Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Saskatchewan Government and General Employees' Union,

complainant,

and

Cowessess First Nation #73,

respondent.

Board Files: 30493-C and 30715-C
Neutral Citation: 2015 CIRB **762**
February 25, 2015

The Canada Industrial Relations Board (Board or CIRB) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members.

Counsel of Record

Mr. Greg D. Fingas, for the Saskatchewan Government and General Employees' Union;
Mr. Mervin C. Phillips, for Cowessess First Nation #73.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to issue this interim decision without an oral hearing.

I. Nature of the Complaint

[1] The Board is seized with two unfair labour practice complaints from the Saskatchewan Government and General Employees' Union (SGEU) alleging *inter alia* that the employer,

Cowessess First Nation #73 (Cowessess), violated section 94(3) of the *Code* by taking reprisals against employees for their participation in its organizing campaign.

[2] For the allegations arising under section 94(3), section 98(4) of the *Code* imposes a reverse onus on Cowessess requiring it to explain that its actions were devoid of anti-union *animus*:

> 98. (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[3] In accordance with the usual Board practice in cases involving section 98(4), Cowessess will be presenting its evidence first at the Board's hearing: see, for example, *Canadian National Railway Company*, 2010 CIRB 501.

[4] On February 23, 2015, the SGEU filed a motion alleging that Cowessess had failed to provide proper summaries of its witnesses' anticipated evidence ("Summaries") for the issues the SGEU raised in its complaints. The Board gave Cowessess 24 hours to respond to the motion, given that the oral hearing will commence on March 3, 2015 in Regina.

[5] On February 24, 2015, Cowessess responded and argued its Summaries, when considered together with the response it filed in each case, were compliant.

[6] Cowessess' Summaries stated that its witnesses would "refute the allegations contained in the complaint", as well as refute the information set out in the SGEU's detailed Summaries. The Board finds Cowessess' Summaries were essentially useless.

[7] The Board orders Cowessess to provide the SGEU with full and fair Summaries of the intended evidence from each of its witnesses. If Cowessess fails again to comply with the *Canada Industrial Relations Board Regulations*, *2012* (*Regulations*), the Board will consider the SGEU's remedial requests, up to and including imposing the consequences mentioned in section 27(4) of the *Regulations*.

[8] These are the Board's reasons for this decision.

II. The Importance of Disclosure in CIRB Proceedings

[9] CIRB proceedings fall somewhere in between the informality of labour arbitrations and the procedure heavy process in civil litigation matters. In a typical labour arbitration, the arbitrator on the first day of a hearing may have no knowledge whatsoever about the matter to be heard.

[10] By contrast, in civil litigation matters not covered by a more summary process, the parties proceed with full written pleadings, full document production by way of affidavit, examination for discovery, requests to admit and various other procedural steps designed to ensure the trial deals fully with the matter.

[11] In labour board matters, some of the trappings of civil litigation may be adopted and adapted, especially for a tribunal like the CIRB which is not obliged to hold an oral hearing in every case: section 16.1. While there is no examination for discovery in CIRB matters, the Board does require some document production in its cases.

[12] The *Regulations* further require the parties to provide a summary of each of their witnesses' anticipated evidence about the legal issues arising from the pleadings. The overall goal is to ensure a fair hearing, as well as to avoid wasting the Board's limited hearing and travel resources.

A. Document Production

[13] The *Regulations* set out three scenarios impacting the parties' obligations for document production. First of all, pleadings filed with the Board must include supporting documents. For example, in an unfair labour practice complaint, section 40(1)(*e*) requires a complaint to include copies of supporting documents:

> 40. (1) A complaint must include
>
> …
>
> (*e*) a copy of supporting documents for the complaint;

[14] Similarly, for a response or a reply, section 12(1)(*d*) of the *Regulations* requires copies of supporting documentation:

> 12. (1) Any person who makes a response or reply must include the following information in the response or reply:

…

(*d*) a copy of supporting documents for the response or reply;

[15] Secondly, if the Board decides to hold an oral hearing, then section 27(1)(*a*) sets out each party's obligation to produce the documentation on which they intend to rely at the hearing:

> 27. (1) A party that intends to present evidence must file with the Board six copies or such other number as the Board may specify of the following:
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> (*a*) **all documents on which the party intends to rely as evidence**, including any documents filed with the application, response or reply, as the case may be, in one or more tabbed books; …
>
> (emphasis added)

[16] The first two scenarios in the *Regulations* set out parties' obligations regarding the production of the documents in support of their original pleading and the documents on which they intend to rely if the Board decides to hold an oral hearing. Section 21(1) of the *Regulations* establishes a third scenario pursuant to which a party may request disclosure of other relevant documents from another party:

> 21. (1) A party that seeks disclosure of relevant documents must request in writing the disclosure directly from the other parties before applying to the Board for an order requiring disclosure.

[17] The goal of the *Regulations'* document production provisions is to ensure, in a manner similar to what occurs in civil litigation, but without formal examination for discovery, that the Board has before it all the relevant documentation. This not only assists the Board, but also may encourage settlements when all documents, including those which may not be favourable to a party's case, have been produced.

[18] The legal principles the Board applies when disputes arise about document production were summarized in *Air Canada*, 1999 CIRB 3, at paragraph 28:

> [28] From these awards flow the following principles, which may be suitably applied to the present case.
>
> 1. Requests for production are not automatic and must be assessed in each case.
>
> 2. The information requested must be arguably relevant to the issue to be decided.

> 3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content.
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> 4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case.
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> 5. The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested.
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> 6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.

B. Summary of Witnesses' Evidence

[19] In civil litigation, counsel usually agree during the examination for discovery process to provide each other with a summary of their witnesses' anticipated evidence. This helps eliminate surprises.

[20] The Board's *Regulations* at section 27 have adapted this type of evidentiary production in order to ensure each side has a fair understanding of the evidence the other will lead. This is critical for a labour process which does not utilize examination for discovery due to the costs and delay involved.

[21] Section 27(1)(*b*) sets out the parties' obligations to provide a list of witnesses, as well as a "…summary of the information that is expected to be provided on issues raised in the application, response or reply":

> 27. (1) A party that intends to present evidence must file with the Board six copies or such other number as the Board may specify of the following:
>
> …
>
> (*b*) a list of witnesses expected to be called that includes their names and occupations, along with **a summary of the information that is expected to be provided on issues raised in the application, response or reply.**
>
> (emphasis added)

[22] The Board routinely attaches forms to its hearing letters in order to assist the parties in complying with section 27(1)(*b*). Those forms request the name of the witness and a summary of his/her evidence.

[23] In order to emphasize the importance of document and evidence production, there can be significant consequences for non-compliance:

> 27. (4) If a party does not comply with subsection (1), (2) or (3), the Board may refuse to consider any document or hear any witness tendered by the party at the hearing.

[24] Evidently, a party may be prejudiced when it prepares proper Summaries, only to be faced with the other side's failure to provide any meaningful summary of its witnesses' evidence.

[25] The Board generally leaves the policing of Summaries up to counsel, since they know the factual underpinnings better than the Board. But the Board will intervene if a failure to comply may prejudice a party, and undermine the efficient running of the hearing.

[26] The Board commented on the need for evidentiary production in *Plante*, 2011 CIRB 582:

> [53] The Board has adopted an explicit policy of both documentary and evidentiary pre-hearing production. This encourages the parties to explore possible resolutions after putting all their cards on the table. It also allows the Board to prepare thoroughly for its oral hearings.
>
> [54] There is a labour law practice, unique to Quebec, which allows a party that has the burden of proof to call the complainant or grievor as its first witness. Unlike in the Common Law provinces, the party with the burden of proof is not bound by the complainant's testimony. But it does provide a form of discovery of the other side's facts.
>
> [55] The Board has respected this long-standing Quebec practice in the past. The complainant was not called first in this case. However, even if he had been, that process is not a substitute for complying with the Board's *Regulations* concerning will-say statements for each and every witness.
>
> [56] The *Regulations* are designed to avoid evidentiary surprises. This not only ensures a fair hearing, but also allows the Board to conduct its oral hearings efficiently and avoid time-wasting adjournments.

[27] The Board in *Rogers Radio (CJMX-FM)*, 2003 CIRB 246, has examined how it will apply the *Regulations* when faced with a breach of the obligation to provide Summaries:

> [22] The foregoing is not to indicate that in consideration of the matter now before it, the reconsideration panel is of the view that the strict enforcement of the *2001 Regulations* in all of the circumstances was contrary to the rules of natural justice. However, the present reconsideration panel is concerned that because of the overriding need to take particular care to ensure the integrity of Board hearing processes, as a matter of policy, a broad view of relevant factors be taken when the exclusion of apparently relevant evidence is considered.

III. Analysis and Decision

[28] On February 19, 2015, the SGEU provided Cowessess with properly particularized Summaries in conformity with the Board's hearing notice. Those Summaries allowed Cowessess to know the evidence that the SGEU intended to present through its witnesses, if needed, after Cowessess had first led its evidence.

[29] On February 20, 2015, Cowessess filed its Summaries. Those Summaries clearly identified the names of its witnesses, as required by section 27 of the *Regulations*, except for a reference to an unnamed expert witness.

[30] However, in contrast to the Summaries provided by the SGEU, all Cowessess' Summaries stated unhelpfully: "Will refute the allegations contained in the complaints and in the witness statement of (names of various SGEU witnesses)". The Board was already aware that Cowessess did not accept the SGEU's factual allegations. Cowessess' suggestion that the response it filed for each complaint somehow brought its Summaries into compliance ignores both the text of the *Regulations*, as well as the forms the Board sent it with its September 26, 2014 hearing notice.

[31] The Board's hearing notice requested explicitly "the witness' name, job title and a summary of the evidence he/she will be providing for each witness called by a party (forms attached)".

[32] Cowessess has the burden of proof for several matters the SGEU raised in its complaints. Its Summaries need to provide its witnesses' evidence on the specific issues the SGEU raised in its complaints. It is not enough that Cowessess will present its evidence first at the hearing or that it filed responses to the two complaints.

[33] For current purposes, the Board orders Cowessess to provide proper Summaries to the SGEU by no later than **Thursday, February 26, 2015 at 2:00 p.m. (Saskatchewan Time).** The Board is confident this will resolve this unnecessary issue.

[34] The Board reserves the right to revisit the issue should circumstances require.

[35] This is a unanimous decision of the Board.

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Graham J. Clarke
Vice-Chairperson

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Daniel Charbonneau
Member

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Robert Monette
Member