Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN,

applicant,

and

Conseil des Innus de Pessamit,

respondent.

Board File: 31710-C
Neutral Citation: 2017 CIRB **861**
October 6, 2017

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

Counsel of Record

Mr. Benoit Laurin, for the Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN;
Mr. Kenneth Gauthier, for the Conseil des Innus de Pessamit.

I. Nature of the Application

[1] On July 8, 2016, the Board received an application for reconsideration filed by the Syndicat des enseignantes et enseignants de la communauté Innue de Pessamit-CSN (the union), challenging the decision in *Conseil des Innus de Pessamit*, 2016 CIRB 831 (RD 831).

[2] In RD 831, issued on June 10, 2016, the original panel dealt with three unfair labour practice complaints filed by the union. The union alleged that the Conseil des Innus de Pessamit (the Conseil des Innus or the employer) had changed the terms and conditions of employment of the

employees that were the subject of an application for certification, in violation of sections 24(4) and 94(3)(e) of the *Code*.

[3] The union had filed an application for certification on November 21, 2011. In the context of the application for certification, the employer raised a preliminary objection regarding the Board's constitutional jurisdiction to deal with the application for certification. After hearing the parties on this issue, the Board dismissed the preliminary objection, stated that it did have jurisdiction to entertain the application and certified the union as the bargaining agent for a unit of teachers on August 15, 2012.

[1] In the three unfair labour practice complaints, the union argued that the employer had changed the teachers' terms and conditions of employment as follows:

1. By cancelling floating holidays that had been negotiated with the teachers in consideration for a reduction in salary;
2. By eliminating a specialist premium of $800 per year for 12 specialized teachers at Nussim school;
3. By asking the teachers at Uashkaikan school to teach more than 24 periods without paying them a corresponding salary.

[2] The complaints were seeking to restore the terms and conditions of employment that existed before the application for certification was filed and before the changes were imposed by the employer.

[3] After listening to the parties' evidence and arguments at a hearing, the original panel dismissed the complaints filed under section 24(4) of the *Code*. It also dismissed the section 94(3)(e) complaints for lack of evidence.

II. Positions of the Parties

[4] In its application for reconsideration, the union argues that the Board's decision contains errors of law or policy that cast serious doubt on the interpretation of the *Code* or a policy. It states that the Board disregarded the statements made by the Supreme Court of Canada (SCC) in *United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada Corp.*, 2014 SCC 45; [2014] 2 S.C.R. 323 (*Wal-Mart*), which, in its view, introduced a shift in the legal paradigm that should apply to the freeze provisions set out in section 24(4) of the *Code* after a new certification is issued by the Board.

[5] More specifically, the union alleges that the Board's finding that *Wal-Mart*, *supra*, does not substantially change the Board's jurisprudence invalidates its decision because that finding led to an incorrect application and interpretation of the provisions of the *Code* related to the maintenance of the terms and conditions of employment.

[6] In arguing that a new approach is needed in the analysis of the facts that underlie complaints related to the maintenance of terms and conditions of employment, the union indicates that the Board must ensure a substantive right to those terms and conditions of employment, not merely a procedural protection for maintaining the status quo, which would constitute a paradigm shift. The union reiterates the facts that relate to the employer's changes to show that the employees were deprived of their rights to the terms and conditions of employment that were in effect before the application for certification was filed.

[7] For its part, the employer submits that the SCC did not disregard the courts' analysis of the purpose of the freeze provisions. On the contrary, it argues that at paragraph 34 of its decision, the SCC clearly stated that striking a balance and maintaining the status quo have always been sought in maintaining the terms and conditions of employment; the Court also specified that, in practice, this leads to promoting the exercise of the right to collective bargaining and encouraging good faith bargaining.

[8] The employer states that *Wal-Mart*, *supra*, does not impose greater rigidity and argues that the criteria developed by the jurisprudence permitting a change in the terms and conditions of employment are still applicable. It submits that the Board applied these criteria fairly to the evidence adduced at the hearings into the complaints at issue.

III. Analysis and Decision

[9] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Furthermore, the Board is not required to notify the parties of its intention not to hold a hearing (see *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30; and also *Raymond* v. *Canadian Union of Postal Workers*, 2003 FCA 418). In this case, the Board is satisfied that the documents produced and the parties' written submissions are sufficient for it to issue a decision without an oral hearing.

[10] Having thoroughly reviewed all the arguments of the parties and the documents on file, the Board is not satisfied that the original panel made an error of law or policy that casts serious doubt on the interpretation of the *Code* in RD 831.

[11] Section 18 of the *Code* gives the Board with the power to reconsider its own decisions:

> **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.

[12] The *Code* also provides that Board decisions are intended to be final. The Board's privative clause at section 22(1) of the *Code* explicitly states the following:

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

[13] The Board places great importance on the finality of its decisions to ensure certainty and stability in workplaces where disputes arise. The Board, therefore, exercises its power to reconsider with restraint and on narrow grounds. The onus is on the applicant to show that there are serious reasons, even exceptional circumstances, which justify the reconsideration of a decision.

[14] In addition, the Board has stated numerous times that an application for reconsideration is not intended as a right to appeal a Board decision or as an opportunity to present essentially the same arguments that were presented to the original panel, hoping for a different conclusion. On reconsideration, the Board will not reassess the evidence to make its own findings of fact nor will it substitute its own discretion for that of the original panel.

[15] The proper grounds for seeking reconsideration of a Board decision are set out in various Board decisions and may be described as follows:

- The existence of new facts that were not available to the parties at the time the original application was filed and which could have had an impact on the Board's decision;
- The presence of an error of law or policy that casts serious doubt on the interpretation of the *Code*;
- A failure to respect a principle of natural justice or procedural fairness.

[16] Based on these principles, the Board will consider the application for reconsideration filed by the union in this case. The analysis has two components: the first concerns the interpretation

of *Wal-Mart*, *supra*, and the second deals with the substantive right to the maintenance of the terms and conditions of employment in the context of the three complaints.

A. Interpretation of *Wal-Mart*, *supra*

[17] In its application, the union argues that the original panel disregarded the teachings in *Wal-Mart*, *supra*, when it concluded that this decision did not substantially change the Board's jurisprudence. According to the union, *Wal-Mart*, *supra*, constitutes a historic and legal paradigm shift because it establishes that the purpose of the freeze provision is not merely to strike a balance or maintain the status quo, which is a purely procedural right, but to facilitate certification and encourage good faith bargaining. In this regard, the union points out that the maintenance of the terms and conditions of employment is a substantive right and that, therefore, the employer has a duty to not change how the business is managed at the time the union arrives.

[18] In *Wal-Mart*, *supra*, the employer had terminated approximately 200 employees and closed its Jonquière store during the freeze period established by section 59 of the *Labour Code*, CQLR c C-27. Accordingly, in *Wal-Mart*, *supra*, the SCC specifically considered whether the closure of a business violated the statutory freeze. This is the context in which the SCC analyzed the purpose of maintaining the terms and conditions of employment from the time a group of employees attempts to exercise its right to collective bargaining, and it found that "resiliating" the employment contracts of all employees in the company violated the freeze provision.

[19] In its analysis, the SCC reviewed the legislative context of the provision that imposes a freeze on the terms and conditions of employment, its purpose and its function. In doing so, the SCC stated the following:

> [34] In my opinion, the purpose of s. 59 in circumscribing the employer's powers is not merely to strike a balance or maintain the *status quo*, but is more precisely to facilitate certification and ensure that in negotiating the collective agreement the parties bargain in good faith (*Bergeron*, at pp. 142 and 147; F. Morin, *Le Code du travail: sa nature, sa portée, ses effets* (1971), at pp. 16–17; *Club coopératif de consommation d'Amos v. Union des employés de commerce, section locale 508*, [1985] AZ-85141201 (T.A.), at pp. 11–12; *Association des juristes de l'État v. Commission des valeurs mobilières du Québec*, [2003] R.J.D.T. 579 (T.A.), at para. 71).
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> [35] The "freeze" on conditions of employment codified by this statutory provision limits the use of the primary means otherwise available to an employer to influence its employees' choices: its power to manage during a critical period (see G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), vol. 2, at p. 10-80.3; B. W. Burkett et al., eds., *Federal Labour*

Law and Practice (2013), at p. 171). By circumscribing the employer's unilateral decision-making power in this way, the "freeze" limits any influence the employer might have on the association-forming process, eases the concerns of employees who actively exercise their rights, and facilitates the development of what will eventually become the labour relations framework for the business.

[36] In this context, it is important to recognize that the true function of s. 59 is to foster the exercise of the right of association: F. Morin et al., *Le droit de l'emploi au Québec* (4th ed. 2010), at pp. 1122–23 (see also A. C. Côté, "Le gel statutaire des conditions de travail" (1986), 17 R.G.D. 151, at p. 152; *Coopérative étudiante Laval v. Syndicat des travailleurs(euses) de la coopérative étudiante Laval*, [1984] AZ-84141225 (T.A.), at p. 22; *Association du personnel administratif et professionnel de l'Université Laval (APAPUL) v. Syndicat des employés de l'Université Laval (SCFP), section locale 2500*, [1985] AZ-85142069 (T.A.), at pp. 43–44; *Plastalène Corp. v. Syndicat des salariés de Plastalène (C.S.D.)*, [1990] AZ-90141158 (T.A.); *Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries (Teamsters, Local 1999) v. Quality Goods I.M.D. Inc.*, [1990] AZ-90141179 (T.A.), at p. 6; *Syndicat des salarié-e-s de la Guilde des musiciens du Québec v. Guilde des musiciens du Québec*, [1998] AZ-98141137 (T.A.), at p. 11, aff'd 2001 CanLII 38640 (Que. C.A.); *Travailleurs et travailleuses de l'alimentation et du commerce, section locale 501 v. Wal-Mart Canada (St-Hyacinthe)*, [2010] AZ-50688504 (T.A.), at para. 80).

[37] By codifying a mechanism designed to facilitate the exercise of the right of association, s. 59 thus creates more than a mere procedural guarantee. In a way, this section, by imposing a duty on the employer not to change how the business is managed at the time the union arrives, gives employees a substantive right to the maintenance of their conditions of employment during the statutory period. This being said, it is the employees, as the holders of that right, who must ensure that it is not violated.

(2) Conditions for the Application of Section 59, Paragraph 1

[38] I wish to note first that, since s. 59 is not directly concerned with the punishment of anti-union conduct, the prohibition for which it provides will apply regardless of whether it is proven that the employer's decision was motivated by anti-union animus (*Union des routiers, brasseries, liqueurs douces & ouvriers de diverses industries; Syndicat des employé-es de SPC Automation (CSN) v. SPC Automation Inc.*, [1994] T.A. 718; *Société des casinos du Québec inc. v. Syndicat des employé(e)s de la Société des casinos du Québec*, [1996] AZ-96142008 (T.A.); *Sobey's inc. (N^{o} 650) v. Syndicat des travailleurs et travailleuses de Sobey's de Baie-Comeau (CSN)*, [1996] AZ-96141261 (T.A.); *Association des juristes de l'État v. Conseil du Trésor*, 1999 CanLII 5144 (T.A.); *Centre de la petite enfance Casse-Noisette inc. v. Syndicat des travailleuses(eurs) en garderie de Montréal – CSN*, [2000] R.J.D.T. 1859 (T.A.); *Association des juristes de l'État v. Commission des valeurs mobilières du Québec*; Côté, at p. 156). The essential question in applying s. 59 is whether the employer *unilaterally* changed its employees' conditions of employment *during the period of the prohibition*.

[39] As a result, s. 59 requires that the union representing the employees prove that a unilateral change has been made. To discharge this burden, the union must show: (1) that a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired; (2) that the condition was changed without its consent; and (3) that the change was made between the start of the prohibition period and either the first day the right to strike or to lock out was exercised or the day an arbitration award was handed down, as the case may be. In the instant case, the first two of these facts are disputed by the employer.

[20] After reviewing the criteria used to determine whether the terms and conditions of employment had been changed, the SCC continued its analysis by making it clear that the employer is not paralyzed by the freeze imposed as it is left with its general management power, albeit circumscribed by the provisions of the applicable law. On this point, the SCC stated the following:

> [56] Second, the courts have held that the employer must continue to be able to adapt to the changing nature of the business environment in which it operates. For example, in some situations in which it is difficult or impossible to determine whether a particular management practice existed before the petition for certification was filed, the courts accept that a decision that is [translation] "reasonable", based on "sound management" and consistent with what a "reasonable employer in the same position" would have done can be seen as falling within the employer's normal management practices (Gagnon et al., at p. 600; Burkett et al., at p. 171; *Plastalène Corp.*; *Syndicat des employés de Télémarketing Unimédia (CSN)*; *Association des juristes de l'État v. Commission des valeurs mobilières du Québec*; *Société du centre Pierre-Péladeau v. Alliance internationale des employés de scène et de théâtre, du cinéma, métiers connexes et des artistes des États-Unis et du Canada (I.A.T.S.E.), section locale 56*, 2006 CanLII 32333 (T.A.); *Travailleurs et travailleuses de l'alimentation et du commerce, section locale 501*).
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> [57] Thus, a change can be found to be consistent with the employer's "normal management policy" if (1) it is consistent with the employer's past management practices or, failing that, (2) it is consistent with the decision that a reasonable employer would have made in the same circumstances. In other words, a change [translation] "that would have been handled the same way had there been no attempt to form a union or process to renew a collective agreement should not be considered a change in conditions of employment to which section 59 of the Labour Code applies": *Club coopératif de consommation d'Amos*, at p. 12.
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> …
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> [59] When all is said and done, although the arbitrator has the power to assess the nature of the change contested by the union and the context in which it was made, the *Code*, far from prohibiting all changes in conditions of employment, prohibits those that are not consistent with the management policy the employer adopted or would have adopted before the union's arrival. This analytical approach leaves the employer with the freedom of action it needs to continue operating its business as it did before that time. The approach is thus perfectly consistent with the objectives of the statutory "freeze", since it protects the employees' rights without depriving the employer of all of its management power.
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> [60] The mechanism codified in s. 59 is by no means specific to Quebec, as it exists in all provinces of Canada and at the federal level (Adams, at pp. 10-80.3 to 10-96; Burkett et al., at p. 171). In all the general labour relations schemes in Canada, therefore, although the employer does not lose its right to manage its business simply because of the arrival of a union, it must, from that point on, exercise that right as it did or would have done before then (see *Spar Aerospace Products Ltd. v. Spar Professional and Allied Technical Employees Association*, [1979] 1 C.L.R.B.R. 61; *Metropol- Basefort Security Group Ltd.* (1990), 79 di 139 (C.L.R.B.); *Bizeau v. Aéroport de Québec Inc*., 2004 CIRB 261 (CanLII); *Public Service Alliance of Canada v. Hamlet of Kugaaruk*, 2010 CIRB 554 (CanLII); D. J. Corry, *Collective Bargaining and Agreement* (loose-leaf), vol. 1, at 9:1200). If the employer does not exercise its prerogatives consistently, it is liable to whatever penalty the arbitrator considers appropriate in the circumstances.

[21] It should be noted that from these excerpts that the SCC relies on existing jurisprudence and even cites the Board's decisions in *Bizeau*, 2004 CIRB 261; and *Hamlet of Kugaaruk*, 2010 CIRB 554.

[22] The decision in *Wal-Mart*, *supra*, was recently relied upon in a reconsideration decision by the Board (*FedEx Freight Canada, Corp.*, 2016 CIRB 824). In the judicial review of that decision, the Federal Court of Appeal stated the following:

> [29] In any event, the condition of continued employment is not absolute and the employment relationship does not become any more certain during a freeze period than it was before (*Wal-Mart* at para. 45). According to the SCC, a freeze provision does not operate to paralyze a business; the employer always retains its general management power (*Wal-Mart* at paras. 43, 47). To be considered a prohibited change in terms and conditions of employment, the onus is on the union to demonstrate that the change was inconsistent with "normal management practices" (*Wal-Mart* at para. 46).
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> (*FedEx Freight Canada, Corp.* v. *Teamsters Local Union No. 31*, 2017 FCA 78)

[23] Contrary to what the union submits in its application for reconsideration, it is not wrong to state that the SCC's decision in *Wal-Mart*, *supra*, does not substantially change the Board's jurisprudence in its analysis and application of the freeze provision of the terms and conditions of employment. Although *Wal-Mart*, *supra*, reaffirmed the purpose and function of the freeze provision by indicating that it was not only seeking to maintain the status quo, it did not change the analysis the Board conducts when it is seized of a complaint related to the maintenance of the terms and conditions of employment during a freeze period. In fact, as indicated at paragraph 39 of the SCC's decision, the Board must always consider whether a unilateral change was made to a condition of employment during the freeze period. Moreover, the SCC upheld the employer's business as usual rule, which allows the employer to change the terms and conditions of employment during the freeze period if that change is consistent with the employer's usual practice or is consistent with what a reasonable employer would have done in the circumstances. Accordingly, the Board notes that in RD 831, the original panel correctly stated the purpose of the freeze provision and the criteria that apply when assessing whether the changes made by the employer violate the freeze provision. In that regard, the original panel stated the following:

> [90] The Board also notes that the SCC specified the requirements of section 59 of Quebec's *Labour Code*, CQLR c. C-27, a provision similar to section 24(4) of the *Code*, in *Wal-Mart*. The SCC indicated that the purpose of freezing the terms and conditions of employment was to facilitate certification and encourage good faith bargaining between the parties. It also detailed the applicable burden:

> [39] As a result, s. 59 requires that the union representing the employees prove that a unilateral change has been made. To discharge this burden, the union must show: (1) that a condition of employment existed on the day the petition for certification was filed or a previous collective agreement expired; (2) that the condition was changed without its consent; and (3) that the change was made between the start of the prohibition period and either the first day the right to strike or to lock out was exercised or the day an arbitration award was handed down, as the case may be. ...
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> [91] Other than the variations in the wording of section 59 of the Quebec *Labour Code* and section 24(4) of the *Code*, which establish some differences, the Board is of the view that the SCC's decision does not substantially change the case law applicable in this case.

[24] When read together, those excerpts show that the original panel followed the SCC's teachings. In fact, in striking a balance between the parties by maintaining the terms and conditions of employment during the prohibited period, the freeze provision aims to promote good faith bargaining in order to give true meaning to the right of association and the right to collective bargaining. The Board is of the view that, in addition to correctly stating the purpose of the freeze provision, the original panel correctly identified the issues to be determined in the context of the three complaints before it:

> [93] In light of the jurisprudence, the Board must first determine whether changes were made to the terms and conditions of employment in these files. If it finds changes were made, it must then determine whether these changes fall under the continuation of business based on what was in effect before the certification application was filed.

[25] In any event, in its application, the union argues that the original panel did not comply with the SCC's statements and erred in pointing out that "[t]he jurisprudence cited specifies that such a condition cannot be regarded as unduly onerous in light of the fact that management is in the best position to know whether it is in fact carrying out business as before." Yet, this excerpt is taken from *Spar Aerospace Products Ltd.*, [1979] 1 Can LRBR 61 (Ont.), which is cited with approval by Lebel J. In addition, the Board wishes to specify that the original panel quoted and adopted the criteria set out in *Bizeau*, *supra*, which was also cited with approval in *Wal-Mart*, *supra*.

[26] For these reasons, the Board finds that the original panel correctly set out the criteria applicable to a complaint under section 24(4) and did not make any error of law or policy in its interpretation of *Wal-Mart*, *supra*.

B. Substantive Right to the Maintenance of the Terms and Conditions of Employment in the Context of the Three Complaints

[27] The union argues that the Board's findings do not ensure a substantive right to the maintenance of the terms and conditions of employment that were in place when the application for certification was filed, and consequently, they are contrary to the SCC's teachings in *Wal-Mart*, *supra*. For the reasons that follow, the Board finds that the original panel did not err in law or policy in applying the above criteria to the three complaints before it. The Board will review the original panel's reasoning in the context of each of these complaints.

[28] In the first complaint, the union alleged that the employer had changed the teachers' terms and conditions of employment by cancelling their floating holidays, namely, the Aboriginal education days granted every other Friday. The employer had reduced work hours and salaries in March 2011 because of financial difficulties. In return for this decrease in salary, the teachers requested that a reduced school calendar be introduced, which designated every second Friday as an Aboriginal education day. However, the employer explained that this calendar had to be approved by Aboriginal Affairs and Northern Development Canada (AANDC) and the Quebec Ministère de l'Éducation et de l'Enseignement supérieur (MES). When the MES did not approve the Aboriginal education days, the employer restored the terms and conditions of employment that existed in March 2011 before the new calendar was introduced.

[29] The original panel concluded that the employer had not violated section 24(4) of the *Code* by restoring the terms and conditions of employment that existed in March 2011 because, in doing so, it was complying with the MES' instructions. The original panel stated the following:

> [102] This letter from AANDC was preceded by another letter sent on November 9, 2011, informing the Conseil des Innus that MES approval was required before validating the introduction of 13 Aboriginal education days, thus reducing the number of teaching days. It imposed the condition of approval in these terms:
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> > **Subject: Condition for approval of new school calendar**
> >
> > Dear Chief and Vice-Chiefs:
> >
> > Aboriginal Affairs and Northern Development Canada (AANDC) hereby acknowledges receipt of your correspondence of November 1, 2011, informing us that a new school calendar has been established that includes 13 Aboriginal education days.
> >
> > …

> Nonetheless, in order to demonstrate that the "educational service delivery standards comply with the applicable legislation" (clause 4.2.2 of your funding agreement), the Conseil must take steps with the Ministère de l'Éducation, des Loisirs et des Sports (MELS) to obtain the approval necessary for its specific educational project. This approval is required given that the content of the 13 "Aboriginal education days" is not part of the subject matter list in the MELS educational curriculum.
>
> The Conseil will have to provide a management action plan to AANDC showing quarterly progress on steps taken with the appropriate provincial authorities. The educational project must obtain official approval of the MELS by June 30, 2012. Should it fail to obtain this confirmation, the Ministère will be obligated to require that the regular educational curriculum be restored.
>
> (translation)

> [103] Thus, the employer restored the regular school calendar on February 15, 2012, in this context, in other words, under penalty of funding cuts if it failed to comply with the obligation imposed by the Ministère. In other words, the employer did not have any other choice than to restore the regular school calendar of 180 teaching days.
>
> [104] In the circumstances, the Board is of the view that the employer followed the business as before approach by complying with the instructions of the MES and by restoring the conditions it had imposed in March 2011, before the application for certification.

[30] On reconsideration, the union argues that the original panel disregarded the teachers' substantive right to receive their annual salary in return for working nine days out of ten. It also alleges that the intervention of a third party that has no control over the employees' terms and conditions of employment cannot justify the change to the teachers' substantive right. The Board cannot accept this argument by the union. In fact, in the absence of MES' approval, it is difficult to imagine that the teachers could have had a substantive right to the Aboriginal education days. On this point, the original panel pointed out that the introduction of Aboriginal education days and the reduced school calendar in September 2011 had to be approved by the third party in question, namely, the Ministère de l'Éducation :

> [96] The Board notes from the evidence that the employer underwent significant restructuring in March 2011 owing to financial difficulties; as part of the reorganization, a reduction in work hours was imposed leading to a reduction in the teachers' salaries. The Board also notes that the employer had agreed to introduce, through Aboriginal education days, a reduced school calendar, beginning in September 2011. This new calendar came in response to a suggestion by the teachers to mitigate the effects of the reorganization; however, it needed to be approved by AANDC and the MES.
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> [97] The union's application for certification was filed on November 21, 2011, after the reduction of regular work hours imposed by the employer in March 2011 and after the introduction of the reduced school calendar. The complaint in file no. 29424-C must be considered in this context.

[31] The Board considers that the original panel applied the criteria set out by the SCC to the facts in evidence when it concluded that the changes identified by the union were part of its normal course of doing business. For these reasons, the Board cannot conclude that the original panel made an error of law or policy in the interpretation of the *Code* in the context of the first complaint.

[32] The second complaint concerned the cancellation of the specialist premium for certain teachers after the application for certification was filed. The employer alleged that the premium had been cancelled in June 2010, before the application for certification was filed, but had continued to be paid out in error. Thus, the employer took the position that it was simply correcting an administrative error by ceasing to pay the premium.

[33] The original panel concluded that the employer had acted in the normal course of business when it stopped paying a premium that had been paid out in error.

[34] On reconsideration, the union alleges that the teachers' substantive right to receive the specialist premium was changed unlawfully and cannot be supported on the ground that the procedural right was respected or that the business as before was maintained because of an administrative error.

[35] In this regard, the decision under review clearly shows that the original panel dealt with the issue of whether the teachers actually were entitled to a specialist premium, based on the evidence on file. The original panel stated as follows:

> [109] The Board also notes that the MOA makes no mention of specialist premiums:
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> > **1. PURPOSE OF THE MEMORANDUM**
> >
> > The present memorandum establishes the terms and conditions of employment and pay for the 2010–11 school year. It does not recognize any other rights and privileges that are not mentioned therein.
> >
> > (translation)
>
> [110] In late March 2011, before the union filed its application for certification, the employer had its teachers sign new employment contracts; these contracts provided for a wage freeze and a reduction in regular work hours. The signing of these contracts was a consequence of a new employment policy which came into force in April 2011. The employer also agreed to adjust the teachers' pay beginning on April 1, 2012, to make it consistent with the MES pay scales in effect. There was no mention of a specialist premium.
>
> [111] In fact, was the premium paid to the teachers in error after the employer established pay equity? What is certain is that, beginning on June 18, 2010, the teachers' pay scales

> became the same as the MES scales. The evidence also shows that MES did not provide for a specialist premium for teachers.

[36] The original panel was of the view that the specialist premium had been paid out in error. It then continued its analysis and concluded that the employer had acted in the normal course of business when it cancelled the premium. The fact that the original panel continued its analysis does not constitute a ground for reconsideration. The original panel's analysis showed that it applied the criteria set out in the Board's jurisprudence and adopted in *Wal-Mart*, *supra*, by considering the condition of employment in dispute and by determining whether changing that condition was consistent with the employer's usual practice. In light of the foregoing, the Board is of the view that the original panel did not make an error of law or policy in the interpretation of the *Code* when it dismissed the second complaint filed by the union.

[37] In the third complaint, the union alleged that the employer had violated the freeze provision when it decided in April 2012 to restore the employment contracts that had existed in April 2011 (before the application for certification was filed) rather than maintain the contracts entered into in December 2011 (after the application for certification was filed). The contracts in question dealt with the work performed beyond the 24 teaching periods. The original panel described the facts as follows:

> [116] The Board considers it appropriate to first review the chronology of events:
>
> - On April 1, 2011, based on its Employment Policy, the employer imposed new employment contracts on the teachers. The contracts provided for a 30-hour work week, or 24 teaching periods over nine days of class time.
> - On November 21, 2011, the union filed its application for certification to represent the teachers of the Nussim primary school and Uashkaikan secondary school.
> - In December 2011, a new employment contract was signed between certain teachers and the Conseil des Innus, at the acting director's urging. This contract acknowledges that certain teachers work more than the 24 periods initially provided and formally considers these additional hours to be regular work hours rather than overtime hours.
> - In March 2012, during the annual budget review for the fiscal year underway, the employer discovered that the new contracts did not comply with the authorization procedures in place. It decided to restore, for April 2012, the contracts that were valid before the certification application was filed, namely, those of April 2011.

[38] The original panel found that the employer restored the condition of employment that was in effect before the application for certification was filed because the change announced in December 2011, after the application for certification was filed, was not consistent with its business as before. Thus, the original panel found that the employer had not violated section

24(4) of the *Code* by restoring the contracts that had existed before the application for certification was filed. It stated as follows:

> [120] The Board considers, however, that the present complaint raises a serious issue where it posits that the employer changed a condition of employment after the union filed its certification application and without any validation process.
>
> [121] The Board does not have any evidence enabling it to determine that the contractual change of December 2011 was consistent with the company's business as before. The employer itself argued that it was flawed, and for that reason, it had to restore the teachers' employment contract which was consistent with its Employment Policy.
>
> [122] Therefore, the Board is of the view that it cannot find that the employer violated section 24(4) of the *Code* by restoring the terms and conditions of employment that were in effect before the application for certification was filed.

[39] On reconsideration, the union argues that the original panel's analysis contained errors of law or policy and determinative errors of fact. In particular, the union asserts that the change to the December 2011 employment contracts was not modifying the existing terms and conditions of employment but was part of the employer's usual practice. The union argues that the employer has been adjusting and re-adjusting salaries based on the number of teaching periods since 2000. According to the union, it was the cancellation in April 2012 of the salary adjustments provided in the December 2011 contract that was contrary to the employer's usual practice. In support of its argument, the union refers, *inter alia*, to certain documents that were filed at the hearing before the original panel, including letters to Ms. Denise O'Leary, a teacher, concerning annual salary adjustments from December 2000 to September 2009.

[40] The Board considers that the union's arguments regarding the third complaint are central to the original panel's assessment of the evidence. The Board notes that the original panel held a hearing at which Ms. O'Leary testified. At that hearing, the employer argued that changes to the contracts were prohibited as of April 1, 2011, and that all changes, including the December 2011 change, had to be approved in advance through a resolution. The original panel concluded that it was not satisfied that the change to the December 2011 contract was consistent with the company's business as before. It is not for the Board to substitute its opinion or assessment of the evidence for that of the original panel. Thus, where the union is seeking a different conclusion based on the evidence already presented to the original panel, the Board has no choice but to dismiss this part of the application for reconsideration. For the reasons given previously, the Board is of the view that the original panel did not make any error of law or policy in its interpretation of the *Code*. The panel concluded that the employer restored the

employment condition that was in effect before the application for certification was filed because the change announced in December 2011, after the application for certification was filed, was not part of the normal course of business. In so doing, the original panel applied the criterion described in its jurisprudence and reiterated in *Wal-Mart*, *supra*.

IV. Conclusion

[41] In short, the Board therefore cannot accept the union's argument that the original panel disregarded the substantive right to maintain the terms and conditions of employment that were in place before the application for certification was filed. The Board is of the view that the original panel applied the SCC's criteria to the facts in evidence and concluded that the changes identified by the union were part of the employer's normal course of business.

[42] For all of these reasons, the Board dismisses the application for reconsideration because it is not satisfied that RD 831 contains any error of law or policy that casts doubt on the interpretation of the *Code*.

Translation

Ginette Brazeau
Chairperson