Court of King's Bench of Alberta

Citation: United Food and Commercial Workers Canada Union (Local No 401) v Sobey's Capital Inc, et al, 2026 ABKB 369

Date: 20260512
Docket: 2301 02167
Registry: Calgary

Between:

United Food and Commercial Workers Canada Union, Local No. 401

Applicant

- and -

Sobey's Capital Inc. and Alberta Labour Relations Board

Respondents

Memorandum of Decision
of the
Honourable Justice C.D. Millsap

Introduction

[1] United Food and Commercial Workers Union, Local No. 401 ("the Union") seeks to have two decisions of the Alberta Labour Relations Board ("the Board") reviewed by this Court. The first stems from the refusal of the Board to accept the Union's application to engage in secondary picketing and the second from a refusal to hear a subsequent application prior to the commencement of a strike.

[2] The underlying facts are not in dispute. The Union and the Respondent employer, Sobey's, were engaged in collective bargaining. The Union voted in favour of striking in October, 2022. In November, pursuant to section 84.1 of the *Labour Relations Code* ("the *Code*") an application was forwarded for permission to strike at secondary locations. The

application was refused upon receipt and that refusal was appealed to the Board. The Board upheld it on the basis that a 'Notice to Strike' had not been served and the strike had not yet begun, both being essential elements to their discretion to permit secondary picketing, according to them. The Union then applied for a Judicial Review of that decision.

[3] On January 10, 2023, a Strike Notice was served by the Union as was a new application for secondary picketing. The Board advised that they would hear the application but not until the strike had commenced. The Union, of the view that the law allows for secondary picketing to be approved of in advance of a strike commencing, then applied for a second Judicial Review of that decision.

[4] Eventually the two reviews were amalgamated into a single Judicial Review on both issues. In the interim, the two sides of the dispute resolved their differences resulting in a new collective agreement being struck without the necessity of any job action.

[5] Notwithstanding the resolution, the Union seeks to have the Board's decisions reviewed by this Court. The Respondent employer has since removed itself from the proceedings however due to the filing of *Constitutional Notice* by the Union, the Attorney General of Alberta ("AG") is involved, and the Board has also been added as a party by consent.

[6] The Board's involvement is essentially as a passive observer, and the AG has indicated that it intends to participate in the Judicial Review on the mootness issue only.

Issue

[7] The Court must decide whether to hear the substantive review or whether the mootness of the matter precludes the Court from further involvement.

Analysis

[8] Courts have discretion to hear a Judicial Review even where the initial dispute between the parties is moot. The guiding principles on how that discretion should be exercised are delineated in the Supreme Court of Canada decision in ***Borowski v Canada (Attorney General)***, 1989 CanLII 123 (SCC), (***Borowski***). The first step to be undertaken is to determine whether the dispute has disappeared leaving a merely academic issue to be resolved; the parties agree that, with the strike being averted and a new agreement signed, this step has been met. The next step is for the Court to determine whether the case is an appropriate one in which to exercise its discretion to hear the matter despite it being moot.

[9] There are three factors outlined in ***Borowski*** that serve to inform the Court's decision.

[10] The first factor is whether the presence of an adversarial context exists.

[11] The Union asserts that an adversarial context exists. The AG however points to the absence of a true Respondent as proof positive that it does not. As noted above, the other party to the initial dispute, is Sobey's and they have declined to participate in this hearing. The Board has been added as a party but beyond providing the Record of Proceedings and what they describe as "helpful elucidation" of the *Code*, they are also not an adversarial participant.

[12] The Union points to the submissions made by the AG in oral argument as well as the limited scope of the remedy sought as being factors the Court can consider when determining whether an adversarial context exists in this case.

[13] The Alberta Court of Appeal has offered some guidance on navigating this issue by pointing out dangers inherent in proceeding in the absence of an adversarial context: ***Wiebe v Alberta Labour Relations Board et al***, 2001 ABCA 192, (***Wiebe***). The Applicant quite accurately pointed out that many of the dangers identified are not applicable or have safeguards in place in the case at bar. That said, the over-arching theme of ***Wiebe*** is that hearing moot appeals (or judicial reviews) is the exception, not the rule.

[14] It is unfortunate, and hopefully not purely tactical, that the Respondent employer has chosen not to participate but it has left the Union without a true adversary in this matter. The addition of the Board as a party does not fill that void and the presence of the AG, who appears in a limited capacity is insufficient to create a true adversarial setting in which the Court can be satisfied that a complete picture of the issue and fulsome arguments representing both sides will be presented.

[15] The Union is correct in noting that a Certified Record of Proceedings has been filed by the Board and the record contains relevant arguments filed by the employer at the hearing stage. Additionally, the AG's submissions on the mootness issue have ventured into the merits and as a result the Court does have some insight into what the opposing argument on behalf of the Respondent would be.

[16] These circumstances serve to mitigate the ***Wiebe*** dangers; however, they do not eliminate them completely. The lack of an opposing party remains a concern for the Court should this matter continue to a hearing on the merits.

[17] The second ***Borowski*** factor is the concern for judicial economy.

[18] Overall, the wealth of jurisprudence in this area would suggest that hearing moot matters adversely impacts upon judicial economy. The expenditure of judicial resources on a moot appeal can however be justified in some circumstances. The Union argues that those circumstances exist here due largely to the nature of labour disputes and the fact that they will almost always be resolved before the matter makes its way into the courtroom.

[19] The labour dispute in question, did not even result in a strike and was settled before any picket lines were formed. It is relevant though, that the Union and employer remain tied together by virtue of their ongoing collective bargaining agreement which is set to expire in 2028. Should the issue of secondary picketing not be resolved by the Court, the parties may well find themselves right back here in just a few short years. Judicial economy would not be served by the repeat appearance of familiar litigants seeking to resolve the same issue over and over.

[20] The AG points out that the judicial economy analysis requires a consideration of whether the outcome of the Judicial Review will have a practical effect on the parties. The Court interprets this enunciated factor to mean that there will be a practical effect on both the Union AND the employer. While clearly this issue impacts the Union, there is some question of whether the employer would be impacted or not. Their lack of participation in the face of the possibility that the Court will hear this matter and grant the Union the relief sought would tend to support the conclusion that the practical effect required does not exist or is quite minimal.

[21] It is not lost on the Court that the lack of participation by the employer may well be a calculated tactical move. As noted by the Union, the Board's decisions under review are noted in the practitioner's manual as being of precedential value on this issue and the decisions are clearly

ones that are more favourable to the employer than the Union. There is value to the employer in having these precedents stand.

[22] Part of the judicial economy analysis requires a consideration of the fact that this may be a recurring issue, that by its nature will almost always have disappeared before it is ultimately resolved. The Union argues this matter fits this description. Labour disputes are frequent but often short-lived. If this issue is ever to be resolved by the Courts, it will almost certainly have to be in a moot context.

[23] The counter to that position is that while it may be necessary to resolve the issue while factually moot, the better use of judicial resources would be to wait until there is a true adversarial element to the appeal.

[24] The concerns of the Union are very real, but ultimately their goal is to have the decision of the Board set aside to erase the current precedent and have this Court set a new precedent. As Justice Ross pointed out in, ***Bonsma v Alberta (Information and Privacy Commissioner)***, 2012 ABQB 294, "The case law makes it clear that the desire to set a precedent for others is not a special circumstance." Here, the Union likely seeks to set a precedent for itself, which is perfectly acceptable, however is still not a circumstance that allows them to tip the balance in their favour.

[25] This second factor does not support the exercise of discretion to proceed to hear this matter.

[26] The third ***Borowski*** factor, and perhaps the most important one here, is the need for an awareness of the Court's proper law-making function.

[27] The Supreme Court aptly defined this factor as follows (p 362):

> The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[28] The Union seeks to have this review heard and for the Court to find that the Board failed to recognize the need to properly balance *Charter* issues when considering secondary picketing applications pursuant to section 84 and 84.1 of the *Code*. While this is a proper judicial function and by no means a frivolous endeavour by the Union, there is a real jeopardy that exists if the Court were to engage in this hearing in the absence of a proper adversarial context.

[29] The Court becomes a *de facto* legislator when it offers opinion and makes a pronouncement on interpretation of laws in the absence of a true opposition to the relief sought. While the Union's position on the merits seems quite strong and compelling if not obvious, the Courts must be careful to stay in their lane when it comes to opining on the interpretation of legislation. In the absence of an ongoing dispute, particularly where the opposing party has withdrawn, the issue before the Court becomes more abstract and the decision made becomes largely legislative in function and purpose.

[30] This danger is averted where a live dispute exists and both sides of the dispute are engaged in the litigation. Absent a live dispute, it is not necessarily essential but substantially preferred that the adversarial element exist to mitigate against the Court being drawn out of its lane.

Conclusion

[31] Despite this Court's strong desire to hear the merits of this application, the application of the ***Borowski*** factors do not permit this moot matter to continue. The application for Judicial Review is dismissed.

Heard on the 6th and 7th day of May, 2026.
Dated at the City of Calgary, Alberta this 12th day of May, 2026.

C.D. Millsap
J.C.K.B.A.

Appearances:

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