Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Metro Cable T.V. Maintenance and Service Employees' Association,

applicant,

and

Rogers Communications Canada Inc.,

employer,

and

Grand River Technical Employees Association,

intervenor.

Board File: 31243-C
Neutral Citation: 2018 CIRB **879**
May 8, 2018

The Canada Industrial Relations Board (the Board) was composed of Ms. Allison Smith, Vice-Chairperson, and Messrs. André Lecavalier and Gaétan Ménard, Members.

Counsel of Record

Mr. Christopher McClelland, for the Applicant;
Mr. Brian P. Smeenk, for the Employer.

These reasons for decision were written by Ms. Allison Smith, Vice-Chairperson.

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, which includes the submissions filed in the original Application and the additional submissions requested by the Board following a decision of the Federal Court of Appeal (FCA), the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

I. Background

[1] On August 14, 2015, the Metro Cable T.V. Maintenance and Service Employees' Association (the Union) filed an Application for review of the bargaining unit with the Board, pursuant to section 18 of the *Code*. The Union was seeking to include all: (i) Service Technicians; (ii) Maintenance Technicians; (iii) Head End Technicians; (iv) Platform Technicians; (v) Fiber Technicians; (vi) Construction Technicians; and (vii) Material Handlers (the Technical Employees) employed by Rogers Communications Canada Inc. (the Employer) working at or from the Employer's location in Hamilton, Ontario (collectively, the Hamilton Technical Employees) into the existing bargaining unit.

[2] On August 5, 2016, the Board issued its decision in *Rogers Communications Canada Inc.*, 2016 CIRB LD 3677 (LD 3677). In LD 3677, the Board found that the Union had double majority support and that the addition of the Hamilton Technical Employees to the existing unit would be appropriate for collective bargaining and would foster sound and harmonious labour relations. The Board granted the Union's Application pursuant to section 18 of the *Code* and modified the description of the bargaining unit accordingly.

[3] The Employer applied for judicial review of LD 3677 to the FCA.

[4] The Employer's main grounds for judicial review were that the Board erred when it continued to apply section 18 in a manner that did not take into consideration the recent legislative amendments to the *Code* enacted by the *Employees' Voting Rights Act*, S.C. 2014, c. 40, which implemented a mandatory secret ballot representation vote as part of the certification procedure, and failed to explain why. It also argued that the Board acted unreasonably when it concluded that there was majority support for the Union within the expanded unit, when there was no such evidence to that effect.

[5] On June 15, 2017, the FCA granted the judicial review application (*Rogers Communications Canada Inc.* v. *Maintenance and Service Employees Association*, 2017 FCA 127). In its decision, the FCA noted that the Employer had not challenged the Board's findings in LD 3677 that the amended bargaining unit proposed by the Union was a viable one and was as appropriate for collective bargaining as the previously certified unit, and that the addition of the Hamilton Technical Employees to the existing unit would further labour relations objectives.

[6] The FCA further noted that the Employer conceded at the hearing of the judicial review application that its focus before the Board was the procedure under section 24 of the *Code* and

that it had not specifically raised the issue of the impact of the legislative amendments on the Board's powers under section 18 of the *Code*. The FCA nevertheless reasoned that the requirements of both sections 18 and 24 were "at play" before the Board and inferred that the Employer objected to the Union's Application on the ground that the Hamilton Technical Employees were "deprived of the right to a representation vote conducted by secret ballot, whether in the context of an application pursuant to section 18 or 24 of the *Code*."

[7] The FCA remitted the Union's bargaining unit review Application back to the Board for redetermination in accordance with its decision. Specifically, the FCA directed that the Board determine two matters:

i. The extent to which, if at all, the amendments made to Division III of the *Code* impact on the Union's Application; and
ii. Whether the Union has demonstrated that there is double majority support for the proposed additions to the bargaining unit, having noted the Board's conflicting jurisprudential approaches to this issue.

[8] On July 11, 2017, the Board wrote to the parties requesting that they provide submissions on the two issues that the FCA directed the Board to determine, neither of which were fully developed or argued in the parties' initial submissions that were considered by the Board in LD 3677.

[9] The Board received submissions from both the Employer and the Union regarding the above two issues.

[10] The Board notes that while the Grand River Technical Employees Association (GRA) was an Intervenor and made representations pertaining to the initial Application, it did not make any further submissions in this matter. The Board found in LD 3677 that the Construction Technicians were represented by the GRA and were therefore excluded from the bargaining unit sought. That determination has not been challenged by either the Employer or the Union.

[11] The Board will examine each issue separately below, but before doing so, it is helpful to first describe the Board's general policy concerning section 18 applications for review and the legislative amendments enacted by the *Employees' Voting Rights Act* that are in issue.

A. Section 18 Reviews–The Double Majority Rule

[12] Section 18 of the *Code* sets out the Board's general power of review and it allows the Board to review and amend bargaining unit orders. It also encompasses the Board's power to reconsider its previous decisions. Section 18 reads as follows:

> **18** The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[13] The Board's decision in *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198) (*Teleglobe*) is the seminal case under section 18 with respect to bargaining unit reviews. The decision outlined the policy considerations and set the ground rules for determining bargaining unit reviews. It was a deliberate policy statement at the time by the Board's predecessor, the Canada Labour Relations Board, regarding how review applications would be handled.

[14] The Board's decision in *Teleglobe*, *supra*, was judicially reviewed and upheld by the FCA (*Teleglobe Canada* v. *Canadian Overseas Telecommunications Union,* judgment rendered from the bench, no. A-487-79, October 3, 1980, F.C.A.; and *Proulx* v. *Canadian Overseas Telecommunications Union*, judgment rendered from the bench, no. A-514-79, October 3, 1980, F.C.A.). In particular, the FCA upheld the Board's wide discretion in the area of bargaining unit determination.

[15] The Board has a long-standing discretionary power to determine the composition of a bargaining unit that it considers appropriate for collective bargaining. This power existed at the time of the *Teleglobe*, *supra*, decision and was not altered by the amendments to the *Code* made as a result of the *Employees' Voting Rights Act* or the subsequent reversal of those amendments. This power is described in section 27 of the *Code*:

> **27 (1)** Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
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> **(2)** In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

[16] The Board has long held that it maintains a supervisory role over the scope of bargaining units as determined by it. Unlike in other jurisdictions, it is not open to the parties to negotiate on their own an alteration or modification to the size and scope of a unit that the Board has

determined to be appropriate. Only the Board may do so. Consequently, there must exist a process for this to occur and the Board must thus retain the same significant discretion to review and then vary the scope of a unit on the basis that the proposed amended unit is at least as appropriate as the originally certified unit, for labour relations purposes. This is the Board's broad discretionary power of review found in section 18.

[17] *Teleglobe*, *supra*, established the double majority rule and other requirements to be met by an applicant seeking to amend an existing bargaining unit order through a review application. The *Teleglobe, supra,* decision described and discussed the two main types of applications to vary a bargaining unit, at length: clarifications and expansions, which are summarized below.

[18] Clarification applications seek to add positions and/or classifications to an existing bargaining unit without changing the essential nature of the original certification order. This type of application is also known as an accretion (although this term has been used inconsistently by both parties and the Board alike, leading to some confusion in the Board's case law due to the inconsistent use of terminology).

[19] Where the proposed addition does not affect the intended scope of the original unit, the union must demonstrate overall majority support within the larger bargaining unit and the Board will not canvass the wishes of the employees to be added. Essentially, the Board is looking at the type of work performed by those in the positions to be added and considering whether, based on the type of work performed, those positions would have been included in the bargaining unit at the time of the original certification. If so, the union is seen to already have bargaining rights over the type of work. The nature of the unit is therefore not substantially altered by adding the classifications, and the resulting larger unit remains one homogeneous group.

[20] Accordingly, there is no need for the Board to be canvassing the wishes of the newly added or swept-in employees. Those employees in the group to be added who do not wish to be swept in would be in no different position than those employees who were not in favour of being unionized at the time of the initial certification.

[21] Because of the addition of employees to the existing unit, the Board will nevertheless have to verify that the bargaining agent enjoys majority support of the employees in its now larger unit.

[22] Expansions are the second type of application to vary an existing bargaining unit. These applications seek to add positions to an existing unit, the effect of which is to substantially alter the nature and scope of the original certification order.

[23] Applications for expansion have been described in the Board's case law as ones that substantially or radically alter the composition of the bargaining unit, as the applicant is requesting that the Board add positions to its existing unit that would not have been included or covered by the original certification order.

[24] The type of work performed by those in the positions or classifications to be added is different from that performed by those in positions already included. This effectively creates a bargaining unit that is substantially different from that which was originally certified. It also expands the existing unit to cover employees that were previously unrepresented and for whom the union will be granted new bargaining rights.

[25] Because these expansion applications alter the nature and scope of the existing unit and could ultimately grant bargaining rights to the union over new classifications of previously unrepresented employees, these applications are seen to be similar to, or are of the same nature as an original application for certification and the Board, for policy reasons, has taken the view that similar rights and protections should be afforded to those employees. It is important for the Board to ensure that the applicant union is not permitted to rely on the same membership support that was gathered to acquire bargaining rights for a substantially different bargaining unit, in order to obtain bargaining rights for a new and distinct group of employees. Rather, the employees the union seeks to add to the unit should have the opportunity to express their wishes concerning whether or not they wish to be represented by the applicant union. The Board therefore will not simply accept majority support within the expanded unit but will also require the union to demonstrate that it enjoys majority support amongst the group of employees to be added. The Board must also be satisfied that the altered scope of the unit is appropriate. In this way, the Board has treated such applications **similarly** (but not identically) to an application for certification as the essential requirements of a certification application will be met.

[26] Therefore, in such applications, the bargaining unit, as altered and expanded, must be appropriate and the union must demonstrate double majority support, which is comprised of the following:

i. Majority support of the employees to be added; and
ii. Overall majority support within the newly expanded unit.

[27] *Teleglobe*, *supra*, communicated a clear intention of the Board to maintain flexibility to review bargaining unit composition and not require a new certification application to be filed for each group of employees sought to be added.

[28] By requiring majority support amongst the group of employees to be added, a union is permitted to proceed by way of a bargaining unit review under section 18 to add to an existing unit, rather than having to bring a new application for certification. It cannot then be said that the union is circumventing the certification process when the essential elements of an original certification are respected by the bargaining unit review process. To require a new certification application in these circumstances would force the creation of a separate unit leading to the automatic proliferation of units. To achieve the same result, a union would then be required to bring a second application to join the two units. In applying the double majority rule, the review process under section 18 thus serves both policy objectives: protecting the rights of the unrepresented employees for whom the union is attaining new bargaining rights and avoiding the undesirable labour relations consequences of requiring a new certification application to be brought.

[29] In describing the policy set out in *Teleglobe*, *supra*, the Board in *Brink's Canada Limited* (1996), 100 di 39 (CLRB no. 1153), confirmed that the policy "strikes a delicate balance between the institutional interests of trade unions and the interests of the employees they wish to represent" (at page 46).

[30] To summarize, as described in *Teleglobe, supra*, the Board's practice has been that when the application for review of a certification order to add positions to a bargaining unit does not substantially alter the intended scope or nature of the original unit, the union only needs to show that it holds an overall majority (a majority of all employees in the unit, including the employees sought to be added in the application). However, if the nature and the intended scope of the original unit are changed by the addition, the union must demonstrate that it holds a "double majority": majority support of those to be added as well as majority support of those within the expanded unit. This is to ensure that bargaining agents are not permitted to sweep employees into an altered unit based on its initial support, without regard for the wishes of those sought to be added.

[31] The Board's first task in a bargaining unit review under section 18 is to determine which type of application is before it. In making this determination, the Board attempts to ascertain what was the intended scope of the original certification order and it compares the nature of the functions of the originally included positions or classifications with those sought to be added. This initial characterization will then dictate which process the Board will follow and which requirements the union must meet in order to have its review application granted.

B. Legislative Amendments to the *Code*

[32] On December 16, 2014, the *Employees' Voting Rights Act* received Royal Assent. It came into force on June 16, 2015. Among other things, it made the following change to Division III of the *Code* which introduced the requirement for a secret ballot representation vote to be held in every case, in order for a union to be granted certification by the Board:

> **28 (1)** If the Board is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in a unit who have cast a ballot have voted to have a trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union as the bargaining agent for the unit.
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> **(2)** The Board shall order that a secret ballot representation vote be taken among the employees in a unit if the Board
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> > **(a)** has received from a trade union an application for certification as the bargaining agent for the unit;
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> > **(b)** has determined that the unit constitutes a unit appropriate for collective bargaining; and
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> > **(c)** is satisfied on the basis of evidence of membership in the trade union that, as of the date of the filing of the application, at least 40% of the employees in the unit wish to have the trade union represent them as their bargaining agent.

[33] Further, section 29 of the *Code* was repealed. The relevant portions of section 29 were:

> **29 (1)** The Board may, in any case, for the purpose of satisfying itself as to whether employees in a unit wish to have a particular trade union represent them as their bargaining agent, order that a representation vote be taken among the employees in the unit.
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> ...
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> **(2)** Where a trade union applies for certification as the bargaining agent for a unit in respect of which no other trade union is the bargaining agent, and the Board is satisfied that not less than thirty-five per cent and not more than fifty per cent of the employees in the unit are members of the trade union, the Board shall order that a representation vote be taken among the employees in the unit.

[34] Prior to this legislative amendment to Division III of the *Code*, the Board could certify a union based upon a demonstration of majority support for the union by way of membership evidence (signed union membership cards) filed with the application. In this card-based system, a representation vote was only mandatory if membership evidence filed showed only between 35% and 50% support for the union. The Board nevertheless had the discretionary power pursuant to section 29 of the *Code* to order a representation vote in any given case in order to satisfy itself of majority support.

[35] Following the FCA's decision on June 15, 2017, further amendments to the *Code* came into force on June 22, 2017, which in effect reversed the changes to the *Code* made under the *Employees' Voting Rights Act*.

[36] However, the amendments to the *Code* put into force by the *Employees' Voting Rights Act* were in place at the time the present application was filed with the Board, on August 14, 2015.

[37] Having described both the Board's general policy dealing with applications for review, and the legislative amendments to the certification process under the *Code* that were in effect at the time of the Union's Application for review, the Board will now re-determine this Application in accordance with the reasons of the FCA and address the specific questions raised by it.

II. The Extent to which, if at all, the Amendments made to Division III of the *Code* Impact on the Union's Application

A. Positions of the Parties

1. The Employer

[38] The Employer submits that the amendments to the *Code* did indeed impact this Application. It asserts that the Board was required to hold a secret ballot representation vote, instead of relying on membership evidence filed with the Application, as the means of determining whether the Union had majority support of the group of employees being added to the existing unit, pursuant to section 18.

[39] The Employer argues that, despite the Board having written in LD 3677 that "it treats an application to add positions to a bargaining unit under section 18 similar to a certification application" (page 8), the Board did not conduct a secret ballot vote, as was required in certification applications under Division III of the *Code,* at that time.

[40] The Employer states that the changes brought in by the *Employees' Voting Rights Act* reflected a clear legislative intent to use secret ballot representation votes as the method for determining employee wishes. The Employer argues that this intent is clearly reflected in *Hansard*, as shown by the excerpts from the House of Commons Debates and Standing Committee proceedings that it filed with its submissions. By virtue of that legislation, the mandatory secret ballot representation vote procedure was the rule and there were no exceptions to that rule. According to the Employer, the legislation effectively removed the Board's discretion to rely on membership evidence only.

[41] The Employer acknowledged the Board's authority to review the scope of an existing unit previously certified under Division III, by way of section 18. However, it asserts that it has always been recognized that the section 18 review process is not to be used to circumvent the statutory certification process. In other words, if the Board is to expand a bargaining unit beyond its original scope by way of section 18, thereby granting new bargaining rights over a group of previously unrepresented employees, such applications have historically been treated as "equivalent to" a certification application under Division III and therefore the Board must be satisfied that the bargaining agent enjoys majority support of those it seeks to add.

[42] The Board historically had flexibility and discretion as to how it determined support among a group of employees to be added under section 18. The Employer asserts that this flexibility was a function of the broad discretion the Board enjoyed under the card-based system for certification applications.

[43] The Employer argues that because of the legislative changes and clear policy choice made respecting the process for determining majority support for certification applications, this policy choice must also be reflected in the Board's exercise of its powers under section 18, where it is required to make the same assessment. The removal of the Board's discretion, by implementing a mandatory vote for certification applications, must also be taken to have removed the Board's discretion in section 18 applications and requires the Board to hold a representation vote in section 18 applications as well.

[44] In essence, the Employer states there were two fundamental principles at play at the time that the present Application was filed: certification applications required the holding of a secret ballot representation vote; and, section 18 applications were not to circumvent the certification process. These two principles combined lead to the conclusion that the *Code*, at the time, did not permit the Board to grant bargaining unit reviews which expanded the scope of the existing

unit on the basis of alternative evidence of employee support, such as membership card evidence. Any process other than holding a secret ballot vote to assess employee support would constitute an improper circumvention of the amendments to the *Code* introduced by the *Employees' Voting Rights Act.*

2. The Union

[45] The Union begins by clarifying that at the time it filed its Application under section 18, it did not take any position as to whether or not a representation vote should be taken among the Hamilton Technical Employees. To its knowledge, the Board had not issued any decisions or set out any rules regarding how it would process section 18 applications in light of the changes brought about by the *Employees' Voting Rights Act*. The Union understood that the Employer objected to the Union's use of section 18 to achieve its objective, considering that to be an abuse of process, and submitted that the Union should have filed a separate certification application under section 24. However, it stated that the issue of conducting a representation vote under the section 18 process was not raised by the Employer in its Response to the initial Application.

[46] The question remitted by the FCA to the Board for determination was "the extent to which, if at all, the amendments made to Division III of the *Code* impact on the Union's application." The Union submits that any impact of the legislative amendments is not relevant to this Application because the outcome of holding a secret ballot vote will be the same. The Union is confident the employees will express their wishes by way of secret ballot vote in the same way they did by way of membership evidence filed with the original Application. To that end, the Union notes that it filed fresh membership evidence with the additional submissions requested by the Board to dispel any notion that the employee wishes might have changed since the filing of the original Application.

[47] The Union submits that, leaving policy aside, a secret ballot representation vote has always been a method open to the Board to canvass employee wishes and it has the power to order a representation vote by way of section 16(i) of the *Code*, regardless of any impact the legislative amendments may have on section 18.

[48] The Union states that for the purposes of this Application, it is indifferent as to how the Board determines if it has majority support amongst the Hamilton Technical Employees. Its concern is to have the Application determined as soon as possible. Given the unique

circumstances of this Application, which was originally filed with the Board on August 14, 2015, the Union requests that the Board order a representation vote for the Hamilton Technical Employees.

[49] The Union takes no position on the impact of the amendments brought in by the *Employees' Voting Rights Act* on section 18 applications generally, as it sees this question as purely hypothetical, in light of the repeal of the *Employees' Voting Rights Act*.

B. Analysis

[50] The Board does not dispute that the introduction of the *Employees' Voting Rights Act* made important and significant changes to the *Code*. The certification and revocation procedures are fundamental features of the *Code* and the granting and revoking of bargaining rights is an important function of the Board.

[51] The Board had operated on the basis of the card-based system of certification prescribed by the *Code* for decades. Notably, this did not mean that the Board never ordered secret ballot representation votes to assess the level of support enjoyed by a union when granting or revoking bargaining rights; in fact, such votes were mandatory in certain circumstances, as described above. The card-based system gave the Board flexibility to certify on the basis of the membership evidence filed or order a vote pursuant to section 29(1) of the *Code*.

[52] The introduction of the mandatory vote process admittedly took away the Board's flexibility and removed its discretion and power to certify on the basis of only membership evidence in an original certification application. The Board acknowledges that this was a deliberate policy choice on the part of Parliament at that time.

[53] However, it is also the case that the legislative amendments put into effect by the *Employees' Voting Rights Act* applied only to the certification and revocation processes contained in Division III of the *Code*. Nowhere in the *Employees' Voting Rights Act* does it suggest that a secret ballot vote be mandatory in every case where the Board may be required to measure support for a union.

[54] The certification process is statutorily prescribed. The certification process is set out in sections 24 through 29 and the revocation process in sections 38 through 42 of the *Code*. These sections dictate the timing for when such applications can be filed, and set out the preconditions for granting certification or revoking bargaining rights of a trade union. It is those

sections that were amended by the legislation when Parliament decided to change that process to one of mandatory representation votes.

[55] This is not the same for the other processes under the *Code* in which the Board may have occasion to determine majority support. One of those other processes is the section 18 bargaining unit review process that is the subject of this Application. Other examples are bargaining unit structure reviews, where bargaining units are reconfigured, following an application in which it is alleged that the existing structure is no longer appropriate or following a sale of business or single employer declaration due to corporate or organizational changes affecting the employer.

[56] These processes are primarily Board policy driven, developed through the Board's case law, and are the subject of broad discretion on the part of the Board as part of its general review powers. These types of applications all generally involve changes to existing bargaining units that have already been determined to be appropriate by the Board. The Board's focus in these applications is usually on determining whether or not requested changes to existing units remain appropriate for collective bargaining. Where these applications lead to changes in the scope of one or more bargaining units or the creation of new units, the Board is left to its own devices to determine if, how and when employee wishes are to be canvassed and majority support is to be determined, depending upon the particular circumstances.

[57] The Board has explained above its policy and process for determining section 18 bargaining unit reviews. This process is a clear example of the exercise of the Board's broad discretionary power. It has developed and set out a process for determining such applications based upon what it sees as important labour relations policy objectives and set out its policy statement by way of a Board decision, in *Teleglobe*, *supra*. The double majority rule as it has come to be known is a formulation devised by the Board to determine bargaining unit review applications in a manner that reflects and respects what it considers to be important labour relations principles and objectives. The Board has developed this process on its own and was not and is not constrained by statutory prescriptions or limitations. Nor is the Board statutorily bound to follow or apply that process. Unlike the certification and revocation processes, there is no statutorily imposed method or process for a section 18 application.

[58] The *Employees' Voting Rights Act* amended only the provisions dealing with certification and revocation processes contained in Division III of the *Code* concerning the acquisition and

termination of bargaining rights. The legislation did not touch the Board's powers under sections 18 and 18.1 contained in Division II of the *Code* which sets out the Board's powers and duties.

[59] When implementing the mandatory vote system, the *Employees' Voting Rights Act* repealed the Board's powers contained in sections 29 and 38 of the *Code* to order a representation vote to determine employee wishes, as it saw fit, in certification and revocation applications. However, section 16(i) of the *Code*, which provides the Board with the power and authority to order a representation vote in any circumstance where the Board considered it would assist it, remained intact and untouched. This discretionary power was not removed and the legislation did not add a mandatory vote process or requirement to section 18 or 18.1 applications or any other applications under the *Code*.

[60] Parliament's policy choice to replace the card-based system with a system of mandatory votes for certification and revocation applications was enacted through the *Employees' Voting Rights Act.* It is the Board's view that if Parliament had intended for the mandatory vote system to apply to all of the Board's processes, it could have and would have done so expressly through additional amendments to *Code* provisions, contained in the *Employees' Voting Rights Act.* Parliament clearly did not do so.

[61] The Employer asks the Board to find that because Parliament expressly amended the certification and revocation processes to include a mandatory vote, the Board is obligated to read that policy choice into all of the its other processes, and act as though its discretion has been removed. It suggests that because one of the Board's processes is similar to a certification application, the Board is somehow obligated to treat that other process as if it were in fact a certification application. The Board does not agree and sees no such obligation created by Parliament or by the *Employees' Voting Rights Act*. No such legislative intent was expressed in any of the *Hansard* excerpts filed by the Employer (or elsewhere to the Board's knowledge), all of which spoke of amending the original certification and revocation processes. Nowhere in those *Hansard* transcripts was mention made of any intention to remove the Board's discretionary power under any other provision of the *Code*.

[62] The Board's development and application of the double majority rule, as previously discussed, was the Board's own chosen means of protecting employees' rights in applications other than certification applications where their rights are affected. It chose to treat expansion applications that seek to alter the nature and scope of the original bargaining unit in a manner similar to certification applications, by putting in place certain similar protections. The Board has

chosen to do so by insisting that the union canvass the wishes of any previously unrepresented employees it wishes to include into its existing bargaining unit and demonstrate that it enjoys majority support among that group of employees who will potentially be included in the bargaining unit.

[63] The means by which the Board has chosen to assess that support from the group of employees to be added within the context of a section 18 review, has for decades been by way of membership evidence or, exceptionally, by way of representation vote pursuant to section 16(i) where it saw fit. This process has served the Board and employees well over the years and it sees no reason to change this process, unless it is statutorily mandated to do so. The legislative amendments enacted by Parliament did not do so.

[64] For the above reasons, the Board is unable to find that Parliament, by express or implied means, did or intended to circumscribe its discretionary power under any other provisions of the *Code* than those in fact amended, affecting original certification applications and revocation applications under Division III of the *Code*. The Board's broad power of review under section 18 and its policy-based process for conducting bargaining unit reviews remained untouched and intact.

[65] Accordingly, in answer to the FCA's first question, the Board finds that the amendments to Division III of the *Code*, contained in the *Employees' Voting Rights Act*, had no impact on the Union's present Application for review filed pursuant to section 18 of the *Code*.

III. Whether the Union has Demonstrated that there is Double Majority Support

[66] At the outset of this decision, the Board has described its practice and approach to determining applications filed pursuant to section 18 that seek to review a union's existing bargaining unit and explained the double majority rule, as established by the Board in *Teleglobe*, *supra*.

[67] There is no dispute and the Board has already found that the Union's present Application is properly characterized as an expansion application. It seeks to expand the Union's existing certification order by adding to it the Hamilton Technical Employees, the effect of which is to substantially alter the scope of the existing certification order. Accordingly, the double majority rule is engaged and the Union must demonstrate that it enjoys majority support both within the group of employees to be added, the Hamilton Technical Employees, and within the combined expanded unit.

[68] What remains in dispute between the parties is the manner and means by which a union must demonstrate such majority support and/or the means by which the Board will determine that the union enjoys such support and thereby satisfy the double majority criteria.

[69] In answering the FCA's first question above, the Board dealt with the means by which it could determine one component of the double majority test, which is whether the Union enjoys majority support of the Hamilton Technical Employees, whom the Union seeks to add to its existing unit.

[70] This second question posed by the FCA deals with the means by which the Board may determine the other component of the double majority test, which is whether the Union enjoys overall majority support within the expanded unit.

[71] The FCA has noted the Board's conflicting jurisprudential approaches to assessing majority support within the expanded unit, as reflected in the parties' opposing positions in this matter. Accordingly, the Board takes this opportunity to not only make the determination required for the present Application, but to attempt to explain some of the earlier confusion and clarify the Board's intended approach going forward in an effort to assist the labour relations community.

A. Positions of the Parties

1. The Employer

[72] The Employer states that the second component of the double majority rule is evidenced by majority support for the union among the entire, expanded bargaining unit. It states that no such evidence has been presented to the Board in this case. The only evidence that is before the Board is evidence among the Hamilton Technical Employees, the group to be added. It further submits that there is no evidence of overall majority support for the Union as bargaining agent or in support of its bringing this particular Application to add this group of employees to the existing unit.

[73] Relying on *Air Transat A.T. Inc.*, 2002 CIRB 178 (at paragraphs 20–25), the Employer states that evidence of support within the existing bargaining unit could be found in "membership cards filed by the union, a Board-ordered vote, or a union membership clause in the current collective agreement". The Employer submits that in *Air Transat A.T. Inc.*, *supra*, membership evidence (albeit from a previous but recent application) was used to demonstrate membership support. However, in the present case, this evidentiary requirement is not

satisfied by **any** of these means. It states that there is no evidence of majority support among the members of the existing bargaining unit.

[74] The Employer submits that the Board cannot, as it did in LD 3677, simply presume majority support of the existing bargaining unit as it would render the double majority test meaningless and essentially allow the group seeking to be added to the existing bargaining unit to dictate whether the existing bargaining unit should undergo substantial change. This would make the *Teleglobe*, *supra*, requirement for there to also be a majority within the larger expanded bargaining unit meaningless and be contrary to the democratic principles inherent in the *Code*.

[75] The Employer argues that the Union's position—whereby the Board should presume, in the absence of evidence to the contrary, the support of the extended bargaining unit for an application under section 18 of the *Code*—would upset the careful balance that the Board has struck between industrial relations objectives, individual freedoms and the will of the majority.

[76] It states that the democratic principles underpinning the double majority rule, as articulated by the Board when it first introduced the test, remain: changes that radically alter the scope of a bargaining unit should require the consent of both the existing bargaining unit and the group to be added because both groups' interests are impacted by the changes.

[77] It argues that in cases such as the present matter, where there is no evidence before the Board as to the membership's support to change the structure of its bargaining unit, eliminating the double majority rule would significantly depart from the purpose and principles of section 18 of the *Code*.

[78] The Employer's Reply sets out its perspective on the origins of the double majority rule, first articulated by the Board in *Teleglobe*, *supra*. In doing so, it states that the Board in the *Teleglobe*, *supra*, decision did not limit its comments to the democratic interests of the employees to be added to the bargaining unit, but was clear that those democratic principles applied equally to the existing bargaining unit because allowing the union's application would radically change the existing bargaining unit.

[79] It notes that the requirements for applications to expand a bargaining unit are more onerous than applications for interpretation of the bargaining unit under section 18 of the *Code*, because the former is more akin to a certification application: if granted, the bargaining unit is necessarily a newly formed entity that did not exist before. Doing away with the double majority rule by presuming one of the two branches of the test would mean that the interests of the original

bargaining unit could be fundamentally altered without any input from those employees. Specifically, that group's interests could be diluted or subsumed by the new, larger unit without allowing the original bargaining unit any input into the changes.

[80] The Employer further states that employee wishes are a cornerstone of the Board's review of applications to expand an existing bargaining unit under section 18 of the *Code*. The Board has continued to apply the double majority rule and to strictly apply the requirement to ascertain majority support within the expanded unit. It acknowledges that the Board has in some cases relaxed the double majority requirement by presuming majority support within the larger unit, such as in *Saskatchewan Wheat Pool*, 2002 CIRB 173; and *Ridley Terminals Inc.*, 2002 CIRB 185. It argues, however, that those cases are not directly applicable because they did not involve a radical change to the existing unit. It states that in those cases where the existing unit will be radically altered, it remains of critical importance to maintain the double majority rule and the democratic principles that underpin the *Code*. The Employer states that this case radically alters the existing unit and to do so without ascertaining the wishes of the existing members would fundamentally undermine the bargaining unit members' rights.

[81] It submits that the justifications for presuming continuing support for the union offered by the Union here have no basis in the case law and should not be applied. They are not indicators of the employees' wishes, which is a fundamental element of the Board's policy for bargaining unit reviews under section 18 of the *Code*.

[82] The Employer states that there is simply no principled basis for the Board to presume majority support amongst the broader bargaining unit: presuming support strips the double majority rule of any meaning.

[83] The Employer submits that this case presents a valuable opportunity for the Board to clarify and restate the important principles underpinning *Teleglobe*, *supra*, but notes that this present Application cannot proceed without any evidence that the existing bargaining unit members support the Union's Application to alter the scope of the bargaining unit.

[84] The Employer argues that the Board should dismiss the Union's Application as it has failed to demonstrate that there is double majority support for the proposed addition of the Hamilton Technical Employees.

2. The Union

[85] The Union submits that the Board has sufficient evidence before it to determine that the Union has satisfied the double majority rule and asserts that no further evidence is required.

[86] The Union states that the Board's current approach to the double majority rule in section 18 applications was described in its decision in *Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503 (*Garda*). In that case, the Board indicated that in cases where the addition of employees to the unit would alter the scope of the existing unit, "the Board will accept that the trade union maintains a majority in its existing bargaining unit" (paragraph 36), but will require the union to establish majority support among the employees to be added.

[87] The Union states that the *Garda*, *supra*, decision was referred to as describing the current state of the Board's jurisprudence with respect to the double majority in *Vitran Express Canada Inc.,* 2011 CIRB 598, at paragraph 19 and *Buckmire,* 2013 CIRB 700, at paragraph 18. *Garda*, *supra*, was also cited in *Richardson International Limited,* 2014 CIRB 721.

[88] The Union states that the Board took a similar approach to the issue of establishing a double majority in *Ridley Terminals Inc.*, *supra*, at paragraph 24, where it held that: (i) it maintains flexibility in how it will appreciate evidence in the newly expanded group, and (ii) "in the absence of evidence to the contrary, majority support could be presumed." *Ridley Terminals Inc.*, *supra*, referred to the Board's decision in *Saskatchewan Wheat Pool*, *supra*, at paragraph 91, which identified a number of factors in support of relying on the presumption:

a. The party bringing the application under section 18 was the bargaining agent of the current unit that had been certified by the Board.
b. There was no suggestion that the application was not duly and appropriately brought by the union.
c. There was no suggestion that employees within the current bargaining unit were opposed to the application under section 18.
d. The filing of the application itself by the Association's certified bargaining agent is taken by the Board as a sufficient indication of majority support within the pre-existing unit.
e. When the above factors are present, the Board does not require any further assurance that the employees support the proposed modification and addition to their unit.

[89] The Union ultimately cites the Board's decision in *Royal Canadian Mint*, 2003 CIRB 229, where the Board held that it will "generally be prepared to accept that an applicant union has the continuing support of a majority of its members, unless serious questions arise." The Union asserts that this series of Board decisions sets out the approach to the double majority rule that the Board should continue to apply.

[90] The Union addresses each of the three means by which the Board can assess the level of support enjoyed by the union, set out in *Teleglobe*, *supra*, and reiterated in *Air Transat A.T. Inc.*, *supra*. Concerning reliance on previous membership evidence, the Union asserts that this is not relevant in an application where the original certification is over 40 years old. Moreover, it states that the Board has not used this method since 2002 when *Air Transat A.T. Inc.*, *supra*, was decided.

[91] The Union submits that a Board ordered vote could be considered, but only where there are questions or doubts about the union's continuing support, or where there is concern that the existing members are opposed to the application. It is only in those situations that the substantial expenditure involved in the taking of a representation vote amongst those within the existing unit, which could include hundreds or thousands of employees, might be justified. No such questions or concerns are present here. Again, it states that the Board has not used this method to determine support within the expanded unit since 2002.

[92] Finally, the Union submits that the mandatory union membership clause is not applicable to this case. It questions the logic of using such a method and again states that this method has not been used since 2002.

[93] In the Union's submissions, at paragraph 29, it argues that the Board is justified in presuming that a union has majority support within the existing bargaining unit when:

> (i) the union has previously satisfied the Board that is has trade union status for purposes of the *Code,* including a constitution governing its activities and its relationship with its members;
>
> (ii) the Board has previously certified the union as the bargaining agent for the bargaining unit;
>
> (iii) the union has negotiated successive collective agreements with an employer; and
>
> (iv) the union has satisfied itself that it has taken the steps required by its own internal processes to give it the authority to proceed with the application, which would be self-evident from the fact that an application has been filed.

[94] The Union states that in this case, all of these criteria have been met.

[95] The Union asserts that there is no basis for the Board to require any further evidence for majority support within the existing bargaining unit than that set out above unless a serious concern was raised. It further states at paragraph 31 of its submissions that:

> ... it would arguably be arbitrary and unreasonable for the Board to conduct a review of the union's ongoing support within its existing bargaining unit in situations where there is not even a "suggestion" that the union does not have majority support.

[96] The Union states that it is not aware that any potentially affected employee has raised any concerns with this present Application.

[97] In addition or in the alternative, the Union also states that the Board has consistently held that it retains jurisdiction over the bargaining certificates it issues. Accordingly, in an application under section 18, the Board can consider evidence from any previous certification application or a section 18 application it has received with respect to that bargaining unit, as it expressly did in *Air Transat A.T. Inc.*, *supra*, being relied upon by the Employer. In this Application, the Union states that the Board has the following types of evidence before it regarding its existing bargaining unit:

> a) the entire history of the Association's certificate dating back to 1973;
>
> b) the union's constitution;
>
> c) the current collective agreement and the collective agreements filed with the Board in the previous applications for review dating back to 2001;
>
> d) the employee lists filed with the application for review and in the previous applications for review dating back to 2001, which are evidence of the stability and steady growth of the Association's bargaining unit;
>
> e) the membership evidence filed by the Association in previous applications for review dating back to 2001;
>
> f) evidence as to whether there were any of the serious questions or suggestions in any of the previous applications for review dating back to 2001; and
>
> g) evidence as to whether the Employer raised any serious questions or suggestions when it responded to previous applications for review dating back to 2001.

[98] The Union asks the Board to reject the Employer's argument that the Board's current approach to the double majority test is meaningless or contrary to the democratic principles of the *Code*. It

states that the Board's current approach has worked satisfactorily for at least 15 years and there is no suggestion that it has caused any labour relations issues for employers, unions or employees within existing bargaining units. It asserts that in the event there are questions as to the representative character of the union, the Board's investigating officers can verify the level of support.

[99] The Union reiterates that there are no serious questions or concerns about its support within the existing unit. It asserts that the Board has sufficient evidence before it to determine that it has the requisite support and has satisfied the double majority criteria. No further evidence is required.

B. Analysis

[100] In *Teleglobe*, *supra*, the Board summed up the double majority rule as follows:

> ... this Board will take into account only the overall majority status of the applicant union following an application for revision which does not affect the nature of an existing bargaining unit but we will require proof of majority support among the employees added when the application for revision would radically change the bargaining unit. …
>
> (pages 332; 139; and 16,025)

[101] The Board then provided some guidance as to its approach and the means by which a union must demonstrate the required support. Specifically concerning expansion applications that seek to alter the existing scope of the bargaining unit, the Board stated the following:

> ii) The Board will receive at any time an application from one of the parties for review which on its face would radically affect the nature and scope of the bargaining certificate. But the following conditions must then be fulfilled by the applicant:
>
> a) It must be ready, either by showing membership cards or through a Board ordered vote pursuant to section 127(1) [now section 29(1) of the *Code*]...
>
> or by virtue of a union membership clause in the collective agreement, to prove that it has the support of a majority of the employees to be added to the unit as well as an overall majority in the proposed new unit.
>
> b) Obviously, it must convince the Board of the appropriateness of the proposed new unit.
>
> c) It must demonstrate to the Board that the addition is wanted by its members, excluding those members it might have among the group to be added.
>
> d) If the Board's verification reveals that the applicant does not represent a majority among the group of employees to be added, the applicant will maintain its existing certificate. ...
>
> e) If the Board's verification of union support reveals that the union is in a minority position overall, i.e., does not represent a majority of the employees of the combined groups, the

> application will be dismissed with reasons in which the Board will be forced to conclude that, apparently, the applicant did not have the support of a majority, even in the existing unit, with all the consequences thereof vis-à-vis dissidents who may, in due course, apply to get the existing bargaining agent decertified.
>
> (pages 333; 140; and 604)

[102] As can be seen from the above, the Board in *Teleglobe*, *supra*, specified the three methods by which the Board could verify the level of support enjoyed by the union, both in the group of employees to be added **and** in the overall proposed expanded bargaining unit:

i. Valid membership cards;
ii. A Board-ordered representation vote; and
iii. A union membership clause in a collective agreement.

[103] As noted in paragraph 101 above, in addition to having to satisfy the double majority criteria, *Teleglobe*, *supra*, requires the applicant union to demonstrate that the addition to the unit is wanted by its current bargaining unit members. This has been referred to as the applicant requiring the **consent** or support of the current bargaining unit members to bring the application to expand the unit.

[104] The requirement to have the consent of the existing bargaining unit members established in *Teleglobe*, *supra*, is a separate requirement and not part of the double majority test, although the Board notes that the consent requirement has more than occasionally been confused with or mixed into the application of the double majority test, when looking at majority support within the expanded unit.

[105] The Board notes that while *Teleglobe*, *supra*, added the requirement that the applicant demonstrate that it has the consent of the existing bargaining unit members to the proposed addition, it made no comment on **how** a union was to demonstrate such consent. Nor did *Teleglobe*, *supra*, describe, justify or explain **why** the consent of this group is necessary.

[106] Having set out the key elements established by *Teleglobe*, *supra*, the Board feels that it will be helpful to examine some frequently cited cases that came afterward to see how the Board has come to apply those criteria. This is not an exhaustive examination of the case law concerning the double majority rule, but rather an illustration of the Board's findings which were arrived at using differently-focussed analysis as opposed to consistent application of a purported hard-and-fast rule.

[107] In *Brink's Canada Limited*, *supra*, the union filed a certification application seeking a province-wide certification order when it then represented employees in Edmonton only. The Board determined that the application was more appropriately characterized as a bargaining unit review application to expand the existing Edmonton unit to include the rest of the province, for which double majority should be demonstrated. The Board applied the double majority rule. Not being satisfied of majority support among the employees to be added, the Board exercised its discretion to order a representation vote.

[108] While the Board ordered a representation vote to determine if the union had majority support of the employees to be added, the vote did not canvass the wishes of those in the existing Edmonton unit. The Board stated that overall majority support within the expanded unit had been demonstrated, but it did not say how it made this finding. Further, the Board made no comment on the requirement to show consent of the existing unit for the expansion.

[109] In *Saskatchewan Wheat Pool, supra*, the union sought to add drivers to the existing Country Operations unit. The Board applied the double majority rule and granted the application. Membership evidence filed with the application demonstrated to the Board's satisfaction that a majority of the employees to be added wished to be represented by the union. Because there was no suggestion that the application was not properly brought and no suggestion that the bargaining unit employees were opposed to the application, the Board found that the filing of the application was itself a sufficient indication of consent and majority support within the existing bargaining unit for the proposed addition to the unit. It then found that the existing members should, on balance, be taken to be in support for purposes of satisfying the double majority rule. The Board stated:

> [91] In the present case, the GSU submitted membership evidence with its application demonstrating to the Board's satisfaction that a majority of the employees to be added wish to be represented by that union. Given that the issue arises upon the application of the certified bargaining agent of the current unit and that there is no suggestion that the application was not duly and appropriately brought nor any suggestion that employees within the bargaining unit are opposed, the filing of the application itself is taken by the Board as sufficient indication of majority support within the pre-existing unit. No further assurance is required by the Board that the employees support the proposed modification and addition to their unit. We are here satisfied that the union meets the "double majority" rule since the drivers to be added are in support and the members in the existing unit should, on balance, be taken to be in support. …

[110] It seems as though two presumptions are made in this decision, but the rationale underlying them is not explained.

[111] In *Air Transat A.T. Inc.*, *supra*, the union sought to extend its certification covering Mirabel and Dorval airports, to include the airports in Toronto, Calgary and Vancouver. The Board found that majority support of those to be added was demonstrated by membership evidence that had been filed with the Board. The Board then looked at the means of demonstrating support set out in *Teleglobe*, *supra*. Acknowledging that the union had not filed evidence of support for the extended unit, the Board nonetheless found that consent or support for the addition from the existing unit members had been demonstrated by relying on recent evidence, from a review application filed four months prior, wherein existing members had agreed to extend the existing bargaining unit. On this basis, the Board found the double majority test had been satisfied.

[112] In *Ridley Terminals Inc., supra*, the union sought to add two previously excluded positions to its existing unit. The Board found that the double majority rule applied and granted the application, noting:

> [24] The Board has maintained some flexibility in how it will appreciate the evidence of majority support in the newly enlarged group. In *Saskatchewan Wheat Pool*, [2002] CIRB no. 173; and (2002) 81 CLRBR (2d) 286, the Board held that in the absence of evidence to the contrary, majority support could be presumed: ...
>
> [25] In *Air Transat A. T. Inc.*, [2002] CIRB no. 178, the Board was of the view that even though the union did not file evidence of support for an extended unit by existing employees, evidence of union support in a previous application decided some four months earlier was considered to be recent enough to be used to establish the support of the majority of union members for the extended unit in the context of the current application.
>
> ....
>
> [44] Given that there are 56 employees in the original bargaining unit and three in the group to be added, and applying the principles from *Saskatchewan Wheat Pool*, *supra*, the Board finds that the union has the requisite majority support in the newly expanded group.

[113] In this case, the Board relied on membership evidence that was filed with the application to determine majority support for those to be added to the bargaining unit. It presumed overall majority support within the enlarged unit, based on the small number of positions to be added relative to the number of existing bargaining unit employees as well as the reasoning set out in the Board's earlier decision in *Saskatchewan Wheat Pool*, *supra*. The Board made no finding regarding the *Teleglobe*, *supra*, requirement to seek consent or support for the expansion from the existing unit members.

[114] In *Royal Canadian Mint*, *supra*, the union filed two applications seeking to include additional employees within an existing unit. In one of the applications, where the union sought

to add a position to the unit that would expand its existing scope, the Board dismissed the application for failure to demonstrate support of the employees to be added, but noted:

> [37] The policy enunciated in *Teleglobe Canada*, *supra*, has been further elaborated upon in subsequent decisions of the Canada Industrial Relations Board. While the Board will generally be prepared to accept that an applicant union has the continuing support of a majority of its members, unless serious questions arise, the support of those sought to be added, where their work functions differ significantly from those already included in the bargaining unit, should not be presumed. ...

[115] What can be seen from these decisions is that, since *Teleglobe*, *supra*, the Board has endorsed the principles it outlines and continues to apply the double majority rule in the context of bargaining unit review applications that come before it. It is also evident that in these cases where the existing unit will be substantially altered, the Board's primary focus has been on ensuring that the union demonstrates majority support amongst the group of employees to be added. As discussed, this assures that the union is not permitted to circumvent the certification process and obtain additional bargaining rights over new classifications of unrepresented employees without demonstrating that the employees have chosen to have the union represent them. This has been consistently applied and, in most cases, this majority support has been demonstrated by way of fresh membership evidence filed by the union with its application.

[116] Finally, it is evident that the Board has placed less emphasis on ensuring that the union demonstrates overall majority support within the expanded unit. In fact, contrary to the employer's assertion, the Board has not strictly applied this second aspect of the double majority test. Rather it has applied it inconsistently, and has seldom relied on the means of demonstrating such support outlined in the *Teleglobe*, *supra*, decision. It has maintained flexibility in how it will appreciate the evidence of majority support in the expanded unit. In several instances, the Board has presumed such support, often on the basis of a lack of objection from the existing bargaining unit members to the application to expand the unit. This is where we see some mixing of the concepts of overall majority support for the union as bargaining agent and majority support or consent for the bringing of the application to expand.

[117] As noted previously herein, *Teleglobe*, *supra*, specified the three methods by which the Board could verify the level of support enjoyed by the union. However, the Board's own decisions show that these methods have rarely been utilized and that the Board has struggled to apply this second test of majority support in a practical and meaningful way. One can see that the three methods are not necessarily helpful or practical.

[118] For example, having a union membership clause in a collective agreement will have limited application as many collective agreements do not contain such a clause. In any event, such clauses are not necessarily indicative of support for the union: such clauses simply mandate membership in the union as a condition of employment, which is different than membership as a reflection of employee wishes in support of the union as bargaining agent.

[119] With respect to membership evidence, valid membership cards are effectively a point-in-time snapshot of support and that snapshot may have been taken many years ago. That original evidence may no longer be available and would not necessarily reflect current membership support even if it were available. Unions have seldom provided the Board with membership evidence from all members of the existing unit in support of a bargaining unit expansion application, whether original evidence or newly gathered, as a means of demonstrating majority support within the expanded unit. The Board has not seen fit to require an already certified bargaining agent to gather fresh evidence from all existing members, which could involve significant numbers, in order to prove their continued support. The Board agrees that this is not practical and should not be necessary.

[120] A representation vote is the final method by which *Teleglobe*, *supra*, stated that majority support could be verified. This is likely the most realistic and meaningful method of measuring current support for the union. However, holding a representation vote in every case of bargaining unit expansions would involve a significant expenditure of resources, for the Board and the unions, and is thus not a practical requirement for every such application.

[121] The Board also questions whether it is a necessary requirement. Notably, the Board has not ordered a representation vote to determine majority support in the overall expanded unit in any of the key decisions in which it applied the double majority rule. More recently, the Board has come to presume majority support, meaning that it is prepared to accept that a union has the continuing support of a majority of its members, unless serious questions arise (as in *Royal Canadian Mint*, *supra*). The Board is of the view that this is not an unreasonable approach. The union, in these cases, has already been certified and granted bargaining rights on the basis of having demonstrated majority support at the time of certification. The Board does not have any process or policy by which it feels obliged to re-test that majority support over time on an ongoing basis. If the union loses the support of its membership, the *Code* provides a mechanism by which employees can express their desire to decertify the union as their bargaining agent.

[122] The Board is of the opinion that the same concept should apply in cases of an expansion application, whereby a union should be entitled to rely on the ongoing effect of its existing certification order to establish majority support of the employees within its existing bargaining unit. It sees no labour relations reason to doubt that continuing support, unless there are serious questions raised, causing it to do so. The Board may therefore presume continuing majority support, and will not be required to test that level of support, without compelling reasons to do so.

[123] In the present matter, the Employer takes issue with this approach and advocates for the strict application of the *Teleglobe*, *supra*, criteria for this particular purpose. The Employer speaks to the importance of requiring the union to demonstrate majority support within the expanded unit and asserts that for the Board to presume this second majority support criterion would render the double majority rule meaningless. It insists that to presume majority support is to effectively eliminate that criterion and, to do so would upset the delicate balance that the Board struck in *Teleglobe*, *supra*, between industrial relations objectives, individual freedoms and the will of the majority.

[124] The Board does not agree that an approach that will presume support **unless serious questions arise so as to doubt that support** has the effect of eliminating the second double majority requirement. The Board agrees that because a bargaining unit will be substantially altered, and the union will continue to hold bargaining rights for all employees in that altered unit, it remains important for the union to have majority support amongst those employees in that new expanded unit. The Board is not suggesting that the union's support will not be considered in these types of cases. It will be considered. In cases where serious questions arise or the Board does have reason to doubt or question the union's level of support, the Board may exercise its discretion to hold a representation vote, or employ some other means to assess the level of support enjoyed by the union. As indicated in *Teleglobe*, *supra*, the consequence of finding that the union does not enjoy majority support within the proposed expanded unit will be to dismiss the review application outright.

[125] The Board retains the ability and discretion to test the union's level of support in circumstances where it deems it appropriate, to protect the will of the majority and ensure the union enjoys majority support. At the same time, the Board recognizes the continuing effect of a certification order duly issued following a union demonstrating majority support. The Board need not unnecessarily expend its resources to test that ongoing support in circumstances where the

Board has no reason to question it. This, in the Board's view, continues to maintain the balance of labour relations interests and objectives struck by the Board in *Teleglobe*, *supra.*

[126] The Employer also argued that it is necessary and important to test the overall majority criterion because this type of expansion application will significantly alter the scope of the existing unit and the existing members may not want the addition as their interests could be diluted or subsumed by the addition to the unit. According to the Employer, if this majority criterion were to be presumed, this would allow the interests of the existing unit to be fundamentally altered by the newly added employees, without input from the existing employees.

[127] This, in essence, is the argument supporting the separate *Teleglobe*, *supra*, requirement for consent of the existing members for the addition to the unit, and illustrates the closeness of the two concepts of consent and overall majority support, despite their differences.

[128] If existing bargaining unit members do not want the addition of new employees and do not agree with the union's decision to bring the expansion application, the Board's processes allow for employees to express their opposition. Since *Teleglobe*, *supra*, the Board has maintained an important practice of notifying parties and potentially affected employees of any application for review. *Teleglobe*, *supra*, stated the following:

> Since 1973, the new Canada Labour Relations Board has instituted the practice of advising not only the parties but all the employees of the enterprise when there is an application for certification or for revision of all applications made by the parties on such occasions and what action the Board intends to take. Each time it invites not only the parties but the employees concerned to make any representation they deem suitable. This is an important change from the practice of the old Board.
>
> (pages 327; 135; and 16,025)

[129] This important practice continues today to ensure transparency of the review process and to offer an opportunity to anyone with a legitimate concern to raise it with the Board in a timely way. Upon receipt of an application for certification or revision, the Board directs that notices be posted in conspicuous places in the workplace so that the union, the employer and the employees concerned by the application can make representations to the Board regarding any concern they may have with the application.

[130] If no objections are filed with the Board in response to the Board's Notice to Employees posted in the workplace, this may be one reason why the Board can feel comfortable presuming

overall majority support within the expanded unit. Conversely, if there is significant objection to the application raised by employees, this may be one indicator to the Board that the union's majority support may be in question. It would remain up to the Board to determine whether or not it believed it necessary to then test the union's support within the expanded unit, by holding a representation vote or by other means, depending upon the circumstances.

[131] On the same basis, the Board could rely on the lack of objections filed by employees to the application as a means to presume consent of the existing bargaining unit members to the bringing of the application to expand the unit. Conversely, the Board may find there is no consent from the existing bargaining unit members if significant objections are made known to the Board. In some of the cases reviewed, the Board appears to have taken silence or lack of objection to the union's application to expand the unit as consent of the existing membership to the addition to the unit, although as mentioned, it is unclear if this has been treated as a separate criterion or as part of the Board's assessment of overall majority support for the union in the expanded unit. The Board is unaware of a decision where the Board dismissed an application solely for lack of consent from the existing bargaining unit members.

[132] Apart from the Board's past treatment of this consent requirement, the Board seriously questions whether this is an appropriate requirement at all. The Board is of the view that a union need not demonstrate to the Board that the existing bargaining unit employees want or agree to a change to the scope of the bargaining unit, as this is not a matter for individual employees to decide. Matters concerning the configuration or composition of the bargaining unit and whether a proposed bargaining unit is appropriate for collective bargaining are ones that involve the bargaining agent and the employer, and are for the Board alone to determine. Employee wishes are canvassed to ascertain whether they wish to have union representation, which may in turn impact the Board's assessment as it affects factors such as access to collective bargaining and viability. However, employees will not generally be granted party status or standing to speak to issues of bargaining unit scope, subject to the Board's discretion to do so in certain exceptional circumstances. It is up to the Board, in accordance with its discretion under section 18 and its supervisory role over bargaining unit descriptions, to determine the appropriateness of a bargaining unit and the appropriateness of a proposed expansion to an existing unit in the context of a review application. Consequently, the consent of the employees in the existing unit for the proposed modification is not necessary.

[133] In *New Brunswick Broadcasting Co. Limited* (1988), 75 di 101 (CLRB no. 711), the Board questioned the appropriateness of applying the consent requirement in a review application in which the union sought to extend its bargaining rights to include the operations of a new television station, MITV:

> As for the second above quote from *Teleglobe Canada*, both the employer and the group of MITV employees raised the implied requirement that the union must demonstrate that its members in the existing bargaining unit want the additional employees to be added to their unit, as a hurdle which both of those parties took from *Teleglobe Canada* as being necessary for the union to clear if the MITV employees were to be added to the CHSJ-TV/CHSJ-Radio unit. (This was on the assumption of course that the Board agreed with their submission that the end result of adding the MITV employees would radically alter the intended scope of the original certification order). With the greatest respect, this panel of the Board seriously doubts if the wishes of union members in an existing unit vis-à-vis additional employees coming into the unit is of particular relevance. The only wishes the Board solicits is whether the employees wish to be represented by a named trade union, or, they are given a choice from two or more named trade unions or, at certain times, employees get the option of no trade union at all. We cannot think of any occasion where the Board would ask one group of employees if they wish to be included in the same bargaining unit as another group. If we start doing that, then surely we should be asking both groups, not just one. We would delete this requirement from the *Teleglobe Canada* tests.
>
> (page 113)

[134] As it did in *New Brunswick Broadcasting Co. Limited*, *supra*, the Board again questions whether it is necessary or even appropriate for it to require the union to demonstrate that it has the consent of the members of the existing bargaining unit to an expansion of that unit. The Board concludes that there should no longer be such an obligation on the union to demonstrate consent as part of its expansion application.

[135] The Employer expressed concerns about the potential negative consequences to the rights and interests of existing members should the scope of the unit be expanded by adding new groups of employees without their consent. Employees remain free to express their views and opposition to such an application. In any event, the Board will take these types of issues into consideration when it makes its determination as to whether the proposed expanded unit remains at least as appropriate for collective bargaining as the existing unit, and whether the addition of the positions will further labour relations objectives.

[136] In summary, the Board finds that maintaining the double majority requirement is important and necessary. It also finds that the methods to test majority support previously set out in *Teleglobe*, *supra*, are neither practical nor necessary in most cases. Since *Teleglobe*, *supra*, the Board has not seen fit to strictly apply the methods it prescribed for testing overall majority

support and the Board confirms that there is no requirement to test the overall support for the union in the expanded unit in every case. The Board will maintain its flexibility as to how and when it will assess such evidence. More specifically, the Board adopts, and will apply on a go-forward basis, the more recent approach to applying this aspect of the test as set out in *Royal Canadian Mint*, *supra*, whereby the Board will presume continued ongoing majority support within the existing bargaining unit unless there is serious reason to question or doubt that support. The Board does not see that presuming such support, while maintaining its discretion to test that support where there are compelling reasons to do so, compromises the labour relations principles and objectives that *Teleglobe*, *supra*, sought to protect.

[137] Further, the Board confirms that it will no longer require a union to demonstrate that it has the consent of its members or that its members want the addition to the unit it proposes as a pre-condition to the expansion of an existing unit. The Board will maintain its usual approach to determining the appropriateness of the proposed bargaining unit in the context of a section 18 bargaining unit review application to expand the scope of an existing unit.

[138] An applicant will therefore have to demonstrate that it:

i. has majority support within the group to be added, which will in most cases be demonstrated by the submission of confidential membership evidence for the members to be added; and
ii. has majority support within the overall proposed expanded bargaining unit, noting that majority support within the existing bargaining unit will be presumed, subject to any serious concerns raised.

[139] The Board maintains its long-standing and broad discretion to test the union's support by way of representation vote or by other means, should any serious concern be raised to make the Board doubt or question that support.

IV. Application of the Clarified Double Majority Requirements to the Facts Present in this Matter

A. Majority Support within the Group to be Added

[140] The Board has determined at the outset of this decision that its broad power of review under section 18 and its policy-based process for conducting bargaining unit reviews remained intact and that the amendments to Division III of the *Code*, contained in the *Employees' Voting*

Rights Act, had no impact on the Union's present Application for review filed pursuant to section 18 of the *Code*.

[141] Accordingly, it is open to the Board to assess the level of support enjoyed by the Union amongst the Hamilton Technical Employees, the group of employees to be added, by way of membership evidence. It is not required to hold a representation vote to make this assessment.

[142] The Board has considered the membership evidence filed by the Union with its Application. The Union has twice demonstrated that it has majority support in the group that it seeks to add to the existing bargaining unit. It provided confidential membership evidence with its initial Application on August 13, 2015. Following the FCA's decision, the Board requested additional submissions from the parties. Along with its August 10, 2017 submissions, the Union also provided fresh membership evidence.

[143] On the basis of the membership evidence filed with the original Application and the fresh membership evidence most recently filed confirming the original result, the Board finds that the Union has demonstrated that a majority of the Hamilton Technical Employees have expressed their wish to be represented by it. The Board is thus satisfied that the Union enjoys majority support among the group that it seeks to add to the existing bargaining unit.

B. Majority Support within the Expanded Unit

[144] The Board confirms that it did not receive any evidence of concerns or objections from any existing bargaining unit employees in relation to the Application, or any other indication that the existing members have withdrawn their support for the Union. The Board has received nothing to indicate that the existing members have withdrawn their support for the Union, nor has it received any information that would cause it to question or doubt the ongoing support for the Union within its existing bargaining unit. The Board is therefore satisfied that there is no compelling reason to further verify the ongoing support for the Union of the employees in the existing bargaining unit. Accordingly, based upon the above and on the continuing effect of the existing certification order, the Board presumes that the Union continues to have majority support of those within the existing unit.

[145] On the basis of the above findings and when the two groups of employees are combined, the Board is satisfied that the Union enjoys majority support within the expanded unit and thereby satisfies the second component of the double majority test.

[146] In light of all of the above, the Board is satisfied that the Union has demonstrated double majority support, as required. Accordingly, in answer to the FCA's second question, the Board concludes that the Union has demonstrated double majority support, respecting its proposed expansion Application.

V. Conclusion

[147] In LD 3677, the Board found that the nature of this review Application was one whereby the addition of those employees would substantially alter the scope of the existing certificate. The Application is one that seeks to expand the scope of the existing bargaining unit and therefore the double majority rule is engaged. The Employer did not contest this finding or characterization of the Application and the Board confirms its finding in this regard.

[148] Accordingly, the Union was required to demonstrate that the resulting unit will be at least as appropriate as the existing bargaining unit, that the addition of the positions will further labour relations objectives, and that it has double majority support of the affected employees.

[149] The Board also set out at length, in LD 3677, its reasons for having determined that the expanded unit would be at least as appropriate as the existing unit and that the addition of the Hamilton Technical Employees to the existing unit would further labour relations objectives. Again, the Employer did not challenge this finding in the context of its judicial review application and the Board confirms its finding in this regard for the same reasons as those set out in LD 3677.

[150] The Board has now, in answer to the FCA's questions, clarified the Board's approach to applying the double majority rule, as established and explained in *Teleglobe*, *supra*. Through its analysis above, the Board has applied this test to the facts of the present Application and, for the reasons outlined above, has determined that the Union has demonstrated to the Board's satisfaction that the Union enjoys majority support within both groups of affected employees: majority support amongst the Hamilton Technical Employees—the group of employees to be added—and amongst the employees within the existing bargaining unit, which combined, demonstrate majority support within the proposed expanded bargaining unit.

[151] The Board finds that the Union has satisfied all the requirements needed to support its review Application.

[152] The Board hereby grants the Union's Application pursuant to section 18 of the *Code* and modifies the description of the bargaining unit accordingly. Bargaining unit certificates are attached in both official languages.

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

Allison Smith
Vice-Chairperson

André Lecavalier
Member

Gaétan Ménard
Member