

Canada Industrial Relations Board:

10 Key Points

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I - Introduction¹

The Canada Industrial Relations Board (CIRB) is often known as the “other” labour board.

In recent years, the CIRB has adopted various initiatives to improve the speed at which it resolves cases. The CIRB’s Chair in a recent speech² noted that the CIRB is now a “full-service labour dispute resolution agency”, as opposed to merely an adjudicative tribunal that passively hears cases.

The desire to resolve cases, as opposed to merely adjudicating them, takes many forms. For example, the quicker the CIRB processes a case, the higher the incentive for parties to resolve matters themselves. Cases which fall into a black hole during processing harm resolution efforts.

Similarly, the Board’s Industrial Relations Officers (IROs) and Regional Directors (RDs) settle a majority of the cases that are filed with the Board, whether by way of mediation or some other alternative dispute resolution mechanism.

In recent years, there has been a significant effort by the Board’s representative members to mediate disputes, usually at the beginning of a hearing³. The Board’s neutral Chair and Vice-Chairs can also engage in settlement discussions⁴, depending on the requirements of the parties.⁵

¹ The comments in this paper are solely those of the author and do not bind the CIRB or any of its members.

² MacPherson, Elizabeth, “New Chair, New Direction”, October 6, 2009, speech given to the Canada Labour and Employment Relations Network, available on the CIRB’s website at www.cirb-ccri.gc.ca

³ Since 1999, the CIRB, like the OLRB, has been a representational labour board: *Code*, section 9.

⁴ See Clarke, Graham and El Sonbati, Sara, *Labour Boards’ Use of Mediation and Arbitration Procedures*, 8th Annual Advanced Administrative Law and Practice, The Canadian Institute, October 28-29, 2008, available on the CIRB website.

⁵ Section 15.1(1) of the *Code* reads:

The Board, or any member or employee of the Board designated by the Board, may, if the parties agree, assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board’s power to determine issues that have not been settled.

If such case resolution methods do not succeed, then it is incumbent on the Board to run an effective hearing process, whether orally or in writing, and issue its decision forthwith.

A firm grasp of the Board's processes and its jurisprudence will assist this renewed emphasis on case resolution. This paper will review 10 key areas with a view to assisting lawyers and their clients when presenting cases to the CIRB.

II - 10 Key Points

1. *Written Pleadings*

The Board requires full written pleadings for the applications and complaints it receives. The Board's *Regulations*⁶ set out parties' responsibilities in this area. The Board acknowledges this will require up-front work from the parties, but proper pleadings are essential for the Board to exercise its powers under the *Code*.

For example, particularized pleadings allow RDs and IROs to maintain their high settlement rate, since they have significant background knowledge of the case when they mediate.

Section 16.1 of the *Code* provides the Board with a large discretion whether to hold an oral hearing, *infra*⁷. The parties' pleadings assist the Board in deciding when an oral hearing will be held.

Even where a party raises a preliminary objection, the Board still requires full pleadings.⁸

⁶ *Canada Industrial Relations Board Regulations, 2001*. See, for example, section 10 for an Application's requirements.

⁷ The Board is not required to hold an oral hearing: *Code*, section 16.1. This topic will be covered, *infra*.

⁸ The Ontario Human Rights Tribunal (OHRT) follows a similar process that requires full pleadings, even where a party raises some preliminary objections.

A party takes a risk if it purports to “reserve” its right to provide further submissions to the Board at a later time of its choosing. A unilateral reserve does not prevent the Board from deciding a case based on the material on file⁹.

For duty of fair representation (DFR) cases, the requirement for a fully-particularized complaint allows the Board to apply a “*prima facie* case” test to determine if it requires any response from the respondent trade union.¹⁰

2. *Interim Orders*

The *Code* at section 19.1 has given the Board a large discretion to issue interim orders:

19.1(1) The Board may, on application by a trade union, an employer or an affected employee, make any interim order that the Board considers appropriate for the purpose of ensuring the fulfilment of the objectives of this Part.

Unlike Ontario’s *Labour Relations Act, 1995*, the *Code* provides the Board with less statutory direction and defers instead to the Board’s discretion.

The Board has used this power, for example, where threats against employees have occurred during an organizing campaign.¹¹ In *Transpro*, the Board commented on its interim order power:

[48] The Board has not developed a definitive test for an application under section 19.1. The Board must be very careful in exercising its interim power. The Board appreciates, where material facts are in dispute, that issuing an order could have the unintended consequence of giving a privilege or an advantage to one party. Each party argued that either granting an order, or declining to do so, would give the other an unfair advantage.

[49] In the Board’s view, doing nothing where interim relief is justified, prejudices a party which finds itself on an uneven playing field, while awaiting a hearing and a decision on the merits of its case.

⁹ *Canadian National Railway Company*, 2009 CIRB 461

¹⁰ The paper will discuss this “*prima facie*” case test, *infra*.

¹¹ *Transpro Freight Systems Limited*, 2008 CIRB 422 (“*Transpro*”)

[50] In the instant case, the Teamsters have persuaded the Board that some interim relief is appropriate.

The Board has granted interim relief when faced with a jurisdictional dispute between two trade unions,¹² and to order a dismissed union officer's interim reinstatement.¹³

3. Oral Hearings

The CIRB is not required under section 16.1 of the *Code* to hold an oral hearing in every case:

16.1 The Board may decide any matter before it without holding an oral hearing.

There is no absolute right to an oral hearing for cases before the CIRB¹⁴. The Federal Court of Appeal¹⁵ has confirmed the Board's jurisdiction to decide cases based on the written record:

[11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.

The *Code* also allows the Board to defer deciding certain cases that come before it. Section 16(1.1) of the *Code* reads:

16. The Board has, in relation to any proceeding before it, power

...

¹²3329003 *Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 493

¹³*Trentway-Wagar Inc.*, 2000 CIRB 57

¹⁴ Parties must request an oral hearing under the *Regulations*: section 10(g).

¹⁵ *NavCanada v. International Brotherhood of Electrical Workers, Local 228*, 2001 FCA 30

(1.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution;

The Board may exercise this power, for example, where the same question is pending before a labour arbitrator. In *Trevor Rees*¹⁶, the complainant, who filed a DFR complaint against his trade union for the missing of a time limit to file a grievance, asked as a remedy for the Board to extend the time limit to file a grievance. That same request was already pending before a grievance arbitrator. The Board preferred to defer to that process.

The *Code* also allows the Board to refuse to determine certain unfair labour practice complaints if the issue could be arbitrated under a collective agreement. Section 98(3) of the *Code* reads:

98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

In *Expertech Network Installation Inc.*¹⁷, the Board considered a complaint involving allegations of bargaining in bad faith. The issue concerned whether the collective agreement reflected the understanding the parties had reached at bargaining. An arbitrator had already interpreted the collective agreements behind the dispute between the parties and had considered what occurred at bargaining. As a result, the Board declined to determine a complaint about essentially the same issue.

4. Scheduling Dates

The CIRB, like the OLRB, unilaterally sets the dates for its case management conferences (CMCs) and its oral hearings. Many counsel would prefer that labour boards establish dates in the same way labour arbitrators do, by first canvassing the parties' schedules.

¹⁶ 2010 CIRB 499

¹⁷ 2009 CIRB 481

The CIRB, which usually sits as a tripartite panel, has found that the arbitration model does not work effectively for scheduling the start of hearings.

While the Board will continue to schedule its hearing processes unilaterally, nothing prevents legal counsel from canvassing each other during a case's pleadings stage in order to propose dates to the Board. While that request would not oblige the Board to hold an oral hearing, or to accommodate the proposed dates, that initial planning work by counsel might allow the Board to schedule a panel that can sit on some of the proposed dates. Parties can also consent to a single person panel.¹⁸

The CIRB and the OLRB have similar policies where a party requests an adjournment.

Before writing to the CIRB, it is up to the party requesting the adjournment to canvass the other parties to determine if the request will be contested. The Board has published its adjournment policy in Information Circular (4-01), which is available on the Board's website.¹⁹

The Board recently described its adjournment procedure in *Stephen Frayling*²⁰:

[20] The Board's practice on adjournments is comparable to that followed by other Canadian labour relations boards. A party's first step is **not** to write directly to the Board requesting an adjournment.

[21] The Board's Information Circular No. 4-01, available publicly on the Board's website, clearly explains the Board's policy.

[22] If a party requires an adjournment, then its first step is to communicate with the other parties. Other than in exceptional circumstances, the Board will often adjourn a matter at the joint written request of the parties.

[23] However, if the matter is contested, then the Board will decide whether to adjourn, based on the parties' written submissions or after a CMC, depending on the situation. The Board also has a public interest role to exercise when considering such a request: *Société Radio-Canada*, 2002 CIRB 193.

¹⁸ Section 14(3)(f) of the *Code*.

¹⁹ http://www.cirb-ccri.gc.ca/publications/info/index_eng.asp

²⁰ 2010 CIRB 506

(emphasis in original)

A letter sent to the Board simply advising that counsel is unavailable for a scheduled date will not result in the process being adjourned.

5. The Board's Website

The CIRB uses its website to provide parties and their counsel with up-to-date, practical information.

Parties will find Information Circulars on several practice topics including duty of fair representation complaints, the certification process and reconsideration applications. The Board has created certain forms parties may use, though traditionally it has valued substance over technical forms. For example, the Board has prepared a new, detailed duty of fair representation form for complainants which explains to them the purpose of the duty of fair representation provision²¹.

Parties can also search the Board's reported decisions, including a feature allowing a party to search decisions by a particular author.

Speeches by the Chair and other topical papers about the Board are made available for the community on the website.

6. Duty of Fair Representation Process

The Board has adopted a *prima facie* case analysis for all new duty of fair representation complaints.²²

²¹ *Code*, section 37

²² For a more in-depth examination of the Board's duty of fair representation process, see Clarke, Graham, *Efficient Administrative Tribunals: Why Insist on a Cadillac when a Smart Car Will Do?: 9th Annual Advanced Administrative Law and Practice*, The Canadian Institute, October 28-29, 2009 (available on the CIRB's website).

The Board requires complainants to plead fully their case, with the assistance of the Board's detailed complaint form if necessary, so that the Board can consider whether a *prima facie* case exists.

Under this process, trade unions and employers will not automatically be required to file responses to every DFR complaint. Only those matters establishing a *prima facie* case will require a response.

Once the Board indicates a response is required, however, a response which simply asks for the matter to be dismissed, but which does not respond to the complainant's allegations, can lead to the complaint being accepted without an oral hearing.²³ The Board requires a party's reasons and not just the conclusions it seeks.

This requirement for a proper explanation parallels somewhat the recent trend where the courts are demanding more of administrative tribunals with regard to their reasons. The courts have reminded administrative tribunals that they cannot just give conclusions, but must also explain how and why they reached those conclusions²⁴.

Similarly, a respondent in a DFR complaint must go beyond bald conclusions, and explain the supporting facts.

7. Certification Process

The Board has streamlined its certification process. Rather than having an IRO fully investigate every certification application, the Board now requires only a letter of understanding which summarizes the issues for the parties' comments. A Board panel will then quickly deal with

²³ *Josée Trudeau*, 2009 CIRB 464

²⁴ See, for example, *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para 47 and *Clifford v. Ontario (Attorney General)* (2009), 98 O.R. (3d) 210 (Ontario Court of Appeal)

the case.

The Board has reduced significantly the administrative time it takes to decide a majority of certification applications.²⁵ The *Code* provides for a card-based certification process. Votes are rare, except in revocation and raid situations²⁶.

8. *Bargaining Unit Reviews*

Some Ontario counsel are unfamiliar with the CIRB's continuing control over its bargaining unit orders.

In Ontario, once the OLRB certifies a bargaining unit, the parties are generally free to modify the unit's description when they negotiate their collective agreements.

The CIRB, however, has followed the traditional Quebec labour law approach and retains its jurisdiction over the description of every bargaining unit it certifies.

In *Garda Cash-In-Transit Limited Partnership*²⁷, the Board described its bargaining unit practice:

[28] The Board, contrary to the practice of many of its provincial counterparts, remains seized of the description and scope of all bargaining units it issues. The Board's model follows that found in Quebec labour law: see generally *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198); and *Canadian Pacific Limited* (1984), 57 di 112; 8 CLRBR (NS) 378; and 84 CLLC 16,060 (CLRB no. 482).

[29] While in Ontario parties are generally free to modify their bargaining unit description, and indeed, the original certification is often described as being "spent" after it is issued, parties do not have a similar freedom federally.

²⁵ See *Efficient Administrative Tribunals: Why Insist on a Cadillac when a Smart Car Will Do?*, *supra*, at pages 18-20.

²⁶ The Board must hold a vote if an applicant's support is over 35% but less than 50%: section 29(2).

²⁷ 2010 CIRB 503

[30] Instead, if there are disputes about whether an employee falls within the scope of a bargaining unit, a party can bring that dispute to the Board, as CUPE did in this case, pursuant to section 18 of the *Code*:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[31] Similarly, if a question arises during an arbitration about which employees are bound by an existing collective agreement, the *Code* at section 65 allows the parties to ask the Board to determine the question:

65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

Accordingly, as workplace situations evolve, the parties to a bargaining unit order can ask the Board to determine whether new or modified positions fall within the existing bargaining unit.

If the parties are in agreement about updating a bargaining unit description that has evolved, the Board would appreciate a precise draft order for its review. This will help expedite the Board process, since the parties have the best understanding of the underlying facts and the specific wording for the order they are requesting. The ultimate decision, however, about the bargaining unit's description remains with the Board.

This retained jurisdiction over bargaining units allows the CIRB to rationalize an outdated bargaining structure. For example, if there has been a proliferation over time of bargaining units, a bargaining agent or an employer can apply for a review.

Section 18.1 of the *Code* has codified this longstanding process:

18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board

(a) must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units and any questions arising from the review; and

(b) may make any orders it considers appropriate to implement any agreement.

(3) If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable, the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

...

The Board is not obliged to restructure bargaining units. An applicant requesting a bargaining unit review must convince the Board that the existing units are no longer appropriate for collective bargaining. This threshold requirement is not needed if the review request flows from a single employer or sale of business declaration²⁸.

9. Reconsideration Process

Section 18 of the *Code* provides the Board with the power to reconsider its decisions:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

In the *Regulations*, sections 44 and 45 describe the reconsideration process:

44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the Code include the following:

²⁸ *Viterra*, 2009 CIRB 465 at paras 7-12

- (a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;
- (b) any error of law or policy that casts serious doubt on the interpretation of the Code by the Board;
- (c) a failure of the Board to respect a principle of natural justice; and
- (d) a decision made by a Registrar under section 3.

45. (1) In addition to the information required for an application made under section 10, an application for a reconsideration must set out any arguments supporting the application that may address one or more of the circumstances referred to in section 44.

(2) The application must be filed within 21 days after the date the written reasons of the decision or order being reconsidered are issued.

(3) The application and the relevant documents must be served on all persons who were parties to the decision or order being reconsidered.

In *Ted Kies*²⁹, the CIRB described the grounds for reconsideration and set out what an applicant's pleadings should contain.

Reconsideration is not an appeal, but is rather an exceptional process. The Board's decisions are final when issued.

Where an applicant requests reconsideration, but does not provide clear grounds in support, or is merely asking for a different panel to redo the original case, the Board may summarily dismiss the application, often without calling for submissions from the other parties to the original decision.

In this regard, the procedure resembles the *prima facie* process being used for duty of fair representation cases. The sheer number of reconsideration requests which do not respect the *Code's* requirements have made this procedure necessary.

The Board's reconsideration process, as currently codified in the *Regulations*, has been consistent for decades.

²⁹ 2008 CIRB 413

10. Health and Safety Jurisdiction

The Board has a limited health and safety jurisdiction under Part II of the *Code*.

In the past the Board was involved in determinations regarding whether danger existed in the workplace³⁰. Its role has now been limited to examining whether or not reprisals took place because an employee sought to enforce his or her health and safety rights under Part II of the *Code*.

The Board described its current jurisdiction in *Air Canada*³¹, at paragraphs 59 and 60:

[59] Part II of the *Code* does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees. The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and non-unionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.

[60] The only jurisdiction the Board has under Part II of the *Code* is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the *Code*. Section 147 provides as follows:

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

³⁰ *Tony Aker*, 2009 CIRB 474

³¹ 2007 CIRB 394

In *Tony Aker, supra*, the Board described how its limited jurisdiction could lead to a single set of facts leading to concurrent proceedings. For example, an employee's termination could lead to:

- i) A complaint to a Health and Safety Officer about a contravention of Part II of the *Code* (sections 127.1 and 145);
- ii) An unjust dismissal complaint under section 240 (Part III of the *Code*); and
- iii) A reprisal complaint to the Board related to a work refusal or an attempt to seek the enforcement of Part II (sections 133 and 147).

The Board does not have jurisdiction to enforce an employer's obligation to provide written reasons for discipline under section 147.1(2):

147.1 (2) The employer must provide the employee with written reasons for any disciplinary action within fifteen working days after receiving a request from the employee to do so.

A Health and Safety Officer exercises this enforcement role³².

III - Conclusion

Parties want their cases to be resolved more quickly when they come before the CIRB.

The CIRB has examined its case handling methods and has streamlined the process for DFR complaints and certification applications. The Board is also resolving many cases short of adjudication, through the efforts of its staff and decision makers.

Parties also play a role in assisting the Board to improve its efficiency.

³² *George Court*, 2010 CIRB 498 at paras 75-85

For example, given the key role that pleadings play, including in helping the CIRB decide whether to hold an oral hearing, parties need to focus on completeness. A case with well-drafted submissions could be decided quite quickly.

The parties might also canvass with each other during the pleadings stage possible dates when the matter could be “heard” by the Board, with either a three-person or a single person panel.

For bargaining unit matters, if the parties are requesting on consent a simple update of their bargaining certificate, a draft order will help speed the process along.

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