Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Association des réalisateurs,

applicant,

and

Société Radio-Canada,

employer,

and

Syndicat des communications de Radio-Canada (FNC-CSN); STARF-CUPE Local 5757; and Canadian Union of Public Employees,

bargaining agents.

Board File: 30710-C
Neutral Citation: 2015 CIRB **763**
February 27, 2015

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Ms. Annie G. Berthiaume and Mr. Graham J. Clarke, Vice-Chairpersons.

Counsel of Record

Mr. Jean-Pierre Belhumeur, for the Association des réalisateurs;

Mr. Alexandre W. Buswell, for the Société Radio-Canada;

Mr. Guy Martin, for the Syndicat des communications de Radio-Canada (FNC-CSN);

Ms. Louise-Hélène Guimond, for STARF-CUPE Local 5757;

Mr. Michael Cohen, for the Canadian Union of Public Employees.

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

Canada

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 material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application for reconsideration without an oral hearing.

I. Nature of the Application

[1] On September 19, 2014, the Board issued its decision in *Société Radio-Canada*, 2014 CIRB 741 (*SRC 741*), in which it concluded that the employer, the Société Radio-Canada (Radio-Canada), had established that its bargaining units "are no longer appropriate for collective bargaining" (paragraph 224), pursuant to section 18.1(1) of the *Code*.

[2] The original panel issued its decision after 35 days of hearing during which 29 witnesses had been heard. The parties had agreed to make their final submissions in writing.

[3] In view of its decision pursuant to section 18.1(1), in paragraph 225 of *SRC 741*, the Board gave the parties 90 days to attempt to come to an agreement in respect of any issues that might arise in that context, as required under section 18.1(2).

[4] On October 17, 2014, one of the parties, the Association des réalisateurs (AR), filed an application for reconsideration of the decision in *SRC 741*. The AR is asking that the Board rescind the decision in *SRC 741* for a variety of reasons and "order a stay of the order" (translation) described in paragraph 225.

[5] The Board has decided to dismiss the application for reconsideration for the reasons set out below.

II. Reconsideration Is Not an Appeal

[6] The Board has often repeated in its decisions that the reconsideration process is markedly different from an appeal. Board decisions are final and will not be reviewed except in exceptional circumstances.

[7] Similarly, a reconsideration panel will not substitute its opinion and assessment of the evidence for those of the original panel and will not second-guess the original panel's exercise of discretion.

[8] The Board recently reiterated these points in *Ms. Z*, 2015 CIRB 752:

III. Reconsideration

[28] Reconsideration is not an appeal or a means of rearguing the original case. Despite the fact that section 44 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) was repealed on December 18, 2012, the following excerpt from *Kies*, 2008 CIRB 413, still applies:

> [29] Section 44 of the *Regulations* is not drafted exhaustively and provides the Board with the flexibility to hear the rare case that does not fit within the enumerated grounds for reconsideration described above (see *Hurdman Bros. Ltd.* (1982), 51 di 104; and 83 CLLC 16,003 (CLRB no. 394)). **The enumerated grounds for reconsideration demonstrate that the reconsideration process is neither an appeal nor an opportunity for a party to reargue its case a second time before a differently constituted panel.**
>
> (emphasis added)

[29] In *Williams* v. *Teamsters Local Union 938*, 2005 FCA 302, the Federal Court of Appeal noted the difference between an appeal and an application for reconsideration:

> [7] I am unable to say that the Board's Reconsideration decision was patently unreasonable. **A request for reconsideration is neither an opportunity to obtain a new hearing nor is it an appeal. In conducting its review of the Initial decision, the reconsideration panel was not to substitute its own appreciation of the facts for that of the original panel.** In this case, based on the facts before it, the original panel concluded that the Union was within its right not to pursue the matter further and there are no new facts or grounds now advanced by the applicant that would alter this conclusion.
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> (emphasis added)

[9] The AR's application is to a large extent an application to have the reconsideration panel rehear the original matter. In fact, the AR has reproduced a long excerpt from the written submissions it made to the original panel in regard to the appropriateness for bargaining of the bargaining unit it represents.

[10] The AR has also challenged some of the findings of fact drawn by the original panel (see pages 34 *et seq.* of the AR's application). In making this type of argument, the AR is asking the reconsideration panel to arrive at different findings of fact from those of the original panel. The AR states the following:

> 81. These findings in no way justify a determination that the producers unit is no longer appropriate for collective bargaining.
>
> (translation)

[11] The arguments made by the AR are in the nature of an appeal. An application for reconsideration that is nothing more than a veiled appeal will be summarily dismissed. The above-noted arguments do not fit within the reconsideration process that has been soundly established in the Board's jurisprudence.

[12] Were it not for its clear reconsideration policy which has been in place for decades, the Board would be forced to hear each matter twice. Such a practice would undermine the finality of Board decisions and would be inconsistent with sound labour relations.

III. Main Grounds for Reconsideration

[13] In *Kies*, 2008 CIRB 413, the Board reviewed its reconsideration process in detail, along with the grounds for reconsideration as set out in section 44 of the *Canada Industrial Relations Board Regulations, 2001* (*2001 Regulations*) (repealed in 2012).

[14] In *Buckmire*, 2013 CIRB 700, the Board reiterated that the grounds for reconsideration remained the same following the repeal of section 44 of the *2001 Regulations* in 2012:

> [36] The main grounds for reconsideration, and the applicant's obligations when pleading an application for reconsideration, remain as described below. Decisions of the Registrar under section 3 of the *Regulations* similarly remain subject to reconsideration.
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> **1. New Facts**
>
> [37] This ground involves new facts which the applicant did not put before the Board when originally pleading its case. It is not an opportunity for the applicant to add facts it had omitted to plead.
>
> [38] As summarized in *Kies 413, supra*, an application for reconsideration will include, at a minimum, the following information about the alleged new facts:
>
> 1. What the new facts are;
> 2. Why the applicant could not have put them before the Board panel originally; and
> 3. How those new facts would have changed the Board's decision under review.
>
> [39] Generally, the original panel will consider applications raising this ground, given its advantageous position to decide whether "new facts" exist and their impact, if any, on its previous decision.
>
> **2. Error of Law or Policy**
>
> [40] Any alleged error of law or policy must cast serious doubt on the Board's interpretation of the *Code*. This creates a two-pronged test. A mere difference of opinion about the legal or policy interpretation will not justify reconsideration.

[41] A party must also have raised the point of law or policy issue in question before the original panel.

[42] The minimum pleading requirements for an allegation raising an error of law or policy remain as set out in *Kies 413, supra*:

> 1. A description of the law or policy in issue;
> 2. The precise error the original panel made in applying that law or policy; and
> 3. How that alleged error casts serious doubt on the original panel's interpretation of the *Code* or policy.

3. Natural Justice and Procedural Fairness

[43] Reconsideration may raise allegations that the original panel failed to respect the principles of natural justice or those related to procedural fairness.

[44] As described in *Kies 413, supra*, a party's minimum pleading requirements would address the following issues:

> 1. An identification of the particular principle of natural justice or procedural fairness in issue; and
> 2. A description of how the original panel allegedly failed to respect that principle.

E. Summary of Main Grounds for Reconsideration

[45] In summary, the main grounds for reconsideration may be described as follows:

> (*a*) New facts that the applicant could not have brought to the attention of the original panel and which 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* or policy;
>
> (*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and
>
> (*d*) A decision made by a Registrar under section 3 of the *Regulations*.

[46] It is with the above principles in mind that the Board will address Mr. Buckmire's application.

[15] While the Board summarily dismisses the AR's arguments that are in the nature of an appeal, it considers that the argument regarding an alleged error of law in interpreting section 18.1(1) is worth being addressed on reconsideration.

IV. Interpretation of Section 18.1(1)

[16] The AR submits that the original panel's interpretation of section 18.1(1) constitutes an error of law that casts serious doubt on that panel's interpretation of the *Code*.

[17] Section 18.1(1) reads as follows:

> 18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.

A. Parties' Positions and Original Panel's Findings

[18] According to the AR, the Board should interpret section 18.1(1) in the following manner:

> 6. The question that the Board must answer first when entertaining an application made under section 18.1(1) of the *Code* is whether the bargaining units are no longer appropriate for collective bargaining.
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> 7. The Board must answer that question for each and every bargaining unit.
>
> 8. If a bargaining unit is still appropriate for collective bargaining, the Board must recognize it as such and must not include that bargaining unit in the bargaining unit structure to be reviewed. That unit must be left out of the process to review the bargaining unit structure.
>
> 9. The Board erred in its interpretation of section 18.1(1) of the *Code* in that it did not first ask itself whether the bargaining units were no longer appropriate for collective bargaining.
>
> 10. Rather, the Board asked itself whether the existing bargaining unit structure was outdated.
>
> (translation)

[19] Radio-Canada suggests a different interpretation:

> 15. As is clear from the very wording of section 18.1(1) of the *Code*, what is to be reviewed in this context is the structure of the bargaining units and the bargaining units considered together as a whole rather than the individual circumstances of each bargaining unit, as the AR appears to be erroneously suggesting in this application.
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> …

> 29. Pursuant to section 18.1 of the *Code*, the applicable test is clearly not to determine whether any one bargaining unit in particular is still appropriate for collective bargaining but rather whether all the bargaining units are still appropriate for collective bargaining given the difficulties associated with the existence of a large number of bargaining units.
>
> (translation)

[20] The original panel dismissed the AR's argument respecting the interpretation of section 18.1(1):

> [19] For the reasons set out below, the Board finds that the factors cited by Radio-Canada have had a real impact on labour relations and that the existing bargaining unit structure for employees of the French network is no longer appropriate for collective bargaining. The Board will not at this stage consider the criteria relating to the determination of the new bargaining unit structure since it must first allow the parties to come to an agreement on this issue, in accordance with section 18.1(2) of the *Code*.
>
> …
>
> **C. Relevant Factors for Application of Section 18.1(1) of the *Code***
>
> [125] The bargaining agents and in particular the AR allege that Radio-Canada has not discharged its burden of proof in relation to the applicable tests for a review of the existing bargaining unit structure, such as for example community of interest, viability of the bargaining units, employees' wishes and industry practice. **The Board wishes to clarify that the tests listed by the AR are actually those that the Board considers when it must determine the unit or units that, in its opinion, is or are appropriate for collective bargaining. The Board will thus consider those tests at the second stage of the procedure, if applicable, when determining the unit or units appropriate for collective bargaining.**
>
> (emphasis added)

[21] The original panel's reference to a "second stage" in the review of the bargaining unit structure is based on sections 18.1(2) and 18.1(3):

> 18.1(2) If the Board reviews, pursuant to subsection (1) or section 35 or 45, the structure of the bargaining units, the Board:
>
> (*a*) **must allow the parties to come to an agreement, within a period that the Board considers reasonable, with respect to the determination of bargaining units** and any questions arising from the review; and
>
> (*b*) may make any orders it considers appropriate to implement any agreement.
>
> (3) **If the Board is of the opinion that the agreement reached by the parties would not lead to the creation of units appropriate for collective bargaining or if the parties do not agree on certain issues within the period that the Board considers reasonable,**

the Board determines any question that arises and makes any orders it considers appropriate in the circumstances.

(emphasis added)

[22] Indeed, if the Board determines that the units are no longer appropriate for collective bargaining in the context of a structure that encompasses more than one bargaining unit, it must then give the parties the opportunity to come to an agreement on the determination of the new bargaining unit or units.

B. Review of Bargaining Unit Structure: Background

[23] Prior to 1999, the Board could order a review of the bargaining unit structure under section 18 of the *Code*:

> 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.

[24] In *Canadian Broadcasting Corporation* (1993), 92 di 95 (CLRB no. 1023), the Canada Labour Relations Board (CLRB), the predecessor of the current Board, explained how it applied section 18 to perform a global review of the bargaining units:

> **What is clear from these decisions, apart from the fact recognized by all that each is an individual case, is that it must be established that the units are not or are no longer appropriate, that they are complex or obsolete, depending on the vocabulary used in the particular decision. In other words, the applications have to be based on reasons associated with the organization of sound labour relations.**
>
> Therefore, the Board will not welcome from an employer, any more than it would from a union, applications based on short-term opportunism that is designed, for example, to short-circuit the bargaining process. On each occasion, the Board must carefully weigh the reasons supporting the application in terms of the principles cited earlier, i.e. the definitive character of its decisions and the stability of labour relations. As the Board pointed out in *Teleglobe Canada, supra*:
>
> > This Board is therefore of the view that the reconciling of the wishes of Parliament towards the rights of the employees to freedom of association, their rights to fair representation, the rights and obligations of certified unions, the rights of the public to orderly labour relations through the determination of viable and realistic bargaining units, and the rights of employers to operate their enterprises in an efficient manner, constitute an exercise in balancing where it may happen that some rights, which were believed before to be carved in marble, may sometimes have to balanced against others which the general public good makes it imperative to favour.
> >
> > (pages 316–317; and 125)

> **Should it decide that certain bargaining units are no longer appropriate, the Board will establish new ones, on the basis of the rules and criteria generally applicable to certification.** It will then determine the bargaining agent for each, according to the rule of the majority.
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> (page 106; emphasis added)

[25] In 1995, as part of a revision of Part 1 of the *Code*, the authors of *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report) described the CLRB's practice in regard to bargaining unit reviews:

> At present, the *Code* contains no criteria and no specific processes or powers to guide it through such major reviews. **The authority should continue, but should be set out in a separate section of the *Code***.
>
> The Board views its role vis-a-vis bargaining unit determination as ongoing and encourages parties to apply to vary certificates when circumstances warrant change. At present, the Board sometimes initiates reviews of its own accord. Further, even if an applicant tries to withdraw the application, the Board may refuse to grant the withdrawal and continue on.
>
> **The Board will not amend bargaining units without compelling reasons. It will review bargaining unit structures if social, economic, and technological conditions in the workplace have evolved so that existing bargaining structures are out of date.** It will act in situations where bargaining is cumbersome and change is necessary to streamline bargaining, or to reduce jurisdictional disputes.
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> (pages 75–76; emphasis added)

[26] Prior to the enactment of section 18.1 of the *Code*, the Board could initiate bargaining unit structure reviews of its own accord, a practice that could lead to significant costs for the parties concerned. The Sims Report recommended that only the parties have the power to commence such a process and that the review process be fully laid out in the *Code*:

> RECOMMENDATIONS:
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> The *Code* should contain a new provision enabling the Board to reconsider bargaining unit configurations for employers with more than one bargaining unit. The section should provide that:
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> - applications must be commenced by an affected employer or trade union;
> - where feasible, the parties be encouraged to resolve the matters before the Board, provided that the Board is satisfied that the resolutions achieved lead to units appropriate for collective bargaining;
> - **applicants must satisfy the Board that there are problems with the present bargaining unit configuration that render one or more of the units within the workplace inappropriate for collective bargaining;**

- the Board be empowered to make interim orders for the conduct of its review, and for the maintenance of collective bargaining and collective agreement administration during its review;
- the Board be given the power to make whatever consequential orders are necessary following its decision to re-establish effective collective bargaining and contract administration.

(page 70; emphasis added)

[27] One of the objectives of the recommendations was to avoid subjecting the parties to the substantial disruption and expense associated with bargaining unit review where such a review is not necessary. The Sims Report stated as follows:

> Because of the substantial disruption and expense, such reviews should be undertaken only if directly affected parties can satisfy the Board that there are serious problems with the current bargaining unit structures. Otherwise there is no justification for interfering with the employees' choice of bargaining agent. The employer or one or more of the affected trade unions should initiate the process, not the Board of its own volition. Once a party has made the case for review, the Board should be able to finish the review, bringing in all affected parties to the proceedings.
>
> (page 69)

[28] The *Code* was subsequently amended, in 1999, to include section 18.1, under which a review of bargaining unit structure may only be initiated on the application of a party or following a single employer or sale of business declaration.

C. Wording of Section 18.1 Does Not Support AR's Arguments

[29] The original panel did not commit any error of law or policy in its interpretation of section 18.1.

1. The words "the…units" in section 18.1(1) are not the same as "each...unit"

[30] For reference purposes, section 18.1(1) is reproduced in English and French below:

Section 18.1	Article 18.1
18.1(1) On application by the employer or a bargaining agent, the Board may review the structure of the bargaining units if it is satisfied that the bargaining units are no longer appropriate for collective bargaining.	18.1(1) Sur demande de l'employeur ou d'un agent négociateur, le Conseil peut réviser la structure des unités de négociation s'il est convaincu que les unités ne sont plus habiles à négocier collectivement.

[31] Section 18.1(1) applies only to cases where the employer has more than one bargaining unit. Where there is only one bargaining unit, the application is always filed pursuant to section 18 of the *Code*. The Board explained its practice when a single bargaining unit is involved in *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503.

[32] In section 18.1(1), Parliament chose to use the words "the…units" rather than "each...unit," which would have resulted in the following wording: "if it is satisfied that each bargaining unit is no longer appropriate for collective bargaining."

[33] All of the AR's arguments concerning the interpretation of section 18.1 seem based on a supposed equivalence between the words "each...unit" and the actual words "the...units."

[34] Parliament's choice of the words "the...units" is logical, especially given its intention that the *Code*'s wording explicitly reflect the Board's past practice in conducting comprehensive reviews of bargaining units even though the Board can no longer initiate such reviews of its own accord.

[35] In the context of a comprehensive review, the Board has always considered whether the units as a whole are no longer appropriate for collective bargaining. A reconsideration panel confirmed the principle that the Board reviews the structure of the bargaining units overall based on the context of each matter in *Canadian Broadcasting Corporation*, 2003 CIRB 253.

2. The AR is seeking to combine the separate stages set out in sections 18.1(1) and 18.1(2)

[36] The Board must begin by determining whether the units are no longer appropriate for collective bargaining. The Board may not move to the second stage set out in section 18.1(2) without first making that determination.

[37] Even where the condition set out in section 18.1(1) is met, there is no basis in that section for finding that the Board must then automatically merge all of the units into one. Rather, section 18.1(2) provides that the parties may come to an agreement concerning a new bargaining unit structure. The new structure might include all of the units, but not necessarily.

[38] The Board retains its discretion to determine the appropriate structure even if the parties arrive at an agreement: section 18.1(3). In *V INTERACTIONS Inc.*, 2010 CIRB 542 (*V INTERACTIONS 542*), the Board refused to create a single unit despite the arguments of the employer and all the unions but one that such a structure would be appropriate.

[39] The AR's argument appears to be directed at forcing the Board to assess its unit's appropriateness to bargain collectively at the first stage of the unit review process under section 18.1(1), whereas that question is only relevant at the second stage of the process, as provided for in section 18.1(3).

[40] Clearly Parliament intended for the Board to proceed in stages, starting with the first stage, set out in section 18.1(1). If the parties are unable to arrive at a settlement, the review of the issue of the AR unit's appropriateness to bargain will be considered when section 18.1(3) of the *Code* is applied.

3. Nor are the words "the…units" the same as "all the...units"

[41] In the case of an employer such as Radio-Canada, which has four bargaining units, the condition set out in section 18.1(1) is met if at least two of the four units are no longer appropriate for collective bargaining. Generally speaking, this confirms that "the…units" are no longer appropriate for bargaining. The Board is under no obligation to determine that "all the…units" are no longer appropriate.

[42] The fate of each individual unit will be decided at the second stage of the process. All of the units may be merged, or the Board may decide that some units should be merged while others should keep their existing status: *V INTERACTIONS 542*. That decision will be based on the evidence before the Board.

[43] At that second stage, the AR will have the opportunity to argue that its unit should not be changed in any way, since it is still appropriate for collective bargaining. The original panel already heard the AR's evidence in this regard, but determined that the evidence would be relevant only at the second stage of the process. For that reason, the reconsideration panel dismisses the AR's argument based on the principle of *audi alteram partem*. The reconsideration panel moreover considers that the argument is premature as the original panel has not had the opportunity to consider the evidence in question given that it has not yet commenced the second stage of the process.

4. The AR's argument could prevent the Board from fulfilling its obligations under the *Code*

[44] The AR's argument could moreover lead to an absurd situation where section 18.1 would be completely devoid of any meaning. The AR is suggesting that, if its unit

remains "appropriate," it should no longer be included in the process governed by section 18.1(2). The AR is therefore requiring that the Board assess the individual circumstances of each unit.

[45] However, if the AR's interpretation were allowed, all that a party concerned by an application for review would have to do is show that a single unit is still viable and appropriate for bargaining in order to prevent the Board from exercising its discretion to review the overall structure of the units involved.

[46] The Board must sometimes merge a large number of units. In *Canada Post Corporation* (1988), 73 di 66; and 19 CLRBR (NS) 129 (CLRB no. 675), the CLRB decided that it was appropriate to reduce 26 units represented by eight bargaining agents to four bargaining units. Some of the units in question represented supervisors.

[47] Would it be logical for the Board to be prevented from reviewing an outdated structure if a party could show that a single unit within the group remained appropriate for bargaining?

[48] The AR has not satisfied the reconsideration panel that the original panel erred in law or policy in its interpretation of section 18.1. The specific circumstances of the AR unit can be dealt with in the process governed by sections 18.1(2) and 18.1(3).

[49] The AR is also alleging that the original panel failed to follow the reasoning set out by the Board in *Société Radio-Canada*, 2005 CIRB 307. In that matter, the Board indicated that a party applying for a review of the bargaining unit structure must be able to demonstrate that it has done "everything it can to obtain the concessions it needed."

[50] However, the jurisprudence is clear that the rule of precedent does not apply to Board decisions: *J.D. Irving Ltd. v. General Longshore Workers, Checkers and Shipliners of the Port of Saint John*, 2003 FCA 266. In the instant matter, the original panel was satisfied that Radio-Canada had in fact obtained sufficient concessions and recognized that the burden of proof was not insurmountable under section 18.1.

[51] The AR is also seeking a stay of the original panel's decision. An application for reconsideration does not automatically lead to a stay of an original decision (see *Brink's Canada Limited*, 2002 CIRB 204). In view of the findings in this decision, the request for a stay has become moot. The original panel must carry on with the process to review the bargaining unit structure.

[52] For the foregoing reasons, the application for reconsideration filed by the AR is dismissed.

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

Translation

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Ginette Brazeau
Chairperson

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Annie G. Berthiaume
Vice-Chairperson

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Graham J. Clarke
Vice-Chairperson