CANADA INDUSTRIAL RELATIONS BOARD: RECENT KEY DECISIONS

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I. INTRODUCTION

In just a few months, the Canada Industrial Relations Board ("CIRB") will mark its fifth anniversary[1]. In a paper I prepared for the 2001 Federal Mediation and Conciliation Services Industrial Relations Conference[2], I reviewed many of the key differences between the Canada Labour Relations Board ("CLRB") and the CIRB.

I placed particular emphasis on the changes in oral hearings at the CIRB, the exercise of its discretion in single employer applications and its extension of the duty of fair representation into the realm of collective bargaining negotiations.

This paper will review some of the recent case law on new *Code* provisions dealing with strike votes, strike notices and essential services. I will also examine the increase in the number of stay of proceedings applications being made to the Federal Court of Appeal.

These CIRB cases will also illustrate how labour law in general, and the CIRB in particular, continue to become more judicial. As the complexity of labour law matters increases, so does the decision-making procedure.

This evolution will no doubt frustrate those who want labour law decisions to be made quickly and without excessive legal procedure.

The three parts of this paper will examine:

1. the CIRB's recent decisions on strike/lockout votes and notices;

2. the *Code's* provisions on essential services; and

3. the CIRB's evolving procedures.

II. THE CIRB'S RECENT DECISIONS ON STRIKE/LOCKOUT VOTES AND NOTICES

The vast majority of labour law cases still involve the relatively simple task of interpreting statutory language and applying it to the facts of the case. New *Code* sections on strike/lockout notices and votes fall within this category.

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[1] The CIRB came into existence when *Canada Labour Code* amendments were proclaimed in force on January 1, 1999.

[2] G. Clarke, "*New Trends at the Canada Industrial Relations Board*", (2002) 9 C.L.E.L.J. 239.

a. Strike/lockout notices

The 1999 *Code* amendments added procedural requirements to the right to strike and lockout. Specifically, the *Code* introduced the requirement to give a minimum 72-hour notice of a strike/lockout.

Sections 87.2(1) and (2) of the *Code* read as follows:

> 87.2(1) Unless a lockout not prohibited by this Part has occurred, a trade union must give notice to the employer, at least seventy-two hours in advance, indicating the date on which a strike will occur, and must provide a copy of the notice to the Minister.
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> 87.2(2) Unless a strike not prohibited by this Part has occurred, an employer must give notice to the trade union, at least seventy-two hours in advance, indicating the date on which a lockout will occur, and must provide a copy of the notice to the Minister.

In *Vidéotron Télécom Ltée*[3], the union applied for an unlawful lockout declaration because of Vidéotron's actions during the seventy-two hour notice period.

Vidéotron had given the requisite seventy-two hours notice of a lockout. However, rather than allowing its employees to continue working during those seventy-two hours, Vidéotron advised them that they would be paid for the hours but would not be allowed into the workplace. Vidéotron argued before the Board that it had concerns about the safety of its equipment if employees were allowed to work during the seventy-two hour period.

The *Code* defines a lockout as follows:

> "Lockout" includes the closing of a place of employment, a suspension of work by an employer or a refusal by an employer to continue to employ a number of their employees, **done to compel their employees**, or to aid another employer to compel that other employer's employees, to agree to terms or conditions of employment. (emphasis added).

Under the *Code,* a lockout has both an objective and subjective element. Vidéotron argued the objective element did not exist since no employee suffered any economic consequences. It further argued that no subjective element existed since it merely wanted to protect its property.

The CIRB found that the objective element of a lockout did in fact exist:

[3] [2002] CIRB No. 190.

> This Board agrees with the conclusions of the provincial boards, and finds that the employer's actions in not permitting the employees to work during the 72-hour notice period, despite the fact that they were paid by the employer, establish the objective element of the *Code's* definition of lockout.[4]

In other words, a lockout does not require employees to suffer negative economic consequences. Indeed, getting paid without having to work appears no different than a paid vacation.

The Board still had to consider the subjective element in the definition of "lockout", i.e. had Vidéotron's actions been taken "to compel" employees to accept the terms and conditions of employment being offered?

The Board rejected Vidéotron's argument that it had genuine concerns that employees would sabotage equipment:

> Unlike in *Southam Inc., supra,* where the employer submitted conclusive evidence of prior vandalism, in the present matter, nothing in the weeks preceding the lock-out indicated that something similar would happen.[5]

Other Vidéotron actions provided evidence of attempts to compel employees to accept Vidéotron's offer. For example, Vidéotron had held a meeting with employees during which a representative of the company promoted the employer's offer and emphasized the possibility of job losses. Vidéotron's representative also questioned the competence of the union's negotiator and suggested employees use the paid time at home to consider the employer's offer.

Given these additional facts, the Board found the required subjective element for an unlawful lockout.

A second issue in *Vidéotron* concerned whether the unlawful lockout invalidated the original lockout notice. The Board held the union had no reason to believe that the lockout would not commence at the time specified in Vidéotron's lockout notice. As a result, the notice remained valid.

It is interesting to compare that result with the decision in *Canada Steamship Lines Inc.*[6] ("*CSL*") where the Board considered the validity of a strike notice.

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[4]Paragraph 48.
[5]Paragraph 63.
[6] [2002] CIRB No. 201.

Section 87.2(3) establishes that a strike or lockout must start at the time indicated in the notice:

> **(3) New notice** - Unless the parties agree otherwise in writing, where no strike or lockout occurs on the date indicated in a notice given pursuant to subsection (1) to (3), a new notice of at least seventy-two hours must be given by the trade union or the employer if they wish to initiate a strike or lockout.

In *CSL*, the Board concluded that since no strike action occurred on the start date set out in the union's notice, the union had to give a new notice.

The union had asked the Board to interpret section 87.2(3) as requiring only that an employer have proper time to prepare for a strike. Since *CSL* had received time to prepare, then, even if the strike did not proceed, a new notice was not required.

The Board rejected the union's argument given section 87.2(3)'s plain wording that a new notice must be delivered if the strike or lockout does not commence "on the date indicated in a notice".

The results in *Vidéotron* and *CSL* appear contradictory. In *Vidéotron,* a lockout which started too soon did not invalidate the lockout notice. Conversely, a strike which did not start on the precise date set out in the strike notice invalidated that notice. It is difficult to reconcile why a lockout that starts early and a strike that does not start on the day set out in the notice do not both invalidate the respective notices. Section 87.2(3) appears to insist that the strike or lockout start on the date in the notice or else the notice lapses.

In Societé Radio-Canada[7], the Board had to decide if a strike notice could last for just 24 hours following which striking employees would return to work.

The employer argued strikes had to be indeterminate and refused to allow the employees to return to work after the 24-hour strike. The union argued the employer's refusal to reinstate them was an illegal lockout.

The Board declared that the *Code* did not prevent a 24-hour strike. However, the union's decision to have a 24-hour strike allowed the employer to impose a lockout without any need for notice. The refusal to reinstate employees after their 24-hour strike constituted a legal lockout under the *Code*.

[7] [2002] CIRB No. 169.

b. Strike votes

Section 87.3 deals with the rules for a strike or lockout vote. Any vote must be by secret ballot.

Section 87.3(1) sets out a strike vote's requirements:

> Unless a lockout not prohibited by this Part has occurred, a trade union may not declare or authorize a strike unless it has, within the previous 60 days, or any longer period that may be agreed to in writing by the trade union and the employer, held a secret ballot vote among the employees in the unit and received the approval of the majority of the employees who voted.

In *CSL, supra,* the union argued that its ratification vote on the employer's contract offer simultaneously constituted a valid strike vote under the *Code*.

The ratification ballot asked employees to tick off one of these two options:

> "(i) I accept the proposed final offer or
>
> (ii) I reject the proposed final offer".

The union recommended rejection of the employer's offer. In a memo that accompanied the ratification ballot, the union gave its members further information about the implications of the vote:

> "understand that if the majority vote to reject this offer, it will serve to give your negotiating committee a mandate to initiate strike action if deemed necessary."

When a majority of voting members rejected the employer's final offer, the union took that as a mandate to engage in strike action. The employer argued a valid strike vote had never taken place.

The Board considered various issues in its decision such as whether a strike vote could ever be combined with a ratification vote. If a strike vote could take place as part of a ratification vote, did the ballot have to meet certain specific requirements in order to constitute a valid strike vote?

The CIRB decided that a strike vote could be combined with a ratification vote. Indeed, the ballot can list just two options:

i) I accept the employer's offer; or

ii) I reject the employer's offer and give the union the mandate to strike.

A union does not have to give a third option of:

(iii) I reject the employer's offer and vote against strike action.

This third option would be too prejudicial to the union's attempts to negotiate a collective agreement.

Notwithstanding that a union can combine a ratification vote and a strike vote, the CIRB found that the union's vote in *CSL* did not meet the requirements of section 87.3(1) of the *Code*.

The union's ballot made no reference to a strike vote and, as a result, was not clear and unambiguous. A secret strike vote must pose the strike question in a fair manner. Combining it with a decision not to ratify the employer's offer is "fair". Referring to a strike only in an attached memo falls below the required standard.

III. THE CODE'S PROVISIONS ON ESSENTIAL SERVICES

a. Policy decisions

Some roles assigned to labour tribunals force them to be increasingly judicial in approach. These cases generally involve broadly worded legislative provisions through which the Legislature leaves it up to the tribunal to add the substance. Not surprisingly, parties in these cases demand a full judicial style hearing to ensure that their viewpoint is heard.

Cases involving Charter rights, pay equity and the duty to accommodate are just a few examples of areas where labour tribunals and courts are asked to create policy. An example involving the CIRB concerns the maintenance of essential services. Section 87.4(1) of the *Code* sets out the general principle the Board must apply when considering essential services:

> During a strike or lockout not prohibited by this Part, the employer, the trade union and the employees in the bargaining unit must continue the supply of services, operation of facilities or production of goods to the extent necessary to prevent an immediate and serious danger to the safety or health of the public.

The Board develops the substance that goes with this general proposition.

b. The Board's history with health and safety

For those familiar with the Board's history, there is considerable irony that it is once again being asked to interpret the concept of "danger".
From 1973 to 1978, the Board had no role when it came to health and safety cases involving danger.

However, from 1978 until 1986, the *Code* gave the Board the power to review safety officer's decisions regarding whether or not a danger existed when an employee invoked the right to refuse unsafe work.

From 1986 until 2000, the Legislature reduced the Board's jurisdiction over safety officers' decisions about danger. The *Code* deleted the Board's jurisdiction as far as reviewing safety officers' decisions that danger did in fact exist. An employee could go to the Board only to review a safety officer's decision that no danger existed at the time of the work refusal.

The Board's remaining jurisdiction to review danger cases disappeared when Bill C-12 came into force on September 30, 2000[8].

The Board was not always comfortable with its role in health and safety. While the Board has expertise in labour relations, issues concerning danger were often exceedingly technical. It is not surprising, therefore, that the Legislature has now decided to send appeals concerning danger under Part II of the *Code* to an appeals officer.

On one occasion, a panel of the CLRB publicly expressed its discomfort over health and safety matters[9]:

> With the utmost respect, it seems to us that it would be much more in keeping with the spirit of the legislation if an alternative scheme could be devised to keep the safety and health matters in an industrial atmosphere rather than the legal settings in which they are now being decided. Occupational safety and health has emerged as a discipline onto itself and, in our opinion, it would be wise to utilize the expertise it has developed within this discipline to attain informed and cooperative resolutions of these matters.
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> As a suggestion to stimulate thoughts in this direction, the Minister of Labour might consider amendments to the *Code* removing the Board from the scene

[8] For an historical review of the Board's jurisdiction over "danger" under Part II of the *Code*, see G. Clarke, *Canada Labour Relations Board: An Annotated Guide*, (Toronto: Canada Law Book, 1992).
[9] *Ron Dumont* (1991), 85 di 51 (CLRB No. 868).

> and perhaps the powers under section 138(2) of the *Code* could be used to appoint neutral persons to inquire into and resolve these disputes where opinions of safety officers are being challenged. The major problem with this Board handling these matters is our lack of expertise in the field.

A different panel of the CLRB later disagreed with these comments[10].

It is therefore quite ironic that as Part II of the *Code* was being amended to remove any Board role in reviewing safety officers' decisions concerning danger, the new concept of essential services was added to the *Code*. The *Code* now asks the Board to decide when "an immediate and serious danger" to the public exists.

c. Decisions under section 87.4

The CIRB has issued several decisions under section 87.4. The Federal Court of Appeal has also had one opportunity to comment on this new section.

In *Aéroports de Montréal*[11], the Board analyzed what essential services would have to be maintained if the firefighters at Dorval and Mirabel Airports went on strike. The CIRB decided that nothing less than the regular full complement of six firefighters would have to be maintained at each airport, twenty-four hours a day and seven days a week, in order to ensure public safety.

In *Atomic Energy of Canada Limited*[12], the issue concerned essential services and the production of medical isotopes for use in nuclear medicine. The Board found initially that during a strike or lockout, members of the public would be put at risk by a shortage of medical isotopes. The question remained which employees would have to work in order to maintain the essential services required to produce medical isotopes.

The Federal Court of Appeal reviewed the Board's decision in *Chalk River Technicians* v. *Atomic Energy of Canada Limited*[13]. The Court agreed with the CIRB that there was sufficient evidence to support the conclusion that serious danger to the health of the public would result if the production of isotopes did not continue. It also agreed with the Board that the serious danger would be "immediate" as that term is used in the *Code*, if the production of isotopes ceased because of a strike or lockout.

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[10] *H.G. Snook* (1991), 86 di 82 (CLRB No. 895).
[11] [1999] CIRB No. 23.
[12] [2001] CIRB No. 122.
[13] (2002) 298 N.R. 285.

The Board's longest hearing involving essential services concerned air traffic control. In *NAV Canada*[14], the CIRB held twenty-three days of hearings from May 2001 until February 2002. In its 129-page decision, the CIRB reviewed some of the applicable principles for essential services and found that air traffic controller services for the North Atlantic, North American and international flights could not be reduced without constituting a danger to the public.

The Board felt that some reduction could take place with regard to domestic commercial flights and that training of future air traffic controllers by members of the bargaining unit could be withdrawn.

With these findings in mind, the Board asked the parties to attempt to negotiate an essential services agreement themselves. The Board was particularly concerned about the impact of a strike or lockout on Canada's modern health networks.

In *NAV* Canada[15], the matter came back before the Board. The parties had been unable to agree on the essential services required to be maintained in the event of a strike.

The hearing took four days in July 2002. On August 2, 2002, the Board decided that the services provided to train currently unlicensed air traffic controllers could be safely withdrawn. The Board retained jurisdiction with regard to the remaining services. This case is still ongoing.

d. Emerging principles for essential services cases

The limited case law on essential services provides some guidance for future cases:

1. The term "public" in section 87.4 refers broadly to members of the community in general[16];

2. The CIRB will allow a partial right to strike if, during its ongoing process, it identifies a group in the bargaining unit which can withhold its services without causing danger to the public[17];

[14][2002] CIRB No. 168.
[15][2002], CIRB No. 186.
[16]*Aéroports de Montréal, supra*, paragraph 18 and *NAV Canada,* CIRB No. 168 at paragraph 219.
[17]*NAV Canada,* CIRB No. 168 at paragraph 26.

3. Any abridgement of the right to strike must be to the minimum level required to protect the health and safety of the public[18];

4. The Board will consider the employer's and the union's suggestions with regard to essential services but will not hesitate to impose its own view of what is required to protect the public[19];

5. The Board will not avoid applying the *Code* merely because its decision on essential services could deny employees the right to strike or lessen the impact of the strike[20];

6. The Board does not need to be satisfied that a strike or lockout *would* pose a danger, but rather whether they *could* pose a danger. The *Code's* use of the term "could pose" means a "mere possibility" as opposed to "would pose" which would seem to require a "probability"[21];

7. The danger must be immediate and cannot simply appear at any time in the future without eliminating the word "immediate" from the *Code*. The danger, however, does not need to appear "right now or within a few days". The Board must consider the temporal meaning of the word "immediate" in applying section 87.4[22].

e. Policy decisions and the Board's procedures

There is a significant difference between the Board's policy decisions in areas such as essential services and its interpretation decisions for strike or lockout votes and notices. The policy nature of essential services decisions leads to significantly long hearings and expense.

In the two *NAV Canada* decisions[23], the Board heard extensive oral evidence, reviewed a significant number of documents and accepted affidavits for which there had been cross-examinations. The two *NAV Canada* hearings took 27 hearing days. The two decisions total 157 pages.

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[18] *NAV Canada*, CIRB No. 168 at paragraph 228.
[19] *Aéroports de Montréal, supra* at paragraph 21.
[20] *Aéroports de Montréal, supra* at paragraph 24.
[21] *Chalk River Technicians* v. *Atomic Energy of Canada Limited, supra* at paragraphs 51 to 53. The Board's written reasons had used the expression "would pose" rather than the *Code's* "could pose".
[22] *Chalk River Technicians* v. *Atomic Energy of Canada Limited, supra* at paragraphs 61 to 63.
[23] CIRB Nos. 168 and 186.

Essential services decisions demonstrate that policy decisions are resource intensive[24]. The large federal businesses subject to the CIRB's jurisdiction file significant evidence in order to support their views of when "a strike or lockout could pose an immediate and serious danger to the safety or health of the public". It is difficult to imagine how such decisions could be made in an informal, summary way[25].

The Board itself has described its different role in the area of essential services[26]:

> [176] [...]Section 87.4 presents a very different concept; the Board is called upon to perform a public duty to ensure that public health and safety will not be endangered by the exercise of the right to strike.
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> [177] A section 87.4 process is not a partisan process, even though the parties may hold different views on one issue or another. The parties are there to assist the Board by providing evidence of whether or not there will be a danger emanating from the exercise of the right to strike. This is not a win/lose situation or the matter of an award for or against the disputants.
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> [178] In *Aéroports de Montréal*, [1999] CIRB no. 23, the Board almost assumed the role of ombudsperson for the community of airport users. The Board did not adopt the position of either the employer or the trade union, nor did it decide whether one case was better than the other. It said that neither position was good enough. The Board drew on the parties' knowledge and evidence in reaching its conclusion.

IV. THE CIRB'S EVOLVING PROCEDURES

1. Judicial Procedures at the CIRB

Policy decisions are but one reason labour tribunals are becoming increasingly judicial. The 1999 *Code* amendments and the CIRB's use of its increased procedural powers add several civil court procedures to its repertoire.

a. Documentary production

The *Canada Industrial Relations Board Regulations, 2001* ("*2001* Regulations"), came into force on December 5, 2001. They adopt several civil court practices.

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[24] The *Atomic Energy of Canada Limited* decision totals 101 pages.
[25] The CIRB's hearings in this area are proceeding at warp speed if compared to the pay equity hearings for certain federally regulated employers and their bargaining agents.
[26] *Atomic Energy of Canada Limited, supra* at paragraphs 176 to 178.

For example, the *2001 Regulations* oblige parties to produce relevant documentation. Section 16(f.1) of the *Code* was added to give the Board the clear power to compel the production of documents. Sections 10, 21 and 27 of the *2001 Regulations* all deal with the production of documents prior to a hearing.

The Board also demands that parties file witness "will-say" statements in advance of the hearing.

Civil litigators collect and produce relevant documents as a matter of course. Documentary disclosure is new to the CIRB but it became necessary because of refusals by parties in the past to produce documents except at formal Board hearings[27].

b. Transcription of hearings

The CIRB has also started to have its hearings transcribed. This represents a significant departure from the past.

At the CLRB, the Board adopted the policy of not transcribing its proceedings. It also denied parties the right to tape them for their own use. Since it was not reviewable for errors of fact and/or law, the CLRB reasoned a transcript was not necessary. Although parties challenged this practice, the Federal Court of Appeal upheld the Board's right not to have a transcript even if part of its reason for so doing was to discourage applications for judicial review[28].

The CIRB now makes explicit references to the transcript in its reasons[29]. Judges do much the same in their decisions.

c. Expedited procedure

The amended *Code* provided the CIRB with the power to create an expedited procedure. Section 14 of the *2001 Regulations* creates the expedited procedure to deal with such things as i) interim orders, (ii) invalid strike/lockout votes and iii) unlawful strike/lockout applications.

As part of the expedited procedure for an interim order, the application must include one or more affidavits setting out the supporting evidence. The Board has

[27] In *Canadian Pacific Airlines Ltd.* v. *Canadian Airline Pilots Association*, [1993] 3 S.C.R. 724, the Supreme Court of Canada held that the CLRB could only compel the production of documents during a formal hearing.
[28] *Eastern Provincial Airways Ltd.* v. *Canada (Labour Relations Board)*, [1984] 1 F.C. 732.
[29] See, for example, Sociéte Radio-Canada, [2002] CIRB No. 193.

reserved the right to impose terms with regard to the cross-examinations on the affidavits.

This procedure resembles the steps required to bring a motion or an application before the civil courts. In Ontario, the *Rules of Civil Procedure* have recently added Rule 76 which creates a simplified procedure for cases involving less than $50,000.

d. Pre-hearing conferences

Section 25 of the *2001 Regulations* deals with the Board's power to hold pre-hearing conferences. These conferences explore settlement, simplify the issues and obtain estimates from the parties about the duration of the hearing. These pre-hearing conferences may be held by way of teleconference or videoconference. Pre-trials are a regular step in any civil litigation case.

e. Summary

In sum, new procedural mechanisms at the CIRB incorporate procedures commonly used in the area of civil litigation. They are considered essential to allow the Board to meet its mandate.

2. Stay of proceedings applications

The CIRB generally does not stay its own proceedings pending judicial review[30]. There has been an increase in the number of stay applications to the Federal Court of Appeal in the last few years. While several applications result from the same case, it will be interesting to see if parties routinely ask the Court for stays and, more importantly, how receptive the Court is to such requests.

In *P.S.A.C.* v. *Canada (Labour Relations Board)*[31], the Federal Court of Appeal took a clear stance against staying proceedings currently before the Board:

> As to this, we observe (1) that there is no evidence of any serious prejudice other than that which may be suffered by any party to a proceeding which is subject eventually to be set aside or to prove abortive; and (2) that the very text of subsection 122(2) indicates to us that Parliament, having weighed the competing interests involved, has concluded, as a matter of policy, that proceedings before the Board should in virtually no circumstances be subject to being halted before they have come to a conclusion.

[30] *Société Radio-Canada*, [2002] CIRB No. 193.
[31] [1986] F.C.J. No. 156.

In a more recent case, the Federal Court of Appeal reiterated this approach while considering the stay of an ongoing Board proceeding. In *Marine Atlantic Inc.* v. *Canadian Marine Officers' Union*[32], the Federal Court of Appeal was asked to stay Board proceedings into essential services under section 87.4 of the *Code*. The applicant had a pending judicial review application contesting the Board's preliminary decision on constitutional jurisdiction. The Court wrote at paragraph 13:

> The public interest in the resolution of labour relations disputes, and the pivotal role assigned by Parliament to the specialist Board in these matters, are well known. The strong preclusive clauses limiting judicial intervention in the Board's proceedings is a clear legislative indication that the Court should show considerable restraint in the exercise of its discretion to order a stay of proceedings which, in the interests of the parties and the public, the Board has determined should be delayed no further.

Other current decisions from the Federal Court of Appeal, however, suggest that the effect of a CIRB decision may be stayed pending judicial review[33]:

> I agree with the Board that section 22 is a strong privative clause. However, it does not oust the jurisdiction of this Court to decide applications for judicial review if the grounds referred to in paragraphs 18.1(4)(a), (b) or (c) of the *Federal Court Act,* R.S.C. 1985, c. F-7 are applicable.
> ...
>
> If the Court may decide a judicial review based on those grounds, it must follow that it has jurisdiction to grant a stay pending the judicial review or, if necessary, an interim stay.

Notwithstanding the difficulty in obtaining a stay of proceedings, the increasing frequency of such requests may lead to greater delays. Recent cases from the Federal Court of Appeal include:

1. *International Brotherhood of Locomotive Engineers* v. *Cairns*[34]

   The Court stayed CIRB decision no. 35 pending the hearing of the judicial review.

[32] [2003] F.C.J. No. 1180.
[33] *Via Rail Canada Inc.* v. *Cairns*, F.C.J. No. 1167 at paragraph 3.
[34] [2000] F.C.J. No. 112.

2. *International Brotherhood of Locomotive Engineers* v. *Cairns*[35]

   The Court refused to stay the CIRB's reconsideration proceedings into the original decision.

3. *Air Canada Pilots Assn.* v. *Air Line Pilots Assn.*[36]

   The Court refused to stay a CIRB decision setting aside an arbitrator's award but did agree to expedite the hearing of the judicial review.

4. *Via Rail Canada Inc.* v. *Cairns*[37]

   The Court refused to issue an interim stay of proceedings since it would be hearing an application for stay pending judicial review in less than a month.

5. *Marine Atlantic Inc.* v. *Canadian Marine Officers' Union*[38]

   The Court refused to stay proceedings before the CIRB. The CIRB had found that it had constitutional jurisdiction and was continuing its hearing with regard to essential services. The Court did not stay the CIRB's ongoing proceedings pending judicial review of the constitutional decision.

6. *Via Rail Canada Inc.* v. *Cairns*[39]

   The Court stayed CIRB decision no. 230 pending judicial review.

In the civil courts, an appeal generally stays the decision that is the subject of the appeal. Recent case law from the Federal Court of Appeal suggests that the Court might be becoming more receptive to staying CIRB decisions, at least pending the outcome of its judicial review.

[35] [2000] F.C.J. No. 1489.
[36] [2002] F.C.J. No. 1532.
[37] [2003] F.C.J. No. 1167.
[38] [2003] F.C.J. No. 1180.
[39] [2003] F.C.A. 319.

V. CONCLUSION

This paper has reviewed recent key decisions at the CIRB. In particular, it has contrasted simple statutory decisions (strike/lockout votes) with policy decisions (essential services).

There is nothing wrong with the Legislature asking administrative tribunals to get involved in policy cases. Agencies like the CRTC and other regulatory boards regularly do this type of work. However, policy cases do contribute to the ongoing trend of labour tribunals adopting a more judicial structure. This trend seems to conflict with the original reason for removing labour issues from the courts.

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