



Reasons for decision

Saskatchewan Government and General
Employees' Union,

complainant,

and

Cowessess First Nation #73,

respondent.

Board Files: 30493-C

30715-C

Neutral Citation: 2016 CIRB 812

March 4, 2016

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and of Messrs. Daniel Charbonneau and Robert Monette, 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 issue this decision without an oral hearing.

Counsel of Record

Mr. Greg D. Fingas, for the Saskatchewan Government and General Employees' Union;

Mr. Nathan Phillips, for Cowessess First Nation #73.

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

I. Background

[1] The Saskatchewan Government and General Employees' Union (SGEU) applied for certification to represent a bargaining unit at Cowessess First Nation #73 (Cowessess). SGEU

is now certified. SGEU also filed unfair labour practice complaints. SGEU has further filed a complaint alleging that Cowessess had failed to bargain in good faith.

[2] A differently constituted panel of the Board is hearing the bargaining complaint.

[3] This decision sets out the possible consequences for Cowessess as a result of its repeated failures to comply with its obligations as a party, as well as with specific Board orders.

[4] The Board advised Cowessess during a Case Management Conference (CMC) held on February 25, 2016, that if it failed to comply again with a Board order regarding, *inter alia*, summaries of its witnesses' evidence, then, as contemplated by the *Canada Industrial Relations Board Regulations, 2012 (Regulations)*, it would not be allowed to call any further evidence.

[5] The Board would instead proceed to final argument, which the parties have already agreed will take place via written submissions.

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

II. Facts

[7] This has been a novel case for the Board. Never before in this panel's experience has the Board had to spend so much time actively pushing a matter along.

[8] These actions have been necessitated mostly, but not exclusively, by Cowessess' continuing failures to abide by its obligations, whether for those arising under the *Regulations* or from specific Board orders.

[9] A brief review of the history of this case provides context.

A. Failure to File Submissions in Two Matters (File nos. 30388-C and 30493-C)

[10] For both a certification application and an unfair labour practice complaint, Cowessess failed to file submissions, as described by the Board in *Cowessess First Nation #73*, 2016 CIRB LD 3259:

On June 13, 2014, the Board issued an interim certification to the applicant, the Saskatchewan Government and General Employees' Union (SGEU). In *Cowessess First Nation #73*, 2014 CIRB LD 3232, the Board provided the parties with its reasons and also established a timetable for submissions on the issue of three disputed exclusions.

Given that the employer, Cowessess First Nation #73, requested the exclusions from the bargaining unit, it bore the burden of proof.

The deadline for the employer's response was July 3, 2014. The Board has received nothing to date.

On June 9, 2014, the SGEU filed an unfair labour practice (ULP) complaint alleging that certain actions by the employer violated various ULP provisions including sections 24(4), 94(1) and 94(3) of the *Code*.

On June 10, 2014, the Board sent a copy of the ULP complaint to the respondent employer. The employer had five (5) days to respond to the complaint. The SGEU also served the employer with the complaint on June 10, 2014.

On June 16, 2014, Mr. Mervin C. Phillips, legal counsel for the employer, wrote the following to the Board:

The Federal Court decision was rendered on Friday, June 13, 2014. This decision is being appealed and an application for stay being sought.

Until that occurs Cowessess First Nation is not in a position to respond to the Unfair [sic] Practice Complaint sent from the Canada Industrial Relations Board on June 10, 2014 to Chief Terrance Lavallee.

The Board is not aware of the Federal Court proceedings to which Mr. Phillips refers. The SGEU wrote to the Board on June 25, 2014 and referenced a June 11, 2014 resolution authorizing Mr. Phillips to deal with the ULP complaint. The Board does not have a copy of that resolution.

The Board never received a response from the employer to the ULP complaint.

The employer has failed in both of the above files to respect the deadlines established by the Board for submissions. The Board has already advised the parties in its correspondence that it may decide any case based solely on the content of its written file.

While the file contains a vague reference to issues in the Federal Court, the Board's processes have not been stayed, either by the Board or by any court.

As a result, the employer will have a final ten (10) days in which to satisfy the pleading opportunity provided to it in both of the above files. Those submissions will be due on **August 6, 2014**.

Should the employer fail to respond, the Board will proceed with the matters, including, if warranted, deciding the files on the basis of the current submissions.

(pages 2-3; emphasis in original)

[11] The Board had given Cowessess a second chance to respond. Cowessess' pleading failure, which had obliged the Board to take this unusual action, would turn out not to be an isolated incident.

B. Will-Say Statements

[12] As part of the Board's production process, it requires parties to an oral hearing to disclose both the documents on which they intend to rely, as well as summaries of their witnesses' anticipated evidence.

[13] The SGEU provided Cowessess with detailed witness summaries in advance of the start of the oral hearing. However, as described in *Cowessess First Nation #73*, 2015 CIRB 762 (*Cowessess 762*), the Board was obliged to intervene on an urgent basis as a result of Cowessess providing will-say statements which the Board described as being "essentially useless" (para 6). The Board described the importance of these witness summaries and highlighted the possible consequences for a party that failed to respect its obligations:

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

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

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

27 (1) A party that intends to present evidence must file with the Board six copies or such other number as the Board may specify of the following:

...

(b) a list of witnesses expected to be called that includes their names and occupations, along with a **summary of the information that is expected to be provided on issues raised in the application, response or reply.**

(emphasis added)

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

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

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

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

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

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

[53] The Board has adopted an explicit policy of both documentary and evidentiary pre-hearing production. This encourages the parties to explore possible resolutions after putting all their cards on the table. It also allows the Board to prepare thoroughly for its oral hearings.

[54] There is a labour law practice, unique to Quebec, which allows a party that has the burden of proof to call the complainant or grievor as its first witness. Unlike in the Common Law provinces, the party with the burden of proof is not bound by the complainant's testimony. But it does provide a form of discovery of the other side's facts.

[55] The Board has respected this long-standing Quebec practice in the past. The complainant was not called first in this case. However, even if he had been, that process is not a substitute for complying with the Board's *Regulations* concerning will-say statements for each and every witness.

[56] The *Regulations* are designed to avoid evidentiary surprises. This not only ensures a fair hearing, but also allows the Board to conduct its oral hearings efficiently and avoid time-wasting adjournments.

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

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

(emphasis in original)

[14] In *Cowessess* 762, the Board was obliged to order Cowessess to respect its obligations under the *Regulations*:

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

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

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

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

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

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

(emphasis in original)

C. Failure to Appear at a Case Management Conference (CMC)

[15] On March 19, 2015, following initial hearing days in Regina, the Board fixed further hearing dates and advised the parties in writing that it would hold another CMC on July 13, 2015. A CMC is invaluable for the Board, given that it must travel across Canada in order to carry out its mandate.

[16] Usually, however, CMCs are not required for most parties once the oral hearing has already started.

[17] Despite the Board's written notice, Cowessess failed to appear on the CMC conference call. The Board was obliged to proceed in its absence, as described in its July 14, 2015 decision in *Cowessess First Nation #73*, 2015 CIRB LD 3459:

By letter dated March 19, 2015, the Board fixed continuation dates for these matters for July 29 to 31, 2015, and August 18 to 20, 2015. The Board also set the time for the next Case Management Conference (CMC) for July 13, 2015, at 11:00 a.m. CST (1 p.m. EDT).

While Mr. Fingas phoned into the CMC on July 13, 2015, no one from Phillips & Co called in.

After a brief wait, the Board continued with its CMC, as contemplated by the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*). As per section 47(2) of the Regulations, where a person who is notified of a pre-hearing proceeding does not appear, the Board may proceed and dispose of the matter in the absence of that person.

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D. Document Production

[18] The issue of document production was another area where it seemed only Board intervention on its own motion would resolve the issues. Cowessess was not solely to blame for production issues remaining unresolved for many months following the start of the hearing, as described in *Cowessess First Nation #73*, 2015 CIRB LD 3491 dated September 4, 2015:

To date, the hearing has proceeded at an extremely slow pace and has used significant Board time and resources. It is up to the parties to work together to ensure that each scheduled hearing day is used fully and efficiently.

This includes ensuring that witnesses are available each day to give evidence.

In its letter dated March 10, 2015, the Board wrote to the parties:

The Board also requests that the parties discuss which facts can be admitted in order to expedite some of the witness' testimony. Similarly, any issues regarding document production must be resolved now, rather than on the eve of the next hearing dates.

If either party decides to call a new witness during the course of the hearing, they shall follow the process in section 27 of the *Canada Industrial Relations Board Regulations, 2012*, regarding notice and a summary of that person's evidence.

Notwithstanding the Board's request, a request which had to be repeated several times at subsequent hearings, the issue of document production remains unresolved, despite nine (9) days of hearing. This can only lead to further delays in the Board's hearing.

In *Cowessess First Nation #73*, 2015 CIRB 762 (*Cowessess 762*), the Board noted that witness evidence summaries needed to be exchanged. If witnesses, other than those already listed might testify, it is up to the parties to exchange the obligatory summaries. *Cowessess 762* examined the consequences for failing to do so.

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[19] The Board was obliged to revisit the issue of production in *Cowessess First Nation #73*, 2015 CIRB LD 3508 dated October 15, 2015:

2. Production

The parties advised that they have still not resolved the remaining production issues, despite being given time at the last hearing either to settle those issues or plead the matter before the panel. The parties had advised the Board that they had agreed on a process to resolve the matter and thus argument did not take place. Each side recently sent the other a few more documents.

The parties will have until **Monday, October 19**, to file their respective submissions regarding production. They may respond to each other's submission by no later than **Tuesday, October 20**. The Board will then decide the matter, as best it can, given the situation.

(page 3; emphasis in original)

[20] In its October 22, 2015 decision in *Cowessess First Nation #73*, 2015 CIRB LD 3513, the Board itself resolved the issue of production due to the parties' continuing unwillingness to deal with it:

I. Background

The Board has held oral hearings in Regina, Saskatchewan, on March 3–5, July 29–31, and August 18–20, 2015. The Board will be travelling on two further occasions during the weeks of October 26 and November 2, 2015.

Despite all those oral hearing dates, case management conferences and the Board's own efforts, the parties have failed to resolve their outstanding document production issues. Some of those issues are more recent than others.

The Board explained the importance of document production in *Cowessess First Nation #73*, 2015 CIRB 762 (*Cowessess 762*). Despite that decision, neither party has brought any disputed issues to the Board for resolution.

Instead, the Board has pushed for such matters to be resolved in an effort to reduce further unnecessary delays in the hearing of these matters.

The Board reminded the parties of the need to resolve document production issues in its post hearing letter dated March 10, 2015:

The Board also requests that the parties discuss which facts can be admitted in order to expedite some of the witness' testimony. Similarly, any issues regarding document production must be resolved now, rather than on the eve of the next hearing dates.

In its September 4, 2015 letter to the parties, the Board again explained the need to resolve document production issues:

Notwithstanding the Board's request, a request which had to be repeated several times at subsequent hearings, the issue of document production remains unresolved, despite nine (9) days of hearing. This can only lead to further delays in the Board's hearing.

In its October 15, 2015 decision in *Cowessess*, 2015 CIRB LD 3508 (*Cowessess LD 3508*), the Board was again obliged to raise the matter of document production after learning the parties had made only limited progress on the issue:

2. Production

The parties advised that they have still not resolved the remaining production issues, despite being given time at the last hearing either to settle those issues or plead the matter before the panel. The parties had advised the Board that they had agreed on a process to resolve the matter and thus argument did not take place. Each side recently sent the other a few more documents.

The parties will have until Monday, October 19, to file their respective submissions regarding production. They may respond to each other's submission by no later than **Tuesday, October 20**. The Board will then decide the matter, as best it can, given the situation.

(page 3; emphasis in original)

Since the parties did not resolve most issues concerning document production between the August 18–20, 2015 hearing dates and the Board's case management conference on October 14, 2015, the Board ordered written submissions.

This decision will resolve those production requests as best it can, given the limited time available to the Board.

(pages 2-3; emphasis in original)

E. Preparation for Oral Hearing Dates

[21] *Cowessess* has been unable or unwilling to arrive properly prepared to make use of the Board's valuable hearing time when it travels to Regina to hear evidence in this case.

[22] In *Cowessess First Nation #73*, 2015 CIRB 801, the Board described just one of those instances where valuable hearing time was lost due to *Cowessess* not being prepared to proceed:

[8] On September 11, 2015, *Cowessess* alleged that the SGEU and one of its advisors, Mr. Don Regel, who had been attending the Board's oral hearing in the main proceedings, knew that it intended to call Ms. Alexson as a witness. Ms. Alexson did not testify in the afternoon of August 19, 2015, despite a general understanding by all concerned that she would. This led to the loss of valuable hearing time, since *Cowessess* had prepared no alternative evidence for that afternoon to ensure the Board's time in Regina was used efficiently.

[23] In a different Board matter (file no. 31414-C) involving these same parties, by letter dated January 28, 2016, a differently constituted Board panel was obliged to remind Cowessess that other client matters did not provide an acceptable excuse for not being prepared for the Board's hearing:

Despite the extension to the filing deadline, the Board has yet to receive a copy of Cowessess' documents from Mr. Phillips. The Board therefore orders Mr. Phillips to:

- serve Mr. Fingas with his documents **today** and provide proof of delivery to the Board by close of business in Ottawa **today (5:00 p.m. EST)**;
- send a copy of fulsome witness statements to the Board by close of business in Ottawa **today (5:00 p.m. EST)**;
- bring **five copies** of his documents to the hearing beginning on Tuesday, February 2, 2016. The hearing begins at 9:30 a.m. (CST) on February 2, 2016. Cowessess' documents must arrive **to the hearing room by 8:30 a.m.** so that materials can be properly processed prior to the commencement of the hearing.

In accordance with section 27(4) of the *Canada Industrial Relations Board Regulations, 2012*, failure to adhere to the above orders may result in the Board refusing to accept any documents and refuse to hear any witnesses tendered at the hearing.

Mr. Phillips, we kindly ask that you act with courtesy and respect for the Board, its process and opposing counsel. We note that your commitments on other files are not a reasonable excuse to fail to meet filing deadlines, particularly when an extension for filing had already been granted at your request.

(emphasis in original)

[24] In that same file, by letter dated February 8, 2016, the Board later had to deal with similar situations. The Board was obliged to remind Cowessess that it had to be familiar with its documentation:

In advance of the continuation hearing dates of February 11 and 12, 2016, the Board advises the parties of the following:

1. The Board was obligated to provide extra time during cross-examination for Mr. Phillips to review his documents at the hearing on February 2 and 3, 2016. The Board advises that this was a one-time courtesy and will not be tolerated going forward. Counsel are expected to be familiar with their documents prior to questioning witnesses.
2. Appropriate witness statements from Mr. Phillips are to be received at the Board's office by **4:00 p.m. (Central Standard Time)** (5:00 p.m. Eastern Standard Time) on **Tuesday, February 9, 2016.**

3. At the outset of the hearing on February 2, 2016, Mr. Phillips requested that he be able to provide closing submissions in writing. The Board denies this request. Counsel should therefore be ready to present oral closing arguments during the February 11 and 12, 2016 continuation dates.

4. Mr. Phillips is reminded to file an additional Respondent's Book of Documents with the Board. The Board will accept this copy in-person on February 11, 2016.

5. The Board confirms that it received copies of the SGEU's Book of Authorities on February 2, 2016. No authorities were received from Cowessess. Cowessess is therefore expected to provide its Book of Authorities on **Thursday, February 11**, at the commencement of the proceedings.

6. Further to the in-person discussion held with the parties on Thursday, February 4, 2016, the Board does not require any clarifications regarding SGEU's draft collective agreement.

(emphasis in original)

F. Board Orders Regarding Cowessess' Reply Evidence

[25] On November 18, 2015, in *Cowessess First Nation #73*, 2015 CIRB LD 3526 (LD 3526), the Board ordered Cowessess to comply with the following orders relating to its reply evidence well in advance of the next scheduled hearing dates in May 2016:

Long before those dates, however, Mr. Phillips will comply with the following Board orders:

- i) Mr. Phillips will provide the SGEU with the names of **all** of his reply witnesses;
- ii) Mr. Phillips will subpoena those named witnesses, if he has not already done so;
- iii) Mr. Phillips will provide to SGEU a detailed witness statement of those witnesses' proposed reply evidence; and
- iv) Mr. Phillips will provide to SGEU any other documents he intends to enter during those witnesses' reply evidence.

Mr. Phillips will complete all these matters by no later than **February 15, 2016**.

(page 2; emphasis in original)

[26] The due date for Cowessess' compliance was February 15, 2016. The Board's CMC would take place 10 days later on February 25, 2016, a date designed to give the parties time to resolve any issues arising from Cowessess' production of materials.

[27] At the CMC on February 25, 2016, the Board learned that Cowessess had failed to comply with all of the orders. It had requested subpoenas from the Board's regional office that very day, but otherwise, despite having had over three months, Cowessess had simply ignored the Board's orders.

[28] At the SGEU's request during the CMC, the Board did oblige Cowessess to advise of the witnesses it intended to call. Even the naming of those witnesses raised relevancy issues between the parties, which was one of the reasons the Board had insisted that these matters be dealt with far in advance of the Board's next trip to Regina in May, 2016.

III. Analysis and Decision

[29] The Board, as master of its own procedure, must ensure that parties are not prejudiced through undue delay.

[30] This case, however, is stunning. Rarely, if ever, does the Board have to take such an active role in attempting to complete a matter properly. Cowessess' continuing failures to be prepared for the Board's oral hearings, to comply with the *Regulations* and to respect Board orders has come close to prejudicing the SGEU's legitimate expectation for a fair and expeditious hearing.

[31] Cowessess has failed, despite Board orders and without any reasonable excuse, to provide the SGEU with the names of its reply witnesses, including proper witness summaries. Cowessess was further obliged, pursuant to LD 3526, to provide any further documents to SGEU.

[32] The evident goal of the Board's orders was to ensure that its hearing time in Regina will not be wasted in May, 2016 and that any disputes could be dealt with well in advance.

[33] What should be done when faced with Cowessess' continued refusal to comply with the Board's orders?

[34] Section 27 of the *Regulations* has already established the parties' disclosure obligations:

27 (1) A party that intends to present evidence must file with the Board six copies or such other number as the Board may specify of the following:

(a) all documents on which the party intends to rely as evidence, including any documents filed with the application, response or reply, as the case may be, in one or more tabbed books; and

(b) a list of witnesses expected to be called that includes their names and occupations, along with a summary of the information that is expected to be provided on issues raised in the application, response or reply.

(2) The documents referred to in subsection (1) must be filed

(a) no later than ten days before the scheduled date of the hearing, in the case of the applicant; or

(b) no later than eight days before that date, in the case of the respondent and the intervenor.

(3) The documents and information referred to in subsection (1) must be served on all other parties in the applicable time limit as set out in subsection (2).

[35] Section 46 of the *Regulations* allows the Board to vary any time limits in order to ensure the proper administration of the *Code*. This is clearly the type of case which required the Board to modify the usual time lines.

[36] The consequence for non-compliance with production requirements, which was already described to Cowessess in *Cowessess 762*, is set out at section 27(4) of the *Regulations*:

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

[37] Accordingly, as a final indulgence, Cowessess will have until **Friday March 18, 2016** to comply with the Board's orders, as originally set out in LD 3526.

[38] If Cowessess fails to comply fully with the Board's orders, then the Board will refuse to hear any further evidence from it.

[39] Instead, the parties will proceed to final argument by way of written submissions, on a tight timetable to be established by the Board.

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

Graham J. Clarke
Vice-Chairperson

Daniel Charbonneau
Member

Robert Monette
Member