

# COURT RETURN & BRIEF

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## INTRODUCTION

Section 19(2) of the [Labour Relations Code](#) allows a dissatisfied party to apply for judicial review of a Board decision. The applicant applies by filing an Originating Notice in the Court of Queen's Bench and serving it on the Board within 30 days of the Board's decision. The application names the Board, and any other parties, as respondents. This policy describes:

- what judicial review involves;
- what to do upon receipt of an Originating Motion;
- how to open a judicial review file;
- how to prepare and file the Court Return; and
- how to prepare and file the Board's brief.

## WHAT JUDICIAL REVIEW INVOLVES

A judicial review is not an appeal. The Court does not hear evidence. The parties cannot reargue the whole case. Instead, the Court decides the case based on the Board's **record**, and arguments presented by parties. The record consists of documents from Board files that relate to the decision under review. Board staff gather these documents in a binder and file it with the Court. The binder is known as the **return**, because the Alberta Rules of Court require the Board to "...forthwith return to the clerk of the Court of Queen's Bench", the decision together with all exhibits filed, and all things touching the matter..."

### 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 failing 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 that 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.

At the Chair's direction, Board legal counsel usually participates in judicial review applications. They prepare a **brief**. The Board's brief is a summary of the legal arguments and case authority the Board intends to present. It must be filed in Court within time limits set by the Rules of Court.

In court, Board counsel explain the Record and earlier proceedings to the Court. Board counsel generally makes submissions on the appropriate standard of review and less frequently on other matters touching on Board process and policy.

The Court exercises a discretion in making its decision. It may dismiss the judicial review application. It may **quash** (set aside) the Board's decision and substitute its own opinion. Or, it may quash the decision and send the case back to the Board for further consideration.

## RECEIVING THE ORIGINATING NOTICE

The applicant serves a copy of the Originating Notice on the Board, by fax, courier, personal delivery or mail. Service may occur in Calgary or Edmonton.

When an Originating Notice arrives, date-stamp it and advise legal counsel **immediately**. Sometimes, a document entitled "Notice of Motion" accompanies the Originating Notice. The Notice of Motion may require legal counsel to appear in Court on short notice.

A Motion is an application to the Court, usually about a point of procedure in the case. For example, Board counsel may appear on a party's motion to have the Court stay the Board's decision until the judicial review is finished.

Although the original copy of the Originating Notice goes to the solicitor's file, the person receiving it must provide a photocopy to the Database Entry Clerk. That Clerk posts the photocopy to the process file. All further correspondence concerning the judicial review goes to the solicitor's file.

Immediately after the Board's legal counsel receives an Originating Notice of Motion, the legal counsel must:

- advise the Chair of the motion, and obtain the Chair's instructions on it and how the Board should be represented in the proceedings; and
- contact the other Counsel involved in the case to:
  - clarify the grounds being alleged;
  - find out if there are related proceedings such as reconsiderations; and
  - explore the possibility of obtaining an agreement about the documents to be included in the return.

## OPENING A JUDICIAL REVIEW FILE

At legal counsel's request, the legal assistant opens a Board solicitor file. See: [[Chapter 36\(b\), Opening Solicitor's Files](#)]. Place the Originating Notice and a copy of the Board's decision on the file. Attach a Judicial Review Diarization Sheet to the inside cover of the file. Fill out the sheet.

Sometimes, both parties dislike the Board's decision—often for different reasons. If both apply for judicial review, there are two Originating Notices. In this case open two Board solicitor files.

After opening a Board solicitor file, the secretary returns it to legal counsel, with:

1. a supporting documents list for each process file dealt with in the Board decision under review (discussed below);
2. the Board process files;
3. signed hearing logs, or confirmation that arrangements are being made by the hearing clerk to have them signed (all hearing summaries must contain an accurate list of all exhibits); and
4. a letter for the solicitor's signature, acknowledging service of the Originating Notice (discussed below).

The secretary also:

5. sends an email advising Board staff;
6. enters new Originating Notice into Court Challenges record (for publishing in the Alberta Labour Relations Board Reports); and
7. enters the appeal into the database.

If the process files are in Calgary, the legal assistant confirms in place of Point 2 above, that the Calgary Hearing Coordinator has been asked to identify and send the process files to legal counsel. The Calgary Hearing Coordinator promptly sends the files to legal counsel by government courier. For smaller Calgary process files, send photocopies of the file.

### ***Typing Documents to be Filed with the Court***

During a judicial review file, Board legal counsel file certain documents with the Court. These include the return, the brief and any court Orders. On the first page of these documents (the title page), type the **style of cause** exactly as it appears in the Originating Notice. Do this even if it contains an error. Otherwise, the Clerk of the Court may refuse to file the Board's document.

### ***Supporting Documents List***

The supporting documents list forms the basis for listing documents in the Return. Print a list directly from the database for each affected file. The legal assistant should check the database and the decision as well as with the officer involved, to make sure the solicitor is aware of all related Board files.

### ***Letter Acknowledging Service***

Board counsel writes a letter to the applicant's counsel, confirming receipt of the Originating Notice, and the date of the court hearing. If the applicant scheduled the matter for **Special Chambers** (a 2 p.m. start time), acknowledge service using the standard court letters in g:/court/letters.

If the applicant scheduled the hearing in **Ordinary Chambers** (a 10 a.m. start time), another court date is needed. Ordinary Chambers applications cannot exceed 1/2 hour. Judicial reviews usually take longer. In acknowledging service of the Originating Notice, Board counsel also reminds the applicant that the matter requires rescheduling into Special Chambers.

The Special Chambers date determines the timing for filing the Board's return and brief. Once the applicant advises Board counsel of the Special Chambers date, the legal counsel can complete the Judicial Review Diarization Sheet.

## **PREPARING THE COURT RETURN**

The return usually consists of supporting documents, exhibits from the hearing, the hearing summary, and the Board's decision found on the process file.

Legal Counsel reviews the Originating Motion, the supporting documents, the hearing summary and exhibit lists, and all the Board's related process files. Counsel should normally check with the presiding Chair and the officer involved to get a clear picture of the file, making sure to include all relevant process files in the return. Then, legal counsel meets with counsel's assistant to give instructions for preparing the return. Within one week of that meeting, the legal assistant gives legal counsel a draft of the return including the list of its contents. Guidelines for preparing the list appear below.

For Calgary files, the Calgary Hearing Coordinator will forward all relevant process files and exhibits to the legal assistant in Edmonton to prepare the return.

In preparing the return:

- Prepare 2 copies—one for the Court, one for the Board solicitor. Other than the hearing summary, parties have sent or received most documents from the file, so they do not require copies of all documents in the Return. [If the Attorney General is involved in a judicial review matter, another Return would have to be prepared for the Attorney General.]
- Use photocopies of any Board documents. The Board’s “originals” stay on the file.
- If the Board receives a faxed letter and the original arrives by mail another day, use the faxed copy in preparing the Return. We want to show the date the Board first received the piece of correspondence.
- Insert documents grouped together as one item in the supporting documents list, under one tab in the Return. For example, copies of letters the Board sends to all parties confirming or changing a hearing date, or enclosing Reasons for Decision, are usually grouped together.

A date, previously diarized, reminds legal counsel to mail the list of the return’s contents and the hearing summary. This occurs at least four weeks before the court hearing. Parties then have enough time to request copies of any documents they do not have, and to use the same document numbering system when writing their briefs.

Next, legal counsel will arrange for filing the return. To do so, use Lormit [a court filing company] to file the return. Standard memos and letters are found in G:/court/letters. If filed in person, the staff member brings back the photocopy referred to in the letter that accompanies the return.

### ***Preparing the List of Documents in the Return***

In preparing the list of documents:

- Use standard introductory and closing paragraphs.
- Describe each listed document using the standard entry descriptions from the supporting documents list: letter, decision, exhibit, etc.
- Date
- From
- To
- For correspondence to or from lawyers, use the name of the law firm rather than the individual lawyer. When naming the firm for the first time, include the description “Barristers and Solicitors”.

Sometimes, legal counsel applies for a Court order allowing the Board to “limit” the contents of the return. In such cases the closing paragraph in the List of Documents changes. This arises when large amounts of file materials are not relevant to the judicial review application. Legal counsel advises the legal assistant before preparation of the draft Return, if the return will be limited. [Once a return is limited, an Order to that effect will be signed by all parties on the file and filed with the courts. A copy of the Order is found in g:/court/orders.]

Once legal counsel approves the list of documents, the Director or Manager of Settlement certifies it by signing the final page. This does not require a Commissioner of Oaths. The Director of Settlement may certify the contents of a return for a Calgary judicial review, and vice versa. Whoever signs the return takes responsibility for its correctness and completeness, so they need to review the files involved.

## **PREPARING THE BOARD'S BRIEF**

Board legal counsel respond to arguments set out in the applicant’s brief. Sometimes, legal counsel only has 3 1/2 to 4 working days to prepare the brief. This is because of the timing of the filing and delivery of the applicant’s brief. As a result, Board staff and department copying staff must help to meet the short time limits.

The Chair reviews a copy of the written submissions before copying and filing of the brief.

Under the Rules of Court, the Applicant files its brief by **noon**, not less than 14 **clear days** in advance of the hearing. Board counsel files the Board’s Brief by **noon**, not less than 7 **clear days** before the hearing date. See the Judicial Review Diarization Sheet for the calculation of clear days. Make one copy of the Brief for:

- the Court,
- each applicant;
- each respondent, including the Board.

The Brief consists of:

- a blue cover and inner title page;
- the submissions of the Board in numbered paragraphs;
- the list of authorities; and
- the tab numbers and various authorities referred to in the submissions.

On the cover page of the Board’s brief, write the names of the parties as they appear on the Originating Notice.

Use Lormit for filing the Board's Brief. Unlike the return, the brief is not filed at the wicket of the Clerk of the Court of Queen's Bench. In Edmonton, take the brief and letter directly to the Trial Coordinator's office – 6<sup>th</sup> Floor of the Law Courts - Civil Court Section. For Calgary filings, send all materials to the Calgary office and advise Lormit to pick up the documents at their office for filing. Lormit can also serve the brief on affected counsel in the city in which they are filing the Brief. [Letters can be found in g:/court/letters.] Do not send the copies of the brief for Edmonton-area parties to Calgary. The Edmonton Board office distributes these.

On occasion, the Board must send the briefs to Calgary by air cargo, to make the noon filing deadline. Advise the Calgary office of the air cargo package in advance. A member of the Calgary staff picks up the package at the airline's cargo office and takes the briefs directly to the courthouse for filing. After filing the Brief, advise legal counsel by email.

### **Reference**

For general procedure on judicial review, see: [[Section 19 of the Code](#), Part 56.1 of the *Alberta Rules of Court* re Judicial Review in Civil Matters, and the Special Chambers Practice Note included with the Alberta Rules of Court].