Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Canadian Union of Postal Workers,

applicant,

and

Colispro Inc.,

respondent,

and

Teamsters/Québec, Local 931,

bargaining agent,

and

2645-0858 Québec Inc.; 9188-6960 Québec Inc.; 9177-8837 Québec Inc.; 9173-7536 Québec Inc.; Plani-Gestion R.B. (2006) Inc.; 9037-6740 Québec Inc.; Binom Trans Inc.; Olttrans Inc.; 2849-5067 Québec Inc.; Transport Michel Gauthier Inc.; Davlin Inc.,

interested parties.

Board File: 28781-C
Neutral Citation: 2011 CIRB 613
November 15, 2011

The Canada Industrial Relations Board (the Board) was composed of Messrs. Claude Roy, Graham J. Clarke and William G. McMurray, Vice-Chairpersons.

Canada

Parties' Representatives of Record

Mr. Jean-François Beaudry, for the Canadian Union of Postal Workers;

Messrs. Richard Bernèche and Paul A. Venne, for Colispro Inc.;

Mr. Pierre-André Blanchard, for Teamsters/Québec, Local 931;

Mr. Yves Meunier, for 2645-0858 Québec Inc.;

Mr. Jean Montpetit, for 9188-6960 Québec Inc.;

Mr. Gérald Lalonde, for 9177-8837 Québec Inc. and 2849-5067 Québec Inc.;

Mr. Louis Robitaille, for 9173-7536 Québec Inc.;

Mr. Roger Beaudin, for Plani-Gestion R.B. (2006) Inc.;

Mr. Normand Gadoury, for 9037-6740 Québec Inc.;

Mr. Marian Batrinu, for Binom Trans Inc.;

Mr. Cornel Nicolae, for Olttrans Inc.;

Mr. Jean-Jacques Perreault, for Transport Michel Gauthier Inc.;

Mr. Dave Lemelin, for Davlin Inc.

[1] Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the submissions of the parties and the documents filed in support of their respective positions, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

[2] These reasons for decision were written by Mr. Claude Roy, Vice-Chairperson.

I–Nature of the Application

[3] This matter involves an application filed by the Canadian Union of Postal Workers (the applicant, CUPW, or the union) on May 25, 2011, pursuant to section 18 of the *Code*, for reconsideration of the decision of May 4, 2011, in *Colispro Inc.*, 2011 CCRI 588 (RD 588).

[4] In that decision, the Board granted a preliminary objection raised by the employer, Colispro Inc. (the employer), in relation to an application for certification filed by CUPW (Board file

no. 27855-C), claiming *res judicata* in respect of the application for certification and lack of evidence of any changes or new facts relating to an interested party, 2645-0858 Québec Inc.

[5] For purposes of the application for reconsideration before the Board, the applicant requested a stay of proceedings in file no. 27855-C pursuant to section 16(*l*) of the *Code*. Being of the view that none of the parties objected to the request for postponement of the hearing scheduled for June 29 and 30, 2011, and given that it had no apprehension of prejudice to the parties, the Board granted the request on June 15, 2011. The hearing days were therefore cancelled and deferred indefinitely.

II–The Facts

[6] In RD 588, the Board summarized the facts of the matter before it as follows:

> [1] Colispro Inc., also known as Nationex, is an interprovincial transportation company that handles the delivery of different types of parcels. It does business across Canada.
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> [2] On December 7, 2009, the union filed an application for certification to represent a bargaining unit described as follows:
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> "All brokers and owner/lessee operators of vehicles, party to a verbal or written contract, transporting parcels or envelopes, as well as loaders, at the St-Hubert facility of Nationex-Colispro Inc., excluding employees working at the St-Hubert facility covered by order no. 8424-U of the Canada Industrial Relations Board.
>
> (translation)"
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> [3] The brokers covered by the certification application include 2645-0858 Québec Inc., run by Mr. Yves Meunier. In *Yves Meunier / 2645-0858 Québec Inc.*, 2008 CIRB LD 1770, issued on March 3, 2008, the Board determined that the transportation operations of this company were federally regulated and subject to the *Code*. On April 11, 2008, the Board had issued an order certifying Teamsters/Québec, Local 931 (the Teamsters), as the bargaining agent for a bargaining unit comprising "all drivers, dependent contractors of 2645-0858 Québec Inc." (order no. 9444-U).
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> [4] In response to this application for certification, Nationex not only contested the fact that it was the employer of the employees covered by the application, but also raised a preliminary objection claiming *res judicata* in regard to 2645-0858 Québec Inc. and its drivers.
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> [5] Nationex submitted that the certification order issued by the Board on April 11, 2008, had the authority of *res judicata* as regards this company since the purpose, the cause of action and the parties in the instant matter were the same.

[7] The Board granted the employer's preliminary objection, stating the following:

> [34] In the matter now before the Board, as pointed out by Nationex in its submissions, there is nothing in the evidence to show that any legal or factual changes have occurred in the relations between 2645-0858 Québec Inc. and its drivers, dependent contractors, since the Board issued the order of April 11, 2008. The union did not produce any evidence in this regard.
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> [35] It is true that, under section 18 of the *Code*, the Board may review a certification order on the basis of new facts and changes in the specific labour relations environment. However, the instant application by the union is more or less equivalent to an application for revocation of a judgment by a third party rather than an application for review. Indeed, the union was not a party to the original certification matter and consequently is not in a position to comment on the factual situation that led the Board to issue its April 11, 2008, certification order.
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> [36] In its reply, the union states that the Board was somewhat misinformed by the parties and that "during the investigation that led to order no. 9444-U being issued, the parties failed to produce in evidence all of the facts relevant to the determination of economic dependence" (translation). However, in its oral arguments, the union did not raise the existence of any new facts that would warrant the Board reconsidering its decision and finding that the drivers, dependent contractors of 2645-0858 Québec Inc., now have a new employer. In 2008, the company itself indicated that it was the employer of those employees. And contrary to the union, that company was a party to the matter. Yet that company never asked the Board to review the certification order that had determined its employer status. The same holds true for the Teamsters, the bargaining agent concerned by that determination. The union's position is thus as extraordinary as a third party alleging that a woman could not legitimately have claimed some years before to be the mother of her child.
>
> [37] The union did not argue that 2645-0858 Québec Inc. should no longer be considered as the employer of the employees concerned as a result of a sale of business, a transfer of assets or any kind of shutdown of operations.
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> ...
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> [39] The Board comes to the same conclusions in the matter now before it, especially given that, in the matter under review, the union was never a party to the certification matter that led to the Board's order of April 11, 2008.
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> ...
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> [41] The Board certainly cannot amend or rescind the certification order it issued on April 11, 2008, at the request of another union that was not a party to the matter of the certification application filed on September 26, 2007, but that now finds that it is dissatisfied with the order issued.
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> [42] For all of the reasons cited above, the Board finds that it cannot review the certification order of April 11, 2008, and declares that the drivers, dependent contractors of 2645-0858 Québec Inc., cannot be covered by the application for certification filed by the union on December 7, 2009, since their true employer has already been determined.

(RD 588)

III–Positions of the Parties

A–The Applicant

[8] The applicant claims the existence of errors of law and policy in RD 588 that are contrary to the Board's interpretations of the *Code*.

[9] First, it alleges that the Board erred in law in applying the principle of *res judicata* to order no. 9444-U of April 11, 2008, that the Board simply indicated that the principle had to be applied with circumspection rather than dismissing the employer's argument and that it thus erred in law in interpreting Board jurisprudence, particularly in *Bayside Port Employers Association Inc.*, 2004 CIRB 293.

[10] Additionally, it alleges that the Board erred in law in applying that principle to the April 11, 2008, decision, given the lack of identification of the parties.

[11] In relation to this first argument, the applicant states that the principle was not applicable because the Board had granted an application for revocation of order no. 9444-U dated April 11, 2008, in its order no. 10001-U dated February 10, 2011.

[12] Second, the applicant alleges that the Board erred in law and policy in regard to the nature of the application. It submits that the Board treated the application as a section 18 application rather than an application for certification pursuant to section 24 of the *Code*.

[13] It considers that the Board erred in law when it refused to reconsider, in the context of this new certification application, the status of 2645-0858 Québec Inc. based on the April 11, 2008, order, especially since this order was revoked on February 10, 2011, before the Board issued its decision in RD 588 on May 4, 2011.

[14] The applicant alleges that, since it was not certified as a bargaining agent to represent any of the employees covered by the application, it was, according to Board jurisprudence, required to file an

application for certification pursuant to section 24 of the *Code* in order to represent them (see *CFSK-TV, a Division of CanWest Television Inc.*, 2003 CIRB 220). According to the applicant, a section 18 application applies to the union already representing the group of employees concerned (see *Securicor Canada Limited*, 2004 CIRB 304).

[15] Consequently, the applicant is of the view that the Board erred in law by granting the preliminary objection on the basis that no new facts had been presented by the applicant. It alleges that the Board relied on this lack of new facts to grant the objection. It states that it never denied the lack of new facts. According to the applicant, the filing of an application for certification, especially during a raiding period, is sufficient for the Board to consider the new situation without being bound by any previous order. It argues that it filed its application for certification in the time frame provided for under the *Code*, that is, more than 12 months after the April 11, 2008, certification order was issued, since no collective agreement was entered into by the parties, in accordance with section 24(2)(*b*) of the *Code*. The raiding period is a period during which a certification order can be challenged.

[16] It alleges that such an application, given the special circumstances, should be treated as an application for reconsideration of a previous order (*CITV SUB Inc.*, 2001 CIRB 134), especially since this application for certification with respect to a larger unit filed during the raiding period is sufficient for the Board to consider it without being bound by the previous order.

[17] According to the applicant, the Board's granting of the employer's objection sets the order in stone. It argues that such a conclusion has to be an error of law and policy that casts serious doubt on the interpretation of the *Code* by the Board.

[18] The applicant alleges that no collective agreement was signed after certification order no. 9444-U was issued on April 11, 2008, because of the economic dependence of 2645-0858 Québec Inc. on Nationex-Colispro and the latter's control over working conditions and the performance of the work. The Board had to rescind, amend or alter the order to promote access to collective bargaining for the employees covered by the application.

[19] Finally, the applicant alleges that a contractor, even an incorporated contractor, can be recognized as a dependent contractor. However, this allegation was not challenged by the employer.

[20] The applicant did not reply to the employer's submissions regarding this application for reconsideration, as it was entitled to do.

B–The Employer

[21] First, the employer confirms that the merits of RD 588 were correct by analyzing the decision-making process followed by the Board. It alleges that the Board explained the circumstances under which 2645-0858 Québec Inc. had been recognized as the employer of the employees that the applicant is now seeking to represent, referring to order no. 9444-U of April 11, 2008, and to the Board decision that led to that order, *Yves Meunier / 2645-0858 Québec Inc.*, 2008 CIRB LD 1770.

[22] It emphasizes that the Board provided an accurate summary of the facts that were presented to it in the six days of hearing. According to the employer, when the application for certification was filed on December 7, 2009, one of the brokers in question, 2645-0858 Québec Inc., was recognized as an employer in the April 11, 2008, order no. 9444-U, following the Board's determination regarding which of Nationex-Colispro and 2645-0858 Québec Inc. was the true employer of the latter's workers. Hence the preliminary objection raised by the employer within the context of the application for certification of December 7, 2009.

[23] The employer refers to the applicant's position set out in its written arguments in file no. 27855-C, in which it always maintained that its application for certification should be treated as an application for reconsideration of order no. 9444-U dated April 11, 2008. Both the Board and the employer have on several occasions asked the applicant to set forth the changes that have occurred since the order was issued that might explain why 2645-0858 Québec Inc. should not be the employer of its employees.

[24] The employer states that no evidence was submitted to the Board during the six days of hearing that any change whatsoever occurred after order no. 9444-U was issued. Additionally, the employer refers to the applicant's application for reconsideration, in which the applicant confirms that there are no new facts.

[25] The employer submits that the Board gave the applicant every opportunity and latitude possible to show that there had been changes that might justify reconsideration of order no. 9444-U dated April 1, 2008, but that the applicant failed to act accordingly.

[26] In the employer's view, the mere fact that order no. 9444-U was revoked on February 10, 2011, does not change the merit of that order on December 7, 2009, the day the application for certification was filed, or indeed the order's ongoing merit given the lack of any new facts.

[27] Second, the employer analyzes the applicant's criticisms of the Board's decision to show that they are incorrect and without merit. Referring to *Ted Kies*, 2008 CIRB 413, the employer stresses that where a party seeks reconsideration of a decision on the basis of an error of law or policy, there is a heavy onus on that party to prove its case.

[28] The employer refutes the applicant's argument that the Board failed to take into account the nature of its application and treated it as a section 18 application rather than an application pursuant to section 24 of the *Code*, referring to relevant parts of the decision in RD 588. Citing a part of the applicant's written submissions of August 20, 2010, in file no. 27855-C, the employer indicates that the Board pointed out in its decision that what was involved was actually an application for certification which the union was seeking to also have treated as an application for reconsideration of order no. 9444-U of April 11, 2008.

[29] The employer states that the applicant changed its arguments in its application for reconsideration in that it alleged that its application was not an application for reconsideration under section 18 of the *Code* but rather an application for certification under section 24(2)(*b*). According to the employer, the applicant thus changed its position in this application for certification. In the employer's view, the Board correctly understood that the application for certification filed by the

applicant under section 24 of the *Code* was implicitly an application for reconsideration of the previous order, regardless of what the procedural vehicle was originally called, and treated it accordingly.

[30] The employer alleges that it is incorrect to state that, when the Board made its decision, the order became set in stone. The Board gave the applicant the opportunity to have this previous order reconsidered, but on the condition that it produce evidence that such action was warranted. No evidence in this respect was filed with the Board, and the application for reconsideration contained no reference to any evidence whatsoever that might justify a decision by the Board to rescind or alter or amend the previous order.

[31] The employer submits that the reconsideration panel cannot take into account the applicant's argument that no collective agreement could be entered into with Teamsters/Québec, Local 931 (Teamsters), because of the economic dependence of 2645-0858 Québec Inc. on Nationex-Colispro and the latter's control over working conditions and the performance of the work. The employer alleges that absolutely no evidence was presented to the Board as to the reasons for there being no collective agreement with Teamsters. This argument is nothing more than a hypothesis on the part of the applicant, which did not require consideration by the Board in RD 588 or by the reconsideration panel.

[32] Finally, the employer states that the Board did not err in law with regard to the principle of *res judicata* in view of section 18 of the *Code*, under which it may reconsider, rescind, alter or amend its decisions, and with regard to the fact that it had to apply this principle with circumspection. The Board was prepared to reconsider order no. 9444-U but could not do so because no evidence or grounds were presented to warrant such a decision in the circumstances of this case, despite six days of hearing. The Board therefore was not required to take a formal position regarding the *res judicata* argument, especially given the lack of evidence of any new facts that would have enabled it to alter the state of the law established between two companies in regard to the employer status of one of those companies.

IV–Analysis and Decision

A–Applicable Law

[33] Section 18 of the *Code*grants the Board the power to reconsider its decisions. It provides as follows:

> 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.

[34] Additionally, section 22(1) of the *Code* provides that every decision of the Board is final. In fact, it states the following:

> 22. (1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act.

[35] The Board's decision in *Ted Kies*, *supra*, states the following in regard to section 22:

> [5] Section 22 fulfills an important labour relations purpose by ensuring that Board decisions are final. Similarly, reconsiderations under section 18 are the exception rather than the rule, as noted in *591992BC Ltd.*, 2001 CIRB 140:
>
> "[20] The finality of its decisions is of primary concern to the Board. Thus, the rescinding of an original panel's decision remains the exception rather than the rule. The applicant has the burden of proving that there are serious reasons, or even exceptional circumstances, that would justify the reconsideration of a decision. ..."

[36] The Board has stated on several occasions that its reconsideration power under section 18 of the *Code* is not an appeal process in respect of the decision of the panel seized of the original application. The reconsideration panel's role is not to reexamine evidence already presented to the panel seized of the original matter (*Professional Personnel Ltd.*, 2002 CIRB 191; *Robert Adams*, 2001 CIRB 121; and *Rogers Cablesystems Limited*, 1999 CIRB 32). It is established that a difference in interpretation of the law or policies invoked cannot give rise to reconsideration. A reconsideration panel must identify an error of law or policy that casts serious doubt on the interpretation of the *Code* for intervention to be warranted (*Transport Besner Inc*, 2005 CIRB 329).

[37] An applicant cannot reargue the same issues before a different panel or contest the facts and issues determined by the panel seized of the original matter. In *TD Canada Trust in the City of Greater Sudbury, Ontario*, 2006 CIRB no. 363, the Board clearly stated the following in this regard:

> [46] Given that section 22 of the *Code* provides that every decision of the Board is final, the Board's reconsideration powers are limited and are not intended to be an appeal process of a decision, a rearguing of the same issues before a different panel of the Board or a process to contest the facts and issues determined by the original panel. Consequently, the rescinding of an original panel's decision remains the exception rather than the rule. An applicant bears the burden of establishing that there exist serious reasons, or even exceptional circumstances that justify the reconsideration of a decision ...

[38] The grounds for reconsidering a decision are listed in section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*), which provides as follows:

> 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:
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> (*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
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> (*d*) a decision made by a Registrar under section 3.

[39] The Federal Court of Appeal reaffirmed that the list of grounds set out in this section is not exhaustive and does not limit the Board's discretion pursuant to section 18 of the *Code* (see *ADM Agri-Industries Ltée* v. *Syndicat National des Employés de Les Moulins Maple Leaf (de l'Est)*, 2004 FCA 69; *Société des Arrimeurs de Québec* v. *Canadian Union of Public Employees, Local 3810*, 2008 FCA 237; and *Syndicat des débardeurs du port de Québec (CUPE, Local 2614)* v. *Société des arrimeurs de Québec Inc.*, 2011 FCA 17).

[40] Section 28(*c*) of the *Code* states that it is as of the date of the filing of the application for certification or such other date as the Board considers appropriate that the union must have the support of a majority of the employees in the unit in order to be certified. Section 28(*c*) reads as follows:

> 28. Where the Board
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> ...
>
> (*c*) is satisfied that, as of the date of the filing of the application or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent,
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> the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

[41] In *Ted Kies*, *supra*, the Board stated that, where a party seeks reconsideration of a decision on the basis of an error of law or policy, there is a heavy onus on that party to prove its case:

> [16] A reconsideration panel may intervene if an error of law or policy occurred in the original decision and that error casts serious doubt on the interpretation of the *Code*.
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> [17] Section 45 of the *Regulations* requires an applicant to set out, with supporting argument, not only what specific error of law or policy allegedly occurred, but also why the error casts serious doubt on the original panel's interpretation of the *Code*. This two-pronged test demonstrates that an error of law or policy, if one occurred, does not necessarily mean that the original panel's decision will be overturned on reconsideration.

[42] The Board has also stated on several occasions that a party that files an application for reconsideration cannot raise facts that it failed to plead originally or raise new legal arguments that it could have put to the panel seized of the original matter. In *Ted Kies*, *supra*, the Board stated the following:

> [18] An allegation of an error of law is limited to those legal arguments put before the original panel. Just as a party cannot usually raise facts it failed to plead originally, a party cannot, on reconsideration, raise new legal arguments it could have put to the original panel (see *Bell Canada* (1979), 30 di 112; and [1979] 2 Can LRBR 435 (CLRB no. 192)). The Board may be more flexible on this issue when faced with questions of its constitutional jurisdiction over the parties.

B–Decision

[43] Having considered the submissions of the parties, the Board finds that it must dismiss the application for reconsideration in this matter. As requested by the parties and based on their references, the Board also read the written submissions made in file no. 27855-C in support of the application for certification and those respecting the employer's challenge of that application.

[44] The Board finds that the panel seized of the original matter did not commit an error of law or policy that casts serious doubt on the interpretation of the *Code* when it decided to grant the employer's preliminary objection or when it noted the lack of evidence of any new facts or any changes respecting the employer, 2645-0858 Québec Inc.

[45] The Board notes that, on December 7, 2009, the applicant filed an application for certification as the bargaining agent for a unit comprising the following:

> "All brokers and owner/lessee operators of vehicles, party to a verbal or written contract, transporting parcels or envelopes, as well as loaders, at the St-Hubert facility of Nationex-Colispro Inc., excluding employees working at the St-Hubert facility covered by order no. 8424-U of the Canada Industrial Relations Board."

[46] The employer rightly raised the fact that one of the brokers covered, 2645-0858 Québec Inc., for which the applicant was seeking certification, had already been recognized by the Board as an employer, as a result of the certification order issued on April 11, 2008 (no. 9444-U). In fact, in a decision issued on March 3, 2008, following an admission made by 2645-0858 Québec Inc., the Board ruled that this company was the employer of the drivers whom Teamsters/Québec, Local 931, was seeking to represent (*Yves Meunier / 2645-0858 Québec Inc.*, *supra*). The order and decision in question were not contested and no application for reconsideration was filed to challenge them or have them amended at the time the applicant filed its application for certification, on December 7, 2009.

[47] In raising its preliminary objection, the employer cited the principle of *res judicata*. The Board did not err in law in relation to this principle when it stated that "the rule of *res judicata* should be applied with circumspection" (RD 588, paragraph 22), given its power of reconsideration under section 18 of the *Code* and the fluid labour relations environment. The Board referred to *Bayside Port Employers Association Inc.*, *supra*, and did not err in its interpretation.

[48] What the Board notes in particular concerning the argument raised by the employer is that the panel seized of the original matter did not rely so much on this legal principle in granting the objection as on the fact that no evidence of changes was put forth in regard to certification order no. 9444-U and to the employer status of 2645-0858 Québec Inc. Had such evidence been

presented, the Board would have paid attention to it, as it was prepared to reconsider the situation, but its conclusions are clear. The Board was unable to do so given the total lack of evidence of any changes or new facts relating to that employer.

[49] The reconsideration panel recognizes the admission of the applicant regarding the lack of evidence of any new facts. The Board notes in this regard that the panel seized of the original matter heard evidence over six days and set aside one day, March 17, 2011, especially for counsel, to enable them to present their arguments regarding the preliminary objection. A careful reading of the findings of the panel seized of the original matter clearly shows that the applicant failed to present any evidence whatsoever of any new facts or changes as of the date of the filing of its application for certification, on December 7, 2009, that would warrant rescinding or amending order no. 9444-U of April 11, 2008.

[50] As requested by the applicant, the panel seized of the original matter considered its application for certification under section 24 of the *Code*, taking into account its power to review order no. 9444-U pursuant to section 18 of the *Code*. In its written submissions of August 20, 2010, in support of its application for certification, the applicant clearly indicated that its application should also be considered an application for reconsideration of order no. 9444-U pursuant to section 18 of the *Code*. That is precisely what the Board did in its decision. Unfortunately for the applicant, it did not file any evidence whatsoever in the six days of hearing to show any changes or new facts of any kind in relation to the employer status of 2645-0858 Québec Inc.

[51] In its application for reconsideration, the applicant submitted a new argument not previously presented to the panel seized of the original matter: it alleged that its application for certification should have been considered from the viewpoint of an application filed during a raiding period permitted under section 24(2)(*b*) of the *Code*, that is, after the expiration of 12 months from the date of certification of the bargaining agent, Teamsters/Québec, Local 931, that is, April 11, 2008, without any collective agreement having been signed with the employer.

[52] As previously indicated, an applicant cannot raise facts on reconsideration that it failed to plead before the panel seized of the original matter. To clarify, had the Board considered this argument,

it would have dismissed it, since the question of the employer designated in order no. 9444-U, i.e., 2645-0858 Québec Inc., remained the same. The fact that the applicant wishes to represent a larger bargaining unit that includes the employees of 2645-0858 Québec Inc. does not mean that it can try to have order no. 9444-U revoked on the ground that its application for certification was filed pursuant to section 24(2)(*b*). The issue of the employer designated in that order remains the same. The application filed by the applicant did not target the exact group of employees described in order no. 9444-U but rather a larger group of employees who were included in the proposed unit and, especially, who worked for a different employer, Colispro Inc. The real reason that the Board dismissed the application filed by the applicant is because the applicant failed to produce any evidence that would have allowed it to alter or amend order no. 9444-U. Additionally, no evidence was presented to the Board as to why no collective agreement had been entered into with Teamsters/Québec, Local 931.

[53] Obviously the question that remains is that of the revocation of order no.9444-U granted by the Board in order no. 10001-U of February 10, 2011. On July 28, 2010, the Board received an application for revocation of order no. 9444-U filed by an employee of 2645-0858 Québec Inc., in which he stated that a majority of the employees in the bargaining unit no longer wished to be represented by Teamsters/Québec, Local 931. In accordance with section 28(*c*) of the *Code*, the Board had to consider the application for certification filed by the applicant as of the date of filing of that application, that is, December 7, 2009, and not as of the date of filing of the application for revocation, that is, July 28, 2010, nor as of the date of revocation order no. 10001-U, that is, February 10, 2011. All of the evidence adduced was based on the situation of the parties at December 7, 2009. To have acted otherwise would have been an error of law on the part of the panel seized of the original matter, which could not rule beyond the evidence presented. While it is true that the ruling on the preliminary objection was made on May 4, 2011, that is, after revocation order no. 10001-U was issued, that in no way changed the date as of which the Board was required to consider the situation of the parties, that is, December 7, 2009, given the lack of evidence of any changes or new facts.

[54] In this matter, the Board finds that the applicant failed to show any error of law or policy with respect to RD 588 that casts serious doubt on the interpretation of the *Code*. On the contrary, the

panel seized of the original matter used great circumspection in considering the employer's *res judicata* argument and it based its decision to grant the preliminary objection on the applicant's failure to produce any evidence of changes or new facts regarding the employer, 2645-0858 Québec Inc., at December 7, 2009.

V–Conclusion

[55] For all of the above reasons, the application for reconsideration filed by the applicant is dismissed.

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

Certified Translation
Communications

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Vice-Chairperson

Graham J. Clarke
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