ALBERTA LABOUR RELATIONS BOARD

INFORMATION BULLETIN

#6 APPLICATIONS FOR RECONSIDERATION, JUDICIAL REVIEW, AND STAYS

I. INTRODUCTION

The Board has the power to reconsider its decisions under section 12(4) of the *Labour Relations Code.* It may do so either on its own motion or on the application of a party. This Bulletin describes the different categories of reconsideration applications, the grounds for each category, and how the Board processes reconsideration applications. This Bulletin has been updated to reflect the Board's decision in *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd./MM Limited Partnership and Mikisew Fleet Maintenance/MFM Limited Partnership*, [2022] Alta. L.R.B.R. 149, which provides clarification around about reconsideration applications alleging substantial errors of fact or law.

A party who wishes to challenge a Board decision may also apply to the court for judicial review of the Board's decision. This Bulletin outlines the timing and form of the judicial review 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 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. CATEGORIES OF RECONSIDERATION APPLICATIONS & APPROPRIATE GROUNDS FOR MAKING AN APPLICATION

Reconsideration Applications of Board Decisions Initiated by a Party
Reconsideration applications are not a forum to re-litigate issues the Board has already decided, and they should not be brought merely because an unsuccessful party is dissatisfied with a Board decision. *See: Carpenters, Local 1325 v J&N Technical Services Ltd. [2004] Alta. L.R.B.R. LD-044.*

When a party files a reconsideration application of a Board decision, one or more of the following grounds must be identified:

- A party to the underlying decision seeks to present new evidence. This evidence must be significant, relevant, and not reasonably available at the earlier hearing. *See*: *IWA Canada Local 1-207 v. Zeidler Forest Industries [1989] Alta. L.R.B.R. 397*.
- The decision contains substantial errors of fact or law. Examples of substantial errors of law include, but are not limited to:
    - the Board's interpretation of the *Code* or another statute conflicts with earlier decisions of the Board that were not presented to or considered by the Original

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Panel;
    - another statute was not considered or the Board's interpretation of another statute conflicts with court decisions.
- This oversight 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. *See: Timeu Forest Products v. IWA Local 1-207 [1997] Alta.L.R.BR. 430*

Generally speaking, the alleged factual or legal error must not only be apparent, but must pose a risk of significant disorder, mischief, or unrest in the labour relations sphere, or involve a significant breach of procedural fairness: See *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd./MM Limited Partnership and Mikisew Fleet Maintenance/MFM Limited Partnership,* [2022] Alta. L.R.B.R 149.

- Accidental slips or mistakes need correction. A formal hearing is not normally held in these cases.

Board-Initiated Reconsideration Applications
Section 12(4) of the *Code* also permits the Board to reconsider its decisions on its own initiative. The Board usually initiates reconsiderations for three major reasons:

- As a result of judicial review applications where (1) the Court directs the Board to reconsider or rehear a matter after a successful judicial review application or (2) the Board decides to reconsider its decision in response to a judicial review application where the Board believes that reconsideration could address the issues, including alleged breaches of procedural fairness, more expeditiously.
- 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. *See for example: Re: City of Edmonton Bargaining Units et al [1993] Alta. L.R.B.R. 362*.
- To correct accidental slips or mistakes that the Board may notice during the processing of a file.

Reconsideration Applications to Address Fundamental Change in Employer's Operations, Party Names in Bargaining Certificates, or Add Ons to an Existing Bargaining Unit:
Parties may also apply for reconsideration in circumstances where a fundamental change has occurred in the employer's operation that makes the current bargaining certificates functionally inoperable, or where the name of a party to a certificate or registration certificate has changed. This latter category does not include cases that require a successorship application. Unions may also apply to add a group of employees to an existing bargaining unit.

III. TIMING OF RECONSIDERATION APPLICATIONS

Reconsideration applications must be timely. 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. Certain types of reconsideration applications involve particular timeliness considerations, and these are discussed in more detail below.

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Reconsideration Applications of Duty of Fair Representation Decisions
In reconsideration applications relating to duty of fair representation decision, the Board will consider the factors identified in *Toppin v PPF Local 488* [2006] Alta L.R.B.R. 31 when evaluating timeliness. *See*: *Re Anderson and HSAA* [2014] Alta L.R.B.R. LD-007 and *Information Bulletin #18.*

Reconsideration Applications Alleging Substantial Factual or Legal Errors
For reconsideration applications alleging a serious factual or legal error, the parties should file reconsideration applications as promptly as possible. Reconsideration applications are not a workaround for a missed limitation period under section 19(2) of the *Code*. In most cases, parties will need to file within 30 days of the Board's decision. See *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd./MM Limited Partnership and Mikisew Fleet Maintenance/MFM Limited Partnership,* [2022] Alta. L.R.B.R. 149.

Reconsideration Applications to Address Fundamental Change in Employer's Operations or Party Names in Bargaining Certificates or to Add Ons to an Existing Bargaining Unit:
There is no specific timeline for reconsideration applications of this nature. Reconsideration applications relating to a change to party names or a change to employer operations should be made as soon as practicable.

IV. HOW RECONSIDERATION APPLICATIONS ARE PROCESSED

Reconsideration Applications of Board Decisions Initiated by a Party
A party applying for reconsideration of a Board decision must use the mandatory form provided by the Board. A copy of the Board decision that is the subject of the reconsideration application must be provided with the application. *See: Rules of Procedure, Rule 4*.

The Director of Settlement will review reconsideration applications for completeness and timeliness. If a reconsideration application is accepted, the Board Officer will contact the respondent(s) and set timelines for a response and replies by the parties.

After the written submissions have concluded, the Board will conduct what is often referred to as an administrative review. This process involves a preliminary review of documents, during which the Board reviews the written materials filed by the parties to determine whether grounds exist to refer the application to a full hearing. This preliminary step is aimed at determining whether, on the basis of the Original Panel's decision and the parties' written submissions, the matter should be remitted to a full reconsideration panel of the Board. Where the Board determines there is no plausible case for reconsideration, it may summarily dismiss the application.

This preliminary review process is a discretionary exercise in which Board considers the significance of the alleged error(s) and whether Board intervention is necessary. For reconsiderations alleging serious factual or legal errors, Board will no longer issue written reasons after completing its administrative review; rather, the Board's decision will indicate whether the reconsideration application is summarily dismissed or referred to a hearing: See *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd./MM Limited Partnership and Mikisew Fleet Maintenance/MFM Limited Partnership,* [2022] Alta. L.R.B.R. 149.

On rare occasions, where there is clearly an error on the face of the documents, the

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administrative panel may grant the reconsideration application and order whatever remedy it deems appropriate in the circumstances, without referring the application to a hearing: See *Canadian Unit of Public Employees Local 3421 v The City of Calgary (Emergency Medical Services Department)*, [2000] Alta. L.R.B.R. 47 at para. 9.

Board-Initiated Reconsiderations
If the Board initiates the reconsideration process, it will determine the process to be followed. 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.

Reconsideration Applications to Address Fundamental Change in Employer's Operations or Party Names in Bargaining Certificates, or to Add Ons to an Existing Bargaining Unit
This type of reconsideration application must be made in letter form to the Director of Settlement and the application must include the following information:

- details of any certificates affected by the application;
- details of any fundamental change making the current certificates functionally inoperable; or
- evidence of support from the affected employees or employers if the application seeks to amend a current certificate or registration certificate.

V. JUDICIAL REVIEW

Judicial Review Applications
A party whose application was dismissed by the Board may apply to the Court of King's Bench for judicial review of the Board's decision. Judicial review applications are governed by section 19(2) of the *Code*.

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. Judicial review applications are also governed by rules 3.15 – 3.24 of the *Alberta Rules of Court*. An applicant must take steps to serve the application on the Minister of Justice and/or the Attorney General of Canada as the circumstances require, as well as every person or body directly affected by the application: See *Julien v Alberta (Appeals Commission for Alberta Workers' Compensation),* 2023 ABCA 81.

Standard of Review
When a party seeks judicial review of a Board decision, the Court will apply a standard of review of either reasonableness or correctness depending on the nature of the issues raised. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 held that reasonableness is the presumptive standard of review. The reasonableness standard is a deferential standard that focuses on the overall logic, transparency,

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and intelligibility of the decision under review. The presumptive reasonableness standard can only be rebutted through legislation; either by a legislated standard of review, a statutory appeal process, or where the rule of law requires that issues engaged be reviewed on a correctness standard. The correctness standard will apply Board decisions that address (1) questions of constitutional law (2) questions related to jurisdictional boundaries between multiple administrative bodies and (3) questions of law that are of central importance to the legal system as a whole. When the correctness standard of review applies, the Court may conduct its own analysis of the issue and does not need to show any deference to the decision under review.

Certified Record of Proceedings

Judicial review applications proceed based on the Certified Record of Proceeding that the Board prepares and files under rules 3.18-3.19 of the *Alberta Rules of Court*. The use of affidavit or other evidence outside of the record is exceptional, and generally will not be permitted where it seeks to alter or supplement the factual record used by the Board in making its decision: See *Bergman v Innisfree (Village)*, 2020 ABQB 661 and *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904.

Simultaneous Judicial Review & Reconsideration Applications

In *Construction and General Workers' Union, Local No. 92, Mikisew Maintenance Ltd./MM Limited Partnership and Mikisew Fleet Maintenance/MFM Limited Partnership*, [2022] Alta. L.R.B.R. 149, the Board discussed the differences between judicial review applications and reconsideration applications, particularly reconsideration applications alleging substantial errors of fact or law. The Board confirmed it will not take the position before a Court that a party's failure to file a reconsideration operates as a bar to judicial review proceedings.

VI. 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 or Court.

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. 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

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> 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 Board takes into account 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

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