with reconsiderations to correct slips by written submissions. Once received, send the submissions directly to the original panel unless directed otherwise by the Chair. If the panel is convinced of the mistake, it may correct the decision or order.

REMEDIES

The Board is never obliged to reconsider a decision, unless directed to do so by the Courts. The Board generally tries to bring certainty and finality to its decisions by only reconsidering in serious cases worthy of intervention. In less serious cases, the Board's view has been that it is inappropriate for one panel to second guess a decision made by an earlier panel.

If the Board does decide to reconsider, it can do anything the earlier panel might have done. It can vary, revoke or affirm all or part of the original decision. It has no greater power than the original panel. The reconsideration panel normally gives written reasons for its decision on reconsideration. If the panel's decision is not to reconsider, or, having reconsidered, not to vary the decision, a simple letter will often suffice.

When the Board issues its decision, advise the parties of the decision. Update the database and amend any certificates or other Board documents affected by the application.

STAYS

A reconsideration application does not act as a stay of a previous Board decision. The Board's power to reconsider does, however, include the power to order a **stay** of a previous order. A **stay** is an "order, or variance of an earlier order, that has the effect of preventing the operation of the earlier order pending some other event." The Board's power to grant a stay of a Board order flows from Section 12 and is not ousted by the Court's power to grant a stay pending a judicial review application. See: [*Miscellaneous Teamsters 987 v. Alberta Brotherhood of Dairy Employees and Driver Salesmen and Northern Alberta Diary Pool* (#2) [1991] Alta.L.R.B.R. 159].

A stay can be temporary, conditional, or permanent. A party may seek a stay pending a judicial review application or for other reasons, such as a reconsideration request, or the completion of other proceedings before the Board or elsewhere. A stay is a discretionary order. In *NADP (#2), above* the Board identified the tests applicable to stay applications as:

> The first test—the prima facie case or serious questions to be tried—is not clearly defined even within the Courts. This is shown by the debate over the *American Cyanamid* decision. Whichever variant of the test is used, the Board must apply it with two facts in mind.
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> First, the Board's assessment of the merits of the matter is rarely "preliminary and tentative." Usually, the Board will have heard the case in the first instance and rendered a decision on the merits of the matter under judicial review. A Court, assessing a stay in an ordinary civil matter, will assume the applicant may be able to flesh out its allegations with proof. The Board is in a firmer position because usually the allegations will have been tested.
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> The Ontario High Court noted this in *Tandy Electronics Ltd. v. United Steelworkers of America* (1980) 80 C.L.L.C. 14,016. That case involved an application to stay a decision of the Ontario Labour Relations Board pending judicial review. Citing the Ontario Court of Appeal decision in *Talsky v. Talsky (No. 2)* [1973] 1 O.R. (2d) 148, the Court said:
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> > The principle then is the same as that applied in the case of an application for an interim injunction—the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right. [emphasis added]

Second, what is a "prima facie case" or a "serious question to be tried" cannot be assessed in the abstract as a mere academic question. To succeed in Court, an applicant for judicial review must establish jurisdictional error or patent unreasonability. ...

Thus, an applicant for a Board stay must convince the Board that its own decision or process was made without (or outside of the Board's) jurisdiction, or was patently unreasonable. In the latter case, the Board would almost inevitably reconsider its own decision rather than grant a stay pending judicial review. Cases involving allegations of true jurisdictional error cover several situations. In allegations of procedural error, the Board would usually proceed to reconsideration. However, in cases where the question under judicial review involved an arguable point of law, where the Board opted for one of two possible interpretations, but recognized valid arguments on both sides, an applicant might convince the Board it had met this first test.

The second test requires proof of irreparable harm. This is often expressed as "harm not susceptible or difficult to be compensated in damages." Talk of damages is often inappropriate in the labour relations context. Employers, trade unions and employees only infrequently compensate each other by damage payments. Instead, they normally compromise their claims through the give-and-take of the collective bargaining process. We take the irreparable harm test in the labour context to mean harm that would be difficult or not susceptible to resolution through the mechanisms of the collective bargaining process or damages. It would be unwise to set damages as the sole test and ignore the (far greater) flexibility of collective bargaining solutions.

We consider the harm to parties, other than the applicant, under the balance of convenience aspect of the test.

The balance of convenience [*the third test*] (or of inconvenience) in the labour relations context requires consideration of several influences. The normal collective bargaining situation involves the employer, the employees and the trade union. There may be competing trade unions involved, as is the case here. Trade union law is based largely on majoritorian principles. However, within employee groups and bargaining units, there are frequently competing interests. Senior employees may have interests that are different from junior employees. Employees with one set of skills may have different interests than those with others. These issues are normally worked out through the democratic processes of trade unionism. Protecting the important interests of one group can easily cause harm or consequences to another group's interests.

Consideration of the balance of convenience in labour matters must recognize three important and interrelated realities. First, time is often of the essence in employer/trade union relationships. This is true in representation questions like certification. It is equally true in the collective bargaining process where any change in employee or public support can tip the scales in favour of one side or the other.

...

Second, the parties in labour relations matters have to co-exist after their dispute is resolved. They are not like ordinary litigants who are often free, and happy, never to have to deal with each other again. This factor creates the opportunities for collective bargaining solutions mentioned above. However, it also means a freeze imposed by a stay can prejudice ongoing relationships.

The third factor is the broader public interest. The regulation of labour relations through legislation like the *Labour Relations Code* is based on an underlying premise. It is that, giving employees periodic opportunities to choose or change trade unions, and giving parties periodic opportunities for negotiations, including if necessary, economic conflict, will avoid extra-legal disruption of work.

Work goes on despite litigation. The usual pressures that arise from the work environment need ongoing resolution. There is no static status quo to freeze. Attempts to do so, without recognizing the stultifying effect this may have on the changing work environment, can lead to frustration with the labour relations process. When the labour relations system fails, self-help remedies tend to take over. This often has an adverse effect on the public, as well as the private interests involved.

These factors are worthy of consideration on stay applications in labour matters. They resemble the public interest questions involved in staying legislation in Charter matters which the Court carefully weighed in the *Metropolitan Stores* case. If they are too broad to fall in the "balance of convenience" head of the test, they remain appropriate "special consideration" worthy of assessment.