



Practice Direction #17

Right to Sue Applications

1.0 This Practice Direction

- governs the right to sue application process
- outlines the format and content for application materials
- outlines the process for summonses, withdrawals, orders on consent and other matters

2.0 Legislation

2.1 The WSIAT uses certain statutory provisions to determine if a right of action is taken away by the legislation in a right to sue application.

2.2 Section 126 of the *Act* requires the WSIAT to use Workplace Safety and Insurance Board (WSIB) policy in appeals. Since a right to sue is an application and not an appeal, section 126 does not apply. The WSIAT is not bound to apply WSIB policy in right to sue applications. The WSIAT asks the WSIB to provide it with relevant policy for right to sue applications and may consider it. This is to promote consistent decision-making at the WSIAT.

3.0 Who Can Apply?

3.1 Section 31(1) of the *Workplace Safety and Insurance Act, 1997* (the *Act*) states that the following may apply to the WSIAT for certain determinations

- a party to an action
- an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act*

4.0 Available Determinations Under Section 31 of the Act

4.1 A party to an action or an insurer from whom statutory accident benefits are claimed can apply to the WSIAT to determine

- if the right to commence an action is taken away because of the *Act*
- if the amount that a person might be liable to pay in an action is limited by the *Act*
- if the plaintiff is entitled to claim benefits under the insurance plan

4.2 The WSIAT has exclusive jurisdiction to determine an application as described in section 31(1). This is from section 31(2) of the *Act*.

4.3 A worker or survivor can file a claim for benefits with the WSIB within 6 months after the WSIAT determination under section 31(1). This is under 31(4) of the *Act*.

5.0 Interested Parties

5.1 Interested parties are normally

- the parties in the civil action
- the plaintiff's employer

5.2 The Statutory Accident Benefits insurer is usually an interested party in applications where statutory accident benefits were claimed under section 268 of the *Insurance Act*.

5.3 Parties who are not applicants or respondents but have an interest in the application can contact the WSIAT.

5.4 If a party submits that a company, organization or individual is a person's employer, the WSIAT will generally require that notice of the application be sent to that employer.

6.0 Materials

6.1 General

6.1.1 All Right to Sue Statements and other material to be relied upon in a right to sue application must be served on all interested parties to the application. The party filing the material must provide the WSIAT with an affidavit of service. This proves notification to all other parties.

6.1.2 All materials submitted by the parties should be sent to the WSIAT electronically. Parties should provide their materials in a way that is easy to read and navigate. For example, bookmark key pages in your statement. WSIAT staff may ask you to resubmit electronic documents that are not easy to navigate or are of poor quality resolution. If you submit your materials by mail, do not use tabs as part of your application materials. This helps the WSIAT create page-numbered addenda and electronic hearing documents.

6.2 Applicant's Materials

6.2.1 The Applicant must complete a Right to Sue Application Form. They must file the form with the WSIAT. They must include their Applicant's Right to Sue Statement.

6.2.2 The Applicant's Right to Sue Statement should have the following information

- a. a table of contents
- b. a statement of the facts
- c. the issues and arguments to be made
- d. the law
- e. the determination sought
- f. documentary evidence to support the facts that the applicant intends to rely, including any relevant material from the Workplace Safety and Insurance Board (WSIB) file
- g. copies of the relevant portions of examinations for discovery
- h. copies of the relevant portions of transcripts of any previous proceedings, if applicable

- i. a list of all witnesses who will give testimony and an outline of their testimony
- j. all pleadings in the action and in any other matter arising out of the same set of facts

6.2.3 The Applicant's Right to Sue Statement is forwarded to Tribunal Counsel for review.

6.3 Right to Sue Participation Form

6.3.1 WSIAT staff will write to all Interested Parties. WSIAT staff will provide them with a Right to Sue Participation Form. Interested Parties must return the Right to Sue Participation Form to the WSIAT within 3 weeks.

6.3.2 If a party does not return the Right to Sue Participation Form within 3 weeks, the WSIAT will assume that the party does not intend to participate in the application. The party will not receive any further communication from the WSIAT other than the final decision.

6.3.3 Parties must copy all other parties when they send their Right to Sue Participation Form to the WSIAT.

6.4 Employer and Claim Status Information

6.4.1 Once the deadline to return the Right to Sue Participation Form has passed, WSIAT staff will send a Confirmation Letter to the participating parties. The WSIAT will provide the parties with a party list. This will confirm who will be participating in the application.

6.4.2 The WSIAT will also send out Addendum 1 to all participating parties. This has the WSIAT Status Memo about employer accounts, claim files and Workplace Safety and Insurance Board (WSIB) policy.

6.4.3 The Confirmation Letter sets out the due dates for

- Co-Applications
- Respondent's Materials
- Reply Materials

6.5 Co-Applicant or Interested Party's Materials

- 6.5.1 A Co-Applicant or an Interested Party can also file a Right to Sue Statement. Their statement will be in the same form as the Applicant's Statement. No material needs to be duplicated.
- 6.5.2 The Co-Applicant's or Interested Party's Right to Sue Statement must generally be served on all participating parties. It must be filed with the WSIAT within 4 weeks of the Confirmation Letter. Or it must be filed in the time set out in the Confirmation Letter.
- 6.5.3 A Co-Application will generally be heard at the same time as the main application.

6.6 Respondent's Materials

- 6.6.1 The Respondent's Right to Sue Statement will be in the same form as the Applicant's Statement. No material needs to be duplicated.
- 6.6.2 The Respondent's Right to Sue Statement must generally be served on all participating parties. It must be filed with the WSIAT within 8 weeks of the Confirmation Letter. Or it must be filed in the time set out in the Confirmation Letter.

6.7 Reply Material

- 6.7.1 The Applicant can prepare a Reply to the Respondent's Right to Sue Statement.
- 6.7.2 The Applicant's Reply must generally be served on all participating parties. It must be filed with the WSIAT within 10 weeks of the Confirmation Letter. Or it must be filed in the time set out in the Confirmation Letter.

6.8 Correspondence

- 6.8.1 Parties are responsible for copying all other participating parties on all materials they send to the WSIAT.

6.9 Late Filing of Materials

6.9.1 If any of the following is filed late, copies should be provided to the parties to the application as outlined above

- Co-Applicant's or Interested Party's Right to Sue Statements
- Respondent's Right to Sue Statement
- Applicant's Reply Statement

6.9.2 The Vice-Chair or Panel assigned to the application will decide if late documents will be admitted.

7.0 WSIAT Process

7.1 Role of Tribunal Counsel and Assignment of a Vice-Chair or Panel

7.1.1 The Applicant's Right to Sue Statement is forwarded to Tribunal Counsel. They will review the application to ensure that it is complete. They will also ensure that all interested parties have been identified and served with a copy of the Applicant's Right to Sue Statement. Tribunal Counsel may request clarification of the issues or request further documentation.

7.1.2 Tribunal Counsel will review all employer and claim status information received. They will confirm that the Application is ready to proceed. They will also confirm that the Confirmation Letter can be sent.

7.1.3 The Confirmation Letter will outline the filing deadlines for

- Co-Applicant's or Interested Party's Right to Sue Statements
- Respondent's Right to Sue Statements
- Applicant's Reply Statements

- 7.1.4 Once all materials have been received, Tribunal Counsel will request that the Scheduling Department assign a Vice-Chair or Panel to the application. Once a Vice-Chair or Panel is assigned, the materials are forwarded to them for further instructions. They may render a decision using the written record. Or they may provide further instructions like whether the matter is ready to proceed to
- a hearing
 - mediation
 - a Pre-Hearing Conference

7.2 Mediation at the WSIAT

- 7.2.1 Only Vice-Chairs conduct mediations at the WSIAT for right to sue applications. The Practice Direction #6 – Mediation – 2-Party Appeals applies with some necessary modifications for right to sue applications.
- 7.2.2 If an agreement is reached between the parties through mediation, the Vice-Chair will release a decision with the terms of the agreement. All agreements must be consistent with
- the *Workplace Safety and Insurance Act, 1997* (the Act)
 - Workplace Safety and Insurance Board (WSIB) policy
- 7.2.3 If an agreement is not reached between the parties through mediation, it will be referred to a hearing before a different Vice-Chair or Panel. They may give more instructions about proceeding.

7.3 Pre-Hearing Conference

- 7.3.1 A pre-hearing conference can be
- in person
 - by video conference
 - by phone

It is a discussion between a Vice-Chair or Panel and the parties in the application. The Vice-Chair or Panel might give direction for further processing of the application. Or they might determine the way the hearing will proceed.

7.3.2 The Vice-Chair or Panel who conducts the pre-hearing conference will generally hear the merits of the application.

7.3.3 For more information, review Practice Direction #14 – Pre-Hearing Conferences.

7.4 Written Hearing

7.4.1 After a Vice-Chair or Panel has been assigned, they may render a decision from the written record. This will happen without an oral hearing. Review section 7.1.

7.4.2 The Vice-Chair or Panel might ask for more information or submissions from the parties before making a decision.

7.5 Oral Hearing

7.5.1 Parties will be informed if a Vice-Chair or Panel determines that an oral hearing is required. The Scheduling Department will contact the parties to set a date for an oral hearing.

7.5.2 If a party cannot proceed with the oral hearing, they should request an adjournment in writing as soon as possible. The request should set out the reasons for the request and include the consent of the parties. A copy of the request should be sent to the other parties. If an adjournment is granted, it will be several months before the matter can be rescheduled.

7.6 Summons to Witness and Production of Documents

7.6.1 Any party in a right to sue application can ask for the WSIAT to issue a summons to a witness. This happens when the application is likely to be an oral hearing.

7.6.2 A summons request should be made as soon as possible. It must be submitted at least 6 weeks before the hearing date.

7.6.3 The party requesting the summons must provide the witness' name and address information to the WSIAT.

- 7.6.4 All summons requests will be reviewed by the WSIAT. The WSIAT will prepare the summons if it agrees that
- the person's testimony is necessary
 - it will be useful to the proceeding
 - a summons is required
- 7.6.5 The summons will be delivered to the party making the request. That party will be responsible for serving the summons. They must pay the expenses. This follows Tariff A of the *Rules of Civil Procedure*. That party will provide the WSIAT with an original affidavit of service.
- 7.6.6 If the WSIAT does not issue a summons, the party can ask the Vice-Chair or Panel assigned to the application to consider their summons request. The Vice-Chair or Panel will decide the request based on written submissions.
- 7.6.7 If the WSIAT issues a summons on its own initiative, the WSIAT will serve the summons and pay the expenses.
- 7.6.8 A request for a summons for the production of documents is usually referred to the Vice-Chair or Panel assigned to the application for instructions. When documents are in the control of one of the parties, the parties are required to explore the release and exchange of documents.

7.7 Withdrawals and Orders on Consent

- 7.7.1 The Applicant must notify the WSIAT in writing as soon as possible if the parties have settled and want to withdraw the application. This letter must be copied to all participating parties. Last minute withdrawals waste everyone's resources. Parties should provide as much notice as possible of withdrawals.
- 7.7.2 If the parties have settled the action but still need a decision from the WSIAT about an issue raised in the application, they must notify the WSIAT in writing as soon as possible. They must send the WSIAT a signed Draft Order and Consent. Tribunal Counsel will review them. Tribunal Counsel may ask for further instructions from a Vice-Chair or Panel.

7.7.3 If the parties come to an agreement on facts about the issue(s), they must notify the WSIAT in writing as soon as possible. They must send the WSIAT a signed Agreed Statement of Facts. The WSIAT is not bound by the Agreed Statement of Facts from the parties to an application.

7.8 Costs and Expenses

7.8.1 The WSIAT does not award costs. Review Practice Direction #30 – Representatives’ Fees and Costs.

7.9 The Decision

7.9.1 In right to sue decisions, the court file number and family names of the parties to the civil action are generally not anonymous. This is because the civil case is already in the public record.

7.9.2 Names will be anonymous if

- the people are not named in the civil action
- they are not Interested Parties (this could be witnesses or employers who are not named as a party in the civil action)

7.9.3 If a party would like to be anonymous, they must request this when they file their right to sue materials.

7.10 Reconsiderations

7.10.1 WSIAT decisions are final. The WSIAT can reconsider a decision but reconsiderations are exceptional.

7.10.2 A reconsideration has 2 steps.

1. The WSIAT will decide whether it is advisable to reconsider the decision. This is called the “threshold test”.
2. If the threshold test is met, the WSIAT will decide if the previous decision should be changed. If so, the WSIAT will decide how it should be changed. This is called the “decision on the merits”.

7.10.3 For more information about the threshold test, review Practice Direction #27 – Reconsiderations. The process for a reconsideration request from a right to sue application is set out here. Most requests are decided from written submissions. But the WSIAT may require an oral hearing. The usual process is described in section 7.11 and 7.12.

7.11 Limited Time to Apply for Reconsideration

7.11.1 A request to reconsider a right to sue decision must be received by the WSIAT and the other parties within 60 days of the date of the final decision. The application must include any supporting materials. This timing does not apply to a request for clarification.

7.11.2 The Chair or their designate can decide to extend the time for a late reconsideration request. The Chair or their designate will consider any relevant factor, including

- whether the request raises a significant issue that has a reasonable prospect of meeting the threshold test
- whether there is a reasonable explanation for the delay
- whether there is any prejudice to any party
- the particular importance of finality in right to sue applications to allow parties to pursue other legal proceedings

7.11.3 If the time extension is granted, the Chair will assign the late reconsideration request to a Vice-Chair or Panel.

7.12 Reconsideration Process in Applications About the Right to Sue

7.12.1 A party who requests a reconsideration must complete the Reconsideration / Clarification Request form. They must explain why the decision should be reconsidered or clarified. They must attach any additional submissions and any supporting documents. Forms are available on the WSIAT website at www.wsiat.on.ca.

- 7.12.2 The completed Request for Reconsideration / Clarification form, any additional submissions and any supporting documents must be sent to
- the WSIAT
 - the other parties that participated in the hearing (the Respondents)
- 7.12.3 These must be received by the WSIAT and the Respondents within 60 days of the date of the decision.
- 7.12.4 If they are later than 60 days of the date of the decision, the party requesting a reconsideration should include submissions on why the time limit should be extended.
- 7.12.5 The responding party to the reconsideration request will have 3 weeks to respond to the request for reconsideration. This is from the date they received the Request for Reconsideration / Clarification form.
- 7.12.6 Section 6.1.1 of this practice direction also applies to reconsideration/clarification requests of right to sue applications. This means that parties requesting or responding to a reconsideration/clarification request must serve the other parties and provide the WSIAT with an affidavit of service.
- 7.12.7 The responding party to the reconsideration request must complete the Reconsideration / Clarification Response form. They should attach any additional submissions and any supporting documents to the form. If the Request for Reconsideration / Clarification form was not received within 60 days of the date of the decision, Respondents should include submissions on whether the time limit for considering the reconsideration should be extended. The completed submissions must be sent to the WSIAT and to any other parties. At this point, submissions are complete. The reconsideration request is assigned to a Vice-Chair or Panel for a decision on the threshold test.
- 7.12.8 If the threshold test is met, the decision will be reconsidered. A new decision will be made on the merits. The WSIAT might give instructions about the procedure to be followed on the decision on the merits.

8.0 References and Resources

8.1 Legislative Authority

Workplace Safety and Insurance Act, 1997 sections 26, 27, 28, 29, and 31 (rights of action), and sections 129 (the WSIAT power to reconsider) and 131 (the WSIAT can determine its own practice and procedure)

Insurance Act, section 268 (statutory accident benefits)

Rules of Civil Procedure

8.2 Decisions

WSIAT Decision No. 1362/061 (the word “plaintiff” in subsection 31(1)(c) of the *Act* includes “claimants,” so insurers may bring an application to the WSIAT under section 31(1) for statutory accident benefits)

WSIAT Decisions No. 755/02, 1460/02 and 117/98 (WSIB Policy may be considered but is not binding in right to sue applications)

WSIAT Decision No. 350/101 (the *Rules of Civil Procedure* do not prevent the use of evidence that came through the discovery process in a right to sue application if it was about the same civil action)

8.3 Related Practice Directions

#6 – Mediation – 2-Party Appeals

#14 – Pre-Hearing Conferences

#27 – Reconsiderations

#30 – Representatives’ Fees and Costs

#35 – Calculation of Time

#36 – Delivery and Filing Documents

#37 – WSIAT Hearing Recordings and Transcripts

#38 – Transcripts of WSIB Hearing