Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Unifor,

applicant,

and

Persona Communications Inc.,

employer.

Board File: 30510-C
Neutral Citation: 2015 CIRB **760**
February 13, 2015

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

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 determine this application without an oral hearing.

Counsel of Record

Mr. Anthony F. Dale, for Unifor;
Mr. Brian G. Johnston, Q.C., for Persona Communications Inc.

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

I. Nature of the Application

[1] Unifor filed a certification application to represent a bargaining unit at Persona Communications Inc. (Persona) comprised of:

> all employees of Persona Communications Inc. employed in the broadcast group in the cities of Sudbury, Timmins, Simcoe and Listowel save and except supervisors and persons above the rank of supervisor.

[2] In *Persona Communications Inc.*, 2014 CIRB LD 3287 (*Persona 3287*), the Board made certain initial findings, including (i) the right of an employee on maternity leave to participate in the matter; and (ii) the appropriateness of a single bargaining unit covering four geographic locations in Ontario.

[3] *Persona 3287* also requested the parties to provide particularized written submissions concerning certain disputed positions. Those detailed submissions have now allowed the Board to make the remaining determinations in this case without putting the parties to the time and expense of an oral hearing.

[4] Persona asked the Board to exclude the following positions which Unifor had argued fell within its proposed bargaining unit: (i) Administrative Coordinator (Louise Girard); and (ii) upper level producers (Allan Raymond; Joanne Bourre; Chris Elzinga and Betty Uiselt) (Producers).

[5] Persona bore the burden of proof with regard to these requested exclusions: *Pacific Western Airlines Ltd.* (1984), 56 di 173; 7 CLRBR (NS) 346; and 84 CLLC 16,040 (CLRB no. 471).

[6] For the reasons which follow, the Board has concluded that it should certify a single bargaining unit which will contain the Administrative Coordinator and the four Producers.

II. The Certification Process[1]

A. Oral Hearings and Reasons

[7] The Board generally does not hold oral hearings or issue extensive reasons in certification matters. Section 16.1 of the *Code* is explicit that the Board is not required to hold an oral hearing for every case:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

[8] The Board in *Coastal Shipping Limited*, 2005 CIRB 309 commented on oral hearings and the extent of the written reasons provided in certification matters:

[1] The *Employees' Voting Rights Act*, 2nd Sess., 41st Parl. (2014) (Bill C-525) received Royal Assent on December 16, 2014. Bill C-525 will require the Board to hold mandatory representation votes as of June 16, 2015. On the date this decision was issued, the Board could still certify bargaining agents on the basis of the membership cards they submitted. As of June 16, 2015, this decision should be read with those legislative changes in mind.

> [14] As the Board recently noted in *Maritime-Ontario, Parcel Division*, [2000] CIRB no. 100, both the Board and its predecessor CLRB have a long-standing practice of not conducting oral hearings into certification applications except in exceptional circumstances (at paragraph 26). The Board's normal practice is to make its determinations on the basis of the written material on file and to hold oral hearings only in those cases of alleged employer interference or other circumstances deemed exceptional by the Board (see *Purolator Courier Ltd.* (1989), 77 di 1 (CLRB no. 730); and *Cape Breton Development Corporation* (1989), 77 di 78 (CLRB no. 736)). The exception to the Board's general practice may include circumstances where the facts and/or issues are very complex or where issues of credibility need to be determined. This is not to suggest that complex facts will automatically result in an oral hearing (see for example, *Bank of Montreal, Sherbrooke, Quebec* (1986), 68 di 67 (CLRB no. 604) where the Board concluded it could deal with a certification application on the basis of written submissions alone, despite the complex nature of the application).
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> ...
>
> [21] Occasionally, the facts may be very complex or raise certain policy or other issues that may give rise to a greater obligation and the Board may feel compelled to provide more elaborate or detailed reasons for the determinations made in processing the particular certification application. However, in the vast majority of certification applications, the Board will follow its usual practice described above, and, if the application is granted, will issue a certification order without providing any additional reasons beyond those stated in the order.

[9] The Board cannot dispense with an oral hearing if the result would be a breach of procedural fairness: *Cadieux* v. *Amalgamated Transit Union, Local 1415*, 2014 FCA 61. However, the mere existence of contradictory facts in the parties' written submissions does not oblige the Board to hold a hearing, unless a resolution of those facts is essential to the outcome of the decision: *Grain Services Union (ILWU-Canada)* v. *Freisen*, 2010 FCA 339.

[10] Similarly, the Board must give some explanation when it decides inclusions in and/or exclusions from a bargaining unit: *Vancouver International Airport Authority* v. *Public Service Alliance of Canada*, 2010 FCA 158 (*Vancouver International*). The Board's explanation can be concise, but has to indicate why it made the decision it did.

[11] In *Vancouver International*, the Federal Court of Appeal described the Board's obligation to explain:

> [16] Where, as here, an administrative decision-maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision-maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:
>
> > (a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.

> (b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.
>
> (c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier* v. *Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g.*, *Canadian Association of Broadcasters*, *supra* at paragraph 11.
>
> (d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, *supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision-maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

[12] In this case, the parties' expanded written submissions differed significantly on certain facts. Since no administrative tribunal can magically determine contested facts from a simple reading of the written pleadings, this raised an issue: should the panel hold an oral hearing?

[13] Ultimately, the panel satisfied itself that, even accepting the facts as pleaded by Persona, the result would be the same; the two positions and the five individuals in question would fall within the bargaining unit.

[14] The parties' written submissions allowed the Board to consider and determine whether the individuals enjoyed employee status under the *Code*, whether supervisors would have been excluded from the unit, as well as the appropriate bargaining unit description.

III. Facts

[15] Persona carries on business as Eastlink TV Ontario. It has operations in Timmins, Sudbury, Listowel and Simcoe, Ontario. Persona described its local television activities as involving the broadcasting of community and sports events. Persona operates by employing its own employees, as well as by using volunteers who are interested in community television.

[16] Persona's broadcast group is not a stand-alone operation. Persona is one of multiple entities owned by Eastlink Inc., a large Canadian cable and telecommunication undertaking with its head office in Halifax, Nova Scotia. Unifor's certification application suggested there were 19 employees in Persona's broadcast group, with the District Manager, Mr. Dave Carter, being the only excluded person from its proposed unit.

[17] The Board has previously certified Unifor for a bargaining unit involving Persona's Central Ontario Technical Operations Department (Order No.: 9479-U).

[18] Neither party suggested that Persona's broadcast group acted completely independently from other Eastlink Inc. entities. This was clear from the documentation on file. For example, Persona's July 3, 2014 response to the application listed Mr. Ron Campbell, Vice-President, Human Resources, as its representative. However, Mr. Campbell was not listed on the Persona organization chart for the broadcast group, a document which was described as including all "managerial and supervisory personnel".

[19] Similarly, the Certificates of Posting Persona returned to the Board were all signed by individuals who were not listed on the Persona organization chart.

[20] This context is important when examining the individuals working for Persona's broadcast group. Unifor's suggestion that Eastlink Inc.'s Halifax office provided human resources expertise to Persona was not disputed. Indeed, the existence of a Vice-President, Human Resources, suggests such expertise exists in the Sudbury office as well.

[21] Unifor's application focused on Persona's community broadcasting operations. The individuals' actual job titles were described as various types of producers, anchors, video journalists, production assistants and administrative coordinators.

[22] The Board will comment further on some of the facts specific to the employees in dispute when considering their status under the *Code*.

IV. The Analytical Framework for Certification Applications

[23] The Board in *Viterra Inc.*, 2012 CIRB 633 (*Viterra 633*) described various analytical steps in certification matters, though not all steps arise in every application:

> [47] While certification applications, depending on the circumstances, do not always raise the same issues, the Board's analysis frequently focuses on the same questions, including:
>
> 1. Is the applicant a trade union? (sections 3 and 28(*a*));
>
> 2. Which individuals are "employees" under the *Code*? (sections 3 and 28(*c*));
>
> 3. Is the trade union's proposed unit appropriate for collective bargaining? (sections 24(1), 27(1) and 28(*b*));
>
> 4. If the proposed unit is not appropriate, what would be an appropriate unit? (sections 16(*p*)(v), 27(1) and 28(*b*));
>
> 5. Which employees, as defined under the *Code*, should be included in an appropriate bargaining unit? (sections 27(2)–(6)); and
>
> 6. Does the trade union have majority support, or sufficient support for a vote, in a bargaining unit the Board has found appropriate for collective bargaining? (sections 28(*c*), 29(1) and(2)).

[24] In this case, the parties' pleadings required the Board to consider both confidential and manager exclusions, the situation of alleged supervisors, as well as the description of an appropriate bargaining unit.

A. The Confidential Exclusion

[25] Persona argued that the Administrative Coordinator, Ms. Girard, did not meet the definition of "employee" under the *Code* because she was "employed in a confidential capacity in matters relating to industrial relations". Section 3 of the *Code* defines an "employee" and excludes certain individuals on the basis of their work functions:

> 3. (1) In this Part,
>
> ...
>
> "employee" means any person employed by an employer and includes a dependent contractor and a private constable, **but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations;**
>
> (emphasis added)

[26] The Board has traditionally interpreted narrowly the “confidential exclusion” referred to in section 3. That exclusion does not merely prevent someone from being placed in a particular bargaining unit. Rather, a confidential exclusion results in the person not having employee status under the *Code*. They therefore will have no access to collective bargaining. They are in the same situation as managers.

[27] The facts accordingly must show that the employer employed the individual in a confidential capacity in matters relating to industrial relations. That requirement goes beyond being a simple conduit for the flow of human resources information and documentation between Ontario and Nova Scotia.

[28] This Board’s predecessor, the Canada Labour Relations Board (CLRB), reviewed the criteria for an exclusion based on confidential grounds. In *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91) (*Port Dover*), the CLRB described the three-fold test it employed. That test highlights that the employee must perform the confidential function as a regular part of his/her duties:

> The denial of collective bargaining rights to persons employed in a confidential capacity in matters relating to industrial relations is also based on a conflict of interests rationale. The inclusion of that person in a unit represented by a union **might** give the union access to matters the employer wishes to hold close in its dealings with the union. These include bargaining, grievance and arbitration strategy. To avoid that conflict and to assure the employer the undivided confidence of certain employees these persons are denied the right to be represented by a union even if they wish to be represented. However, this exclusion is narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights conferred by Part V.
>
> To this end this Board and other Boards have developed a three fold test for the confidential exclusion. The confidential matters must be in relation to industrial relations, not general industrial secrets such as product formulae (e.g. *Calona Wines Ltd.*, [1974] 1 Canadian LRBR 471, headnote only (BCLRB decision 90/74)). This does not include matters the union or its members know, such as salaries, performance assessments discussed with them or which they must sign or initial (e.g. Exhibit E-21). It does not include personal history of family information that is available from other sources or persons. The second test is that the disclosure of that information would adversely affect the employer. Finally, the person must be involved with this information as a regular part of his duties. It is not sufficient that he occasionally comes in contact with it or that through employer laxity he can gain access to it. (See *Greyhound Lines of Canada Ltd.* (1974), 4 di 22, and *Hayes Trucks Ltd.*, [1974] 1 Can LRBR 284.)
>
> (pages 460; 136; and 537; emphasis in original)

[29] In *Ridley Terminals Inc.*, 2002 CIRB 185 (*Ridley 185*), this Board confirmed its focus on the individual’s functions when considering the confidential exclusion:

(c) Status of Information Services Analyst as an "employee" under the *Code*

[36] While the Board's conclusions on this issue are evident from the above discussion, in view of the employer's argument that the Information Services Analyst is not an "employee" as defined by section 3(1) of the *Code*, the Board wishes to briefly address this argument.

[37] The Board considered a similar argument in *Greater Moncton Airport Authority Inc.*, [1999] CIRB no. 20, and found that this factor was not sufficient to exclude an employee from the bargaining unit:

> [35] It is also this Board's finding that access to confidential information stored in the employer's computer system, which **may** include information relating to collective bargaining with the applicant, does not justify exclusion. Given the sensitivity of bargaining information, it is not likely that such information is allowed to circulate without a means of ensuring confidential access over which the employer has or should have total control.
>
> (page 10)

[38] For such a position to be excluded, there would have to be convincing evidence that the Information Services Analyst's access to the confidential labour relations information be for the purposes of performing his duties related to labour relations matters. In *CJRP Radio Provinciale Limitée* (1975), 11 di 33; and 77 CLLC 16,074 (CLRB no. 50), the Board held that:

> ... The *Code* neither requires nor warrants the exclusion of persons having access to confidential information, but calls for the exclusion of only those persons employed in a confidential capacity in matters relating to industrial relations. ...
>
> (pages 41; and 397)

[39] In the present case, the access to the alleged confidential information is incidental to the Information Services Analyst's duties to administer the computer system.

(emphasis in original)

[30] The issue of whether an employee is covered by the confidential exclusion is ultimately one of fact or opinion for the Board: *Bank of Montreal* v. *Canada Labour Relations Board*, [1979] 1 F.C. 87.

B. The Manager Exclusion

[31] For someone to be a manager, and therefore excluded from employee status under the *Code*, they must have real or final decision-making powers impacting the employment of other employees: *Island Telephone Company Limited* (1990), 81 di 126 (CLRB no. 811). A special technical expertise does not by itself make someone a manager: *Selair Pilots Association* (1995), 100 di 11 (CLRB no. 1150).

[32] The Board interprets the managerial exclusion narrowly: *Maritime Broadcasting System Limited*, 2012 CIRB 663, upheld by the Federal Court of Appeal in *Maritime Broadcasting System Limited* v. *Canada Medial Guild*, 2014 FCA 59.

[33] The CLRB in *Port Dover* explained the rationale for excluding managers:

> The basis of the exclusion of certain "management" persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. **This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment conditions of fellow employees.** It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g., the authority to dismiss or discipline fellow employees). It is for this reason that certain persons are denied collective bargaining rights granted to other employees. **The *Code* is clear that the mere supervision of fellow employees does not satisfy the rationale for exclusion from employee status under Part V [now Part I] (see section 125(4) [now section 27(5)]).** ...
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> (pages 457–458; 134; and 536; emphasis added)

[34] In *Bank of Nova Scotia* v. *Canada Labour Relations Board*, [1978] 2 F.C. 807 (C.A.) the Federal Court of Appeal upheld the CLRB's decision in *Port Dover*. The Court noted the Board's fact-finding role includes considering the term "management functions" in the definition of employee at section 3 of the *Code*:

> ... the concept of "management functions" must be interpreted and applied according to the circumstances of each case and, except in very extreme cases, I am inclined to the view that its precise ambit is a question of fact or opinion for the Board rather than a question of law...
>
> (page 813)

C. Supervisors under the *Code*

[35] Section 27 of the *Code* makes it clear that individuals who supervise others still retain employee status. While the Board could place them in their own bargaining unit if circumstances warrant, it is not obliged to do so.

[36] The Board in *Viterra 633* described the analysis it follows when considering supervisors and their inclusion in a particular bargaining unit:

> **iii) Inclusions and Exclusions**
>
> [38] The *Code* grants the Board the discretion to include or exclude employees from the bargaining unit. This question is different from determining whether someone "performs

management functions", or is employed in a "confidential capacity", and is therefore excluded from "employee" status under the *Code*.

[39] Section 27(2) allows the Board to decide which "employees", as defined in section 3 of the *Code*, should be included in an appropriate bargaining unit:

> 27. (2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, **the Board may include any employees in or exclude any employees from the unit proposed by the trade union.**
>
> (emphasis added)

[40] Unlike in some provinces, the *Code* at sections 27(3)–(6) extends collective bargaining rights to professionals and supervisors, as long as they meet the definition of "employee" in section 3 of the *Code*. The Board may include supervisors in a proposed bargaining unit. It could also accept a unit composed solely of supervisors:

> 27. (3) **Where a trade union applies under section 24 for certification as the bargaining agent for a unit comprised of or including professional employees, the Board, subject to subsections (2) and (4), shall determine that the unit appropriate for collective bargaining is a unit comprised of only professional employees, unless such a unit would not otherwise be appropriate for collective bargaining.**
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> (4) In determining that a unit is appropriate for collective bargaining under subsection (3), **the Board may include in the unit**
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> (a) **professional employees of more than one profession;** and
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> (b) employees performing the functions, but lacking the qualifications, of a professional employee.
>
> (5) **Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.**
>
> (6) The Board shall not include a private constable in a unit with other employees.
>
> (emphasis added)

[41] One of the Board's tasks, among many, is to distinguish between someone who "performs management functions", or is employed in a "confidential capacity", as opposed to someone who is a supervisor. For those the Board finds are supervisors, and consequently "employees" under the *Code*, the Board must then consider a further question whether it makes labour relations sense to include these individuals in the bargaining unit.

[42] Just because an individual has employee status under the *Code* does not mean automatically they should be in the bargaining unit. That decision comes only after the Board analyzes whether it makes labour relations sense to include them. That determination will vary based on the circumstances of each case.

[37] Persona argued the four Producers were managers or, in the alternative, supervisors. The Board has considered each argument, *infra*.

D. Appropriate Bargaining Units

[38] The analysis in a certification case does not end once the Board has determined whether certain individuals enjoy employee status. The Board must then focus its attention on the appropriate bargaining unit and which employees should fall within it.

[39] The *Code* expressly gives these powers to the Board, given its presumed industrial relations experience and expertise.

[40] The Board in *Viterra 633* described how it examines the concept of an appropriate bargaining unit:

> **ii) Bargaining Unit Description**
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> [29] The Board, while it will examine the trade union's proposed unit, has the ultimate authority to determine an appropriate bargaining unit:
>
> > 27. (1) Where a trade union applies under section 24 for certification as the bargaining agent **for a unit that the trade union considers appropriate for collective bargaining**, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
> >
> > (emphasis added)
>
> [30] The Board examines what is an appropriate bargaining unit; it does not determine the most appropriate bargaining unit: see, generally, *Alberta Government Telephones Commission* (1989), 76 di 172 (CLRB no. 726).
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> [31] Section 16 of the *Code* similarly emphasizes the Board's power over bargaining units:
>
> > 16. The Board has, in relation to any proceeding before it, power
> >
> > ...
> >
> > (*p*) to decide for all purposes of this Part any question that may arise in the proceeding, including, without restricting the generality of the foregoing, any question as to whether
> >
> > ...
> >
> > (v) a group of employees **is a unit appropriate for collective bargaining**...
> >
> > (emphasis added)

[32] The determination of bargaining unit descriptions, which is a question of fact rather than a question of law, lies at the heart of the Board's specialized labour relations expertise: *Coastal 309*, *supra*, at paragraph 27.

[33] When a trade union files an application for certification, the Board, based on its labour relations experience, will examine whether the proposed unit "is a unit appropriate for collective bargaining", as the expression is used in section 16(*p*)(v) of the *Code*.

[34] The Board in *BCT.TELUS et al.*, 2000 CIRB 73, described generally the analysis it employs in considering the composition of bargaining units. The analysis is different for initial certification applications, as opposed to bargaining unit reviews under section 18.1 of the *Code*:

> [17] The Board has developed well-established principles and criteria that it will consider when determining the appropriateness of a bargaining unit or when reviewing and reconfiguring existing bargaining units. In making such a determination, the Board will weigh and consider a number of factors, including the following: community of interest; viability of the unit; employee wishes; industry practice or pattern; the history of collective bargaining with the employer; the organizational structure of the employer; and the Board's general preference for broader-based bargaining units, for reasons such as administrative efficiency and convenience in bargaining, lateral mobility of employees, common framework of employment conditions and industrial stability (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797), and *Canada Post Corporation* (1988), 73 di 66; and 1 CLRBR (NS) 129 (CLRB no. 675)). A good description of the Board's approach is outlined in *Quebec North Shore & Labrador Railway Co.* (1992), 90 di 110; and 93 CLLC 16,020 (CLRB no. 978), where it stated the following:
>
> > The tests for determining whether a unit is appropriate for collective bargaining take into account the interests of both the employees and their employer. Without claiming to make an exhaustive list of these factors, we would note, inter alia, the community of interest among the employees, the method of organization and administration of the business, the history of collective bargaining with the employer and in the industry in question, whether the employees are interchangeable and the interests of industrial peace. **The tests may have different weight, depending on the individual case, particularly in terms of whether it is an application for certification or an application for review. In the first situation, the Board must allow the employees to have access to collective bargaining. In the second, it must examine the existing bargaining structure in order to make the bargaining process and the application of the collective agreements more effective.** However, it must always try to balance what are often divergent interests in determining viable bargaining units and in order to ensure effective bargaining and the most harmonious labour relations possible.
> >
> > (pages 123-124; and 14,147-14,148)

[35] The Board, in *United Parcel Service Canada Ltd.*, 2008 CIRB 433, described some of the factors it considers when determining if a bargaining unit smaller than an "all employee" unit is appropriate:

> [21] It is important to note that although the Board generally favours all-employee bargaining units or creating larger bargaining units, it will nevertheless create less than all-encompassing units or fragment an existing unit when there are compelling reasons to do so. The factors that favour smaller units include a lack of community of interest, geographical factors, specific statutory provisions, the likelihood that a larger unit would not be viable, and an interest in enabling employees to obtain representation.
>
> [36] The Board is not bound to accept the trade union's proposed unit, or a unit proposed on consent by the parties: see, in particular, *Quick Coach Lines* (2000), 96 A.C.W.S. (3d) 397 (FCA).
>
> [37] Once the Board has decided on an appropriate bargaining unit, it must then consider which employees fall into the unit.
>
> (emphasis in original)

[41] This case requires the Board to consider the issue of an appropriate bargaining unit at Persona.

V. Analysis and Decision

A. Is Louise Girard excluded from employee status under the *Code* due to being employed in a confidential capacity in matters relating to industrial relations?

[42] Persona suggested that Ms. Girard, who worked with the District Manager, Mr. Carter, held a position analogous to that of an executive assistant to a chief executive officer. The Board agrees that in appropriate cases it may exclude an executive assistant from a bargaining unit: *National Harbours Board* (1980), 41 di 126; and [1980] 3 Can LRBR 265 (CLRB no. 261).

[43] While the Board does not disagree with that principle, Persona's submissions did not satisfy the Board that it "employed" Ms. Girard in a confidential capacity to assist Mr. Carter with industrial relations matters. Nothing in the written job description mentions these types of functions explicitly. Rather, the job summary indicates that Ms. Girard's position carries out administrative, secretarial and reception duties.

[44] Moreover, it appears Ms. Girard now also spends a fair amount of time working as a producer. While the parties disputed the amount of time Ms. Girard spent "producing", Persona suggested she did this for 40% of her time. Unifor had estimated she devoted 80% of her time to production work.

[45] For the work Persona suggested was confidential, the Board was satisfied Ms. Girard was more of a conduit between Persona's Sudbury office, which itself has a separate human

resources expertise given that a Vice-President works there, and the main human resources department for Eastlink Inc. located in Halifax.

[46] The Board's conclusion might have differed if Persona's broadcast group were a stand-alone, wholly independent, business entity which carried out all of its administrative functions itself. If Mr. Carter and Ms. Girard had handled all industrial relations matters internally, then the Board might have looked at the matter further. But services such as those related to human resources came from elsewhere.

[47] The Board does not dispute Persona's suggestion that Ms. Girard could conceivably have access to important information regarding collective bargaining. A similar argument was made in *Ridley 185*. But the organizational structure suggests that such matters could easily be performed by others dedicated to human resources matters, whether in Sudbury or in Halifax. Persona has the authority to control such access.

B. Are the four producers managers and therefore excluded from employee status under the *Code*?

[48] Persona in its July 3, 2014 response pleaded two alternative arguments with regard to the four Producers:

> 5. ELTVO says that the bargaining unit proposed by the Applicant is not an appropriate unit for the following reasons:
>
> > (a) the employees of ELTVO's Timmins, Sudbury, Listowel, and Simcoe locations should not be in the same bargaining unit as they do not share a community of interest;
> >
> > (b) **the Producers, namely Al Raymond, Joanne Bourre, Chris Elzinga and Betty Uiselt, perform management functions and therefore are not "employee(s)" for the purposes s. 3(1) of the *Canada Labour Code***;
> >
> > (c) **in the alternative, if the Producers are not found to perform management functions, ELTVO says that the Producers are supervisors and therefore it would be a conflict of interest if they were included in the same bargaining unit as the employees they supervise**;
> >
> > (d) the Administrative Coordinator, Louise Girard, is engaged in a confidential capacity relating to industrial matters and therefore is not an "employee" for the purposes of s. 3(1) *Canada Labour Code*.
>
> (emphasis added)

[49] Persona's job description for the Producers focused almost exclusively on the producers' technical duties. The introductory paragraphs of the job description read:

> As Canada's largest, family owned and operated telecommunications company with operations in eight Canadian provinces and Bermuda, Eastlink provides residential, business and public sector customers with industry leading video entertainment and communications services. Thanks to our 1,700 employees across Canada, Eastlink has received platinum level recognition as one of Canada's Best Managed Companies.
>
> Reporting to the District Manager, the Producer will have a strong communication, and editorial background coupled with a passion for storytelling with on-air experience. As a representative of Eastllnk TV, the producer will be an active community member ensuring programs produced are relevant to local audience. Thorough, organized and driven to take ownership and accountability for their work, the successful candidate will have the skills to work effectively in a fast paced and dynamic work environment.

[50] There were few, if any, explicit references in the job description to managerial-type functions. While this is not conclusive, Persona's own document did not persuade the Board that the Producers' activities included making real and final decisions impacting other employees in the unit. Rather, the job description seemed to highlight the Producers' technical duties.

[51] However, Persona's submissions further commented on certain duties the Producers carried out. Persona did suggest in its October 3, 2014 supplementary submission that Producers had "made the decision to discipline, dismiss and demote employees on the basis of deficient work." But no particulars were provided in support of this conclusion.

[52] In a case where an employer suggests someone has actually carried out disciplinary actions, with the implication that this demonstrates managerial functions, the Board requires specifics. This is all the more the case when Unifor argues the Producers performed no management or supervisory duties whatsoever.

[53] The burden of proof requires a party to provide specific examples which will then allow the Board to decide whether to conclude that the employees carried out management duties.

[54] Persona indicated in its October 24, 2014 submission that it had no written records of discipline. But particulars of any events would presumably still exist.

[55] The rest of Persona's allegations suggested that the Producers could supervise other employees. For example, Persona advised that the Senior Technical Producer, Allan Raymond,

occupied the main technical position in Ontario. Mr. Raymond supervised employees and was the senior person for technical matters.

[56] For Producer Joanne Bourre, Persona advised she was responsible for quality control and program fixes. Producer Betty Uiselt could hold internal meetings and assign work to employees. Persona was candid that it had no written records of disciplinary issues, but suggested that Ms. Uiselt would have disciplinary control if needed.

[57] Persona also described Creative Producer Chris Elzinga's responsibility for creativity, branding and the "look and feel" of its work.

[58] Even on Persona's facts, the Board concludes that the Producers are not managers. There was no documented example of any of the Producers having the type of real or decision-making power which would impact their fellow employees. Persona would have to demonstrate such power before the Board would deprive the Producers of employee status under the *Code*.

[59] Persona did argue, in the alternative, that the Producers were supervisors and should not be included in the same bargaining unit as the other employees. Unifor said the Producers were not supervisors and its proposed bargaining unit description explicitly excluded supervisors.

[60] The Board will next deal with those submissions as it considers the appropriate bargaining unit, as well as the issue of inclusions/exclusions.

C. What is the appropriate bargaining unit for Persona and which employees fall within it?

1. Appropriate Unit

[61] Unifor argued there were no supervisors among the 18 employees in the broadcast group and suggested a bargaining unit description that excluded supervisors:

> all employees of Persona Communications Inc. employed in the broadcast group in the cities of Sudbury, Timmins, Simcoe and Listowel save and except supervisors and persons above the rank of supervisor.

[62] Persona's alternative argument that the four Producers were supervisors posited that a conflict of interest would occur if the Board included them in the unit with the employees they supervised.

[63] The Board is satisfied that its preference for all-employee units should be followed in this case involving a small workgroup. Even in accepting Persona's facts, the Board was not persuaded that the four Producers should be excluded from the bargaining unit. In such a small workgroup, there must be cogent reasons to persuade the Board to create a second four-person supervisor unit, separate and apart from a 14-person bargaining unit.

[64] The Board expands below on why the Producers, even if supervisors, should be included in a broadcast group bargaining unit at Persona.

[65] The Board has determined that the following bargaining unit is appropriate:

> all employees of Persona Communications Inc. employed in the broadcast group in the cities of Sudbury, Timmins, Simcoe and Listowel, **excluding** managers, those already covered by another certification order and those employed in a confidential capacity in matters relating to industrial relations.

2. Which Employees?

[66] The Board has concluded that the four Producers, even if they exercise some supervisory functions as Persona alleged, will be included in the appropriate bargaining unit.

[67] In the Board's view, the Producers' duties involve providing an experienced technical expertise which allows Persona to carry out its broadcasting activities. While this may require them to direct other employees on a particular broadcast or project, Persona's suggested facts were not sufficient to satisfy the Board that the Producers should be placed in a separate four-person supervisory bargaining unit in order to avoid significant conflicts of interest.

[68] The Board notes that this is not a case involving a stand-alone 19-person business with everyone except the District Manager being placed in the bargaining unit. Such a scenario would raise a potential lack of balance in the parties' labour relations.

[69] In this case, while the parties' submissions did not explore in detail who provided all the other services Persona would need to operate, it was clear that human resources services were available to Mr. Carter, the District Manager. These services did not come from anyone in the bargaining unit. The human resources services could come from the Vice-President, Human Resources in Sudbury and/or from Eastlink Inc.'s Halifax head office.

[70] It was this context which persuaded the Board that an imbalance did not arise from a description of the bargaining unit which would include all 18 employees Unifor sought to represent.

[71] While the Board has the power to create a separate supervisory unit, such a small bargaining unit, within an already small workgroup, would have significant viability issues. Two bargaining units for 18 employees would normally not be appropriate, unless very significant facts persuaded the Board otherwise. The Board is satisfied that a single all-employee broadcast group unit, which includes the Administrative Coordinator and the four contested Producers, will better meet the objectives of the *Code*.

[72] On the basis of the membership evidence Unifor filed with its application, the Board can issue a certification order without the need for a certification vote (section 28(*c*)).

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

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Graham J. Clarke
Vice-Chairperson

_____
André Lecavalier
Member

_____
Norman Rivard
Member