



Reasons for decision

Syndicat des employé(e)s de TVA, Local 687,
CUPE,

applicant,

and

TVA Group Inc.,

employer,

and

Union des artistes,

bargaining agent.

Board File: 30892-C

Neutral Citation: 2018 CIRB **889**

August 8, 2018

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members. Hearings were held on November 13, 2015, September 9, October 14 and 28 and November 24, 2016, and on March 31, April 28, May 5, June 1, and October 4 and 5, 2017.

Appearances

Ms. Isabelle Leblanc, for the Syndicat des employé(e)s de TVA, Local 687, CUPE;

Mr. Stéphane Fillion, for TVA Group Inc.;

Ms. Christine Fortin, for the Union des artistes.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I. Nature of the Application

[1] On January 23, 2015, the Syndicat des employé(e)s de TVA, Local 687, CUPE (the union), filed the present application pursuant to section 18 of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*).

[2] The union believes that Mr. Denis Lévesque, who had been covered by the scope of the union's certification order since being hired in 2005, was excluded unilaterally in 2014 by TVA Group Inc. (TVA or the employer). It is asking the Board to declare that Mr. Lévesque is an employee covered by the scope of the bargaining unit it represents, pursuant to sections 16(p)(i) and (vii).

[3] In their responses dated March 13, 2015, and April 13, 2015, respectively, TVA and the Union des artistes (UDA) argue that Mr. Lévesque's position is not covered by the scope of the union's certification order. In their estimation, the host duties performed by Mr. Lévesque instead come under the scope of the UDA's certification order, and Mr. Lévesque is an independent contractor within the meaning of the *Status of the Artist Act*, SC 1992, c 33 (SAA).

[4] TVA and the UDA are asking the Board to declare that Mr. Lévesque is covered by the scope of the UDA's certification order.

II. Background

[5] Since May 10, 2000, the union has been the bargaining agent duly certified by the Board to represent the employees of a bargaining unit comprising all employees of TVA. The initial certification order (order no. 7776-U) was followed by an order amending the name of the union, on January 26, 2010 (order no. 9805-U), and then an order amending certain positions on the list of excluded positions (order no. 10371-U) dated March 15, 2013. In that most recent order by the Board, the bargaining unit is described as follows:

all employees working at TVA Group Inc. in Montréal, **excluding** the positions identified in the attached Appendix "A".

...

APPENDIX "A"

1. Persons who perform management functions or are employed in a confidential capacity in matters relating to industrial relations, including:

**Executive Secretary
Administrative Assistants**

Programming:

- Television Programming Scheduler
- Films Coordinator
- Managers, Business Coordinator
- Development and Programming Coordinators
- Contract Management Coordinator

Finance:

- Financial Analysts
- Managers, Accounting and Development
- Systems Managers
- Cost Analysts
- Payroll Managers/HR
- Payroll Officers/HR
- SAP Development Consultant

Technologie and Media:

- Project Managers – Informatics
- Project Managers - Engineering

Legal Affairs:

- Legal Counsel
- Legal Secretaries

Human Resources:

- Employee Benefits Advisors
- Human Resources Advisors
- Training Advisors
- Labour Relations Advisors
- Secretaries

Corporate Communications:

- Project Managers
- Project Managers - Publicity and Promotion
- Coordinators - Publicity and Promotion

Operations:

- Auxiliary Services Managers
- Project Managers - Plant layout
- Productive Resources Coordinators and Assignment Manager
- Resources and Postproduction Coordinators

2. Employees of other TVA Group Inc. employers, which business place is located at 1600 de Maisonneuve Boulevard East, including:

- JPL Production Inc.
- JPL Production II Inc.
- TVA Ventes et Marketing Inc.
- HSS Canada Inc.
- TVA International Inc.
- TVA Direct Inc.
- Club TVAchat Inc.

3. Employees already covered by other bargaining certificates.

[6] TVA is a business operating in the fields of producing and broadcasting French-language television programs and in related sectors. It is recognized as a broadcaster by the Canadian Radio-television and Telecommunications Commission (CRTC) and also owns or operates specialty television services, including Le Canal Nouvelles (LCN).

[7] When the present application was filed, the union and TVA were bound by a collective agreement in effect from January 1, 2013, to December 31, 2016.

[8] The UDA is a professional union established pursuant to the *Professional Syndicates Act*, CQLR c S-40. It is an artists' association recognized under the SAA. On August 29, 1996, it was certified by the Canadian Artists and Producers Professional Relations Tribunal (CAPPRT or the Tribunal), and its certification was subsequently amended on December 30, 1997, to represent the following sector:

... all choreographers and performers who are independent contractors engaged by any producer subject to the *Status of the Artist Act* throughout Canada, to choreograph, perform, sing, recite or act in any manner whatsoever in a literary, musical or dramatic work, or in a mime, variety, circus or puppet show:

1. broadcast, presented or performed in Quebec;

[9] In its order of August 29, 1996, the CAPPRT ratified the position of the UDA to the effect that the desired bargaining sector for performers encompassed numerous professional categories, **including the host function**. That certification was later confirmed by the Board on April 29, 2013, after the CAPPRT was abolished.

[10] The UDA and TVA (formerly Télé-Métropole Corporation) have been parties to various collective and other agreements since 1970. TVA and the UDA signed a scale agreement under the SAA for the period of 2009 to 2012, governing all of the terms and conditions of employment

of performers who are independent contractors and whose duties include hosting. On May 31, 2012, the parties signed a letter of agreement to extend the scale agreement for two years.

[11] Mr. Lévesque was hired by TVA in 2005 as a news reader and journalist-presenter for the LCN station. At that time, LCN was an all-news station whose broadcast licence issued by the CRTC limited services to news, reporting and current affairs programming in a headline-news format presented in continuously updated 15-minute segments. At that time, Mr. Lévesque served as a news reader. He was a member of the union because he held one of the journalist positions (news reader) listed in paragraph 5.01 of Appendix 2 of the collective agreement, which included the following positions:

1. Reporter;
2. Editor;
3. Researcher;
4. News Desk Editor;
5. Assistant News Desk Editor;
6. Parliamentary Correspondent;
7. News Reader;
8. Weather Presenter;
9. Sports Presenter/Writer;
10. News Ticker Writer;
11. Web Editor;
12. Reporter, Public Affairs;
13. Researcher, Public Affairs;
14. Helicopter Reporter;
15. Online Parliamentary Correspondent.

(translation)

[12] In Broadcasting Decision CRTC 2006-40 dated February 13, 2006, the CRTC amended LCN's broadcasting licence in order to modify the conditions defining the nature of its service. As a result, LCN was authorized to broadcast a limited amount of programming from category 2(a), "Analysis and Interpretation," as defined in Schedule I of *Definitions for new types of priority programs; revisions to the definitions of television content categories; definitions of Canadian dramatic programs that will qualify for time credits towards priority programming requirements*, Public Notice CRTC 1999-205, December 23, 1999. Since April 17, 2006, Mr. Lévesque has hosted his eponymous program on LCN which falls under that category.

[13] Mr. Lévesque signed a contract with TVA on August 4, 2008, in which he was explicitly recognized as an employee of TVA and agreed to provide TVA, on an exclusive basis, with his services as a journalist-host, columnist and guest.

[14] On August 30, 2014, Mr. Lévesque submitted his resignation to TVA. However, he continued to provide hosting services to the employer through his company “Les productions Ciel d’automne inc.”

[15] On December 9, 2014, Mr. Lévesque signed an employment contract with TVA to host the programs “Le Québec parle” and “Denis Lévesque” from September 1, 2014, to June 19, 2015. Mr. Lévesque signed these contracts as an artist through the business he co-owns with his wife. The contracts are subject to the terms and conditions of the scale agreement between the UDA and TVA.

[16] Mr. Lévesque also signed a number of contracts as an artist from 2014 to 2017 for various appearances on various programs, including “Tout le monde en parle” on Société Radio-Canada, and “Salut Bonjour” and “Testé sur des humains” on TVA.

[17] The union filed a grievance on November 12, 2014, which read as follows:

The Employer is violating the collective agreement generally, and more specifically, Appendix 2, the bargaining certificate and established practice by announcing that Mr. Denis Lévesque, news reader and member of the bargaining unit, is “leaving the company” despite the fact that he continues to perform the same duties and functions as before.

(translation)

[18] The present application was filed with the Board on January 23, 2015.

[19] Having considered all of the evidence on file, including the testimony heard and the parties’ final arguments, the Board finds that Mr. Lévesque is not covered by the intended scope of the union’s certification order.

[20] These are the reasons for the Board’s decision.

III. Oral Evidence

[21] Abundant evidence was presented to the Board by the parties, who also filed numerous documents and exhibits. Twelve witnesses were heard at the hearings into this matter:

- For the union: Mr. Denis Lévesque; Mr. Pierre Ouimet, TVA Director; Mr. Benoit Leroux, Technician with multiple roles at TVA; Mr. Bruno Genest, TVA News Desk Editor; Mr. Réal Leboeuf, CUPE Union Advisor; Mr. Réjean Beaudet, CUPE Provincial President; Mr. Marc Portelance, News Desk Editor with the Argent channel, Union

Steward and Local Manager of Fonds FTQ; and Ms. Nathalie Blais, Advisor in the Research Branch of CUPE-Quebec.

- For TVA: Mr. Jean-Pierre Jodoin, TVA Chief Editor; Ms. Dominique Joly, Executive Producer for TVA Productions; and Ms. Julie Leclerc, Human Resources Advisor at TVA.
- For the UDA: Mr. Denis Lévesque; Ms. Mireille Auger, Assistant Director of Labour Relations at UDA; and Mr. Jérôme Lebel, Recording Secretary for CUPE-675.

[22] In addition, the Board had the opportunity to view several recordings of the programs “Denis Lévesque” and “Le Québec parle,” hosted by Mr. Lévesque, as well as other TVA and LCN programs hosted by unionized and non-unionized personnel. The recordings of programs with non-unionized hosts are entitled: “Mario Dumont,” “Franchement Martineau,” “Arcand,” “Salut Bonjour,” “Michel Jasmin,” “Mongrain” and “Le Vrai négociateur.”

[23] On August 1, 2017, the parties presented, as additional evidence, a statement of admitted facts having to do with the various programs hosted in the past by Messrs. Paul Arcand, Claude Poirier, Jean-Luc Mongrain and Richard Martineau, as well as the program currently hosted by Mr. Mario Dumont on LCN.

[24] Further, the parties provided a sworn statement signed by Ms. Véronique Beauchesne, currently employed by TVA, attesting to the categories in which various programs are classified in the CRTC registry.

[25] The evidence adduced over the eleven days of hearing essentially dealt with the following:

- Mr. Denis Lévesque’s duties and terms and conditions of employment, as well as the production of “Denis Lévesque” and “Le Québec parle”;
- the other TVA and LCN programs, hosted by union members and non-union members;
- the scope of the union’s certification order;
- the scope of the UDA’s certification order.

[26] What follows is a summary of the key elements of the testimony.

A. Mr. Denis Lévesque's Duties and Terms and Conditions of Employment and the Production of "Denis Lévesque" and "Le Québec Parle"

1. The Hiring and Resignation of Mr. Lévesque

[27] Mr. Lévesque was hired at TVA in September 2005, after working for TQS. While awaiting the CRTC decision that would allow him to host his eponymous show, Mr. Lévesque worked as a news reader for eight or nine months. Mr. Lévesque testifies that he went with TVA representatives to meet with people from CNN (Cable News Network) in New York in order to learn how this broadcaster had integrated hosted shows into its news channel.

[28] The "Denis Lévesque" show was modeled based on what had been done at CNN. Mr. Lévesque indicates that TVA gave him carte blanche to develop his eponymous show, "Denis Lévesque," and that he had free rein to do interviews on any topic he liked. An American consultant was hired by TVA to "build the show" (translation). The sets were created internally, following the consultant's advice. The "Denis Lévesque" show debuted in April 2006. Mr. Lévesque negotiated his salary with Mr. Martin Cloutier, TVA's Executive News Editor.

[29] Mr. Lévesque subsequently signed other contracts with TVA. They were negotiated with Mr. Serge Fortin. Messrs. Lévesque and Fortin met a few months before the contracts expired; Mr. Fortin made the offers for TVA and Mr. Lévesque formulated his demands. Salary increases were determined on the basis of ratings. The budget for his wardrobe was additional to his salary. His vehicle and parking were not mentioned in the contracts, but Mr. Lévesque confirmed that he has had the benefit of a free indoor parking spot since the start of his employment. TVA staff do makeup for him and for all guests on his show. Mr. Lévesque acknowledges that he has a TVA Nouvelles identity card with an expiry date of September 9, 2017.

[30] Mr. Lévesque's work schedule has changed since 2005. In the beginning, his program was broadcast live, at 5:00 p.m., and he used to arrive at the station at approximately 1:00 p.m. A few years later, he asked that the show be pre-recorded. Prior to 2014, as a unionized employee, Mr. Lévesque would be paid every two weeks. He admits that he attended a general meeting of the union in the past for a strike vote and that he had signed a membership card. He was entitled to the leave set out in the collective agreement. When he is on vacation, repeats of his show are aired. These episodes are referred to as "timeless" (translation), meaning that they

do not deal with time-specific news items and, as such, are suitable for rebroadcast. Mr. Lévesque has had Fridays off for a number of years.

[31] Mr. Lévesque explains that he decided to resign in September 2014 after discussions with Mr. Fortin, who was proposing a noon-hour show to him. After discussions with Messrs. Mario Dumont and Richard Martineau, both hosts, the witness learned that they were not unionized. He made an agreement with Mr. Fortin that he would resign and that his company would then be contracted by TVA.

[32] Mr. Lévesque's company, "Les productions Ciel d'automne inc.," signed a four-year contract with TVA in September 2014. The contract is for the production of 190 episodes of "Denis Lévesque." Invoices are sent to TVA on a weekly basis. Mr. Lévesque is no longer compensated for his wardrobe-related expenses.

[33] The company was founded in 2011; it belonged at the time to Mr. Lévesque's wife. He is now the majority shareholder. The company has two employees, that is, Mr. Lévesque and his wife, and does business with six clients (possibly others), including TVA. Mr. Lévesque estimates that 75 percent of revenue is from TVA. The remainder of the company's revenue comes from radio, books, magazines and his music album. TVA pays him on a fee basis and does not deduct taxes. Mr. Lévesque indicates that the company's revenues include those of his wife.

[34] Mr. Lévesque is currently working on a number of documentary projects that will not be produced by TVA but elsewhere. However, the company has not produced any other programs since September 2014.

2. The "Denis Lévesque" Show

[35] Mr. Lévesque explains that on a typical day, he and his new desk editor, Mr. Genest, decide what subjects to cover. Mr. Genest worked with Mr. Lévesque at TQS. Together, they survey the "explosive" (translation) news, with the goal of doing things differently than the other stations. The show focuses more on the person being interviewed than on the subject itself. Mr. Lévesque considers himself first and foremost an interviewer.

[36] Mr. Jodoin is the chief editor and producer of the "Denis Lévesque" show. He explains that Mr. Lévesque has tremendous freedom when it comes to choosing topics and how to treat them. He has carte blanche, according to the witness; Mr. Jodoin does not have to approve the

subjects discussed on the program. The concept is a “talk show” in which news and current affairs are discussed and people are interviewed.

[37] Mr. Lévesque explains that when news becomes the “talk of the town,” then that becomes the topic of the show. As examples, he cites the trial of Guy Turcotte, and Marguerite Blais stepping down as minister. However, they always have some “plan B” back-up topics just in case. Messrs. Lévesque and Genest then put the program together and Mr. Genest summarizes what the guest will say.

[38] After viewing a few episodes (including those of May 14, 2014, and April 11 to 15, 2016), Mr. Jodoin stated that a journalist could not have dealt with those subjects in that way. Taking the interview with the singer “Boule Noire” as an example, Mr. Jodoin indicated that Mr. Lévesque was trying to get the singer and his wife to express their emotions. Mr. Jodoin also gave the example of the launch of Denis Lévesque’s album, which the host played for his audience during his own show. This demonstrates, according to Mr. Jodoin, the latitude enjoyed by Mr. Lévesque during his broadcasts.

[39] However, it is Mr. Genest who decides what episodes will be aired. Mr. Genest is also the one who decides what episodes will be rebroadcast. He also determines which topics to cover, together with Mr. Lévesque, as well as the order of the guests to be interviewed. Photos or videos from the TVA newsroom will frequently be used in the context of the shows. Mr. Genest often has to contact a journalist who broadcast a news story and then that story will become one of the topics on Mr. Lévesque’s show. If he or Mr. Lévesque obtains an exclusive story, it is passed on to the newsroom. Mr. Lévesque states that he is in constant contact with journalists in the TVA newsroom. Journalists also appear on his show. When artists appear on Mr. Lévesque’s show, they are paid UDA fees.

[40] It is Mr. Genest who oversees the preparation of guests and ensures they are sent to makeup. Recording of the promo video clip begins at approximately 5:00 p.m. and is aired during Mr. Pierre Bruneau’s newscast. Mr. Genest indicates that there is no meeting with Mr. Jodoin, the Chief Editor, over the course of a day. Mr. Jodoin watches the promo during the newscast. Mr. Lévesque can decide to end an interview if he feels it is not going anywhere. In Mr. Genest’s opinion, the “Denis Lévesque” show is not a newscast. He adds that it can be and is sometimes rebroadcast, whereas a newscast cannot. Mr. Genest further states that TVA gave him all the latitude he wanted in his role when he was hired. He was unionized at the outset, as

was Mr. Lévesque. He admits that all journalists at TVA and LCN, including Mr. Paul Larocque, are unionized. When the program is being recorded, Mr. Genest is in the control room.

[41] Mr. Genest indicates that, for the past five or six years, shows have been rebroadcast when Mr. Lévesque is off sick. In the past, Ms. Denise Bombardier has stood in for Mr. Lévesque for a week. Mr. Réjean Lavallée and Mr. Larocque have also replaced Mr. Lévesque in the past, for short-term periods.

[42] Mr. Genest indicates that when he was approached by TVA to work for the network, he was told that he would be working at LCN with Mr. Lévesque doing interviews and that he would be in charge of program content. Although he started his employment in September 2005, the show concept came into being in December 2005 following a CRTC decision allowing this type of program to be produced. He indicates that LCN wanted to do an interview show. The first episode aired in April 2006, and the program was broadcast live from 7:00 to 8:00 p.m.; that time slot was subsequently changed.

[43] As part of his duties, Mr. Genest discusses with Mr. Lévesque what topics he should cover, and sometimes has to convince him to deal with certain subjects. It is Mr. Lévesque who decides what questions to ask guests. He indicates that an episode may include current affairs, information and news stories. He explains that the show is between 15 and 20 percent news. A news story is handled by Mr. Lévesque in the form of questions or in the context of a debate between guests.

[44] When asked about ratings, Mr. Jodoin indicates that viewership numbers are tracked for every broadcast, including those of the “Denis Lévesque” show. He adds that TVA can decide to terminate any service contract if ratings are poor. Mr. Jodoin points out that he checks the ratings every half hour of every day; if a show no longer commands a large enough audience, he terminates the host’s contract even if he or she is a UDA member.

[45] The spaces in which Mr. Lévesque’s shows are recorded were refitted three years ago. They are equipped with four cameras, and the technicians who operate them are unionized. The cameras may also be used for other LCN recordings.

[46] Mr. Lévesque currently occupies a closed office that he shares with Mr. Genest. If there are any issues relating to computers or telephones, Mr. Lévesque calls Mr. Jodoin or TVA’s IT department.

[47] The “Denis Lévesque” show is directed by Mr. Ouimet, who has directed such variety shows as “Cyberclub” and “J.E.” Mr. Ouimet begins working on “Denis Lévesque” at about 2:00 p.m. He meets with Mr. Genest, the show’s news desk editor, finds out what topics will be discussed and works out the visuals. To that end, he performs the required research or follows Mr. Genest’s suggestions. He uses his computer for his research, consulting the Internet, TVA’s archives and the website YouTube. He works with TVA’s unionized graphic artists. His office is across from Mr. Lévesque’s.

[48] The program is recorded from 5:00 p.m. to 7:00 p.m. During that time, Mr. Ouimet runs the control room, sets the pace for Mr. Lévesque and sorts through the interviews he does for recording purposes.

[49] Mr. Leroux has essentially had the job of editing the “Denis Lévesque” show since 2011. He works under the director. After the program is recorded, everything is sent for broadcast in segments. The director may decide to cut certain recordings if they are found to be too long. Mr. Leroux also works on broadcasting the show with the director. He is in charge of sound, music and sound effects, among other things.

[50] Mr. Leroux also testifies that he has been assigned to Messrs. Dumont’s and Martineau’s shows, where all of the employees were unionized.

[51] Mr. Portelance indicates that he had the opportunity to work on the “Denis Lévesque” show for several weeks in 2005. During that period, meetings would be held in the morning with the researcher and Mr. Lévesque to decide on what current affairs to comment on during the live broadcast at 7:00 p.m. According to the witness, there is no distinction between Mr. Lévesque’s work and that of a “news reader,” as performed by Ms. Sophie Thibault and Messrs. Bruneau and Dumont.

[52] Mr. Portelance commented on the various recorded broadcasts of the “Denis Lévesque” show viewed by the Board. For example, one episode shows Mr. Lévesque introducing Prime Minister Justin Trudeau’s new cabinet on November 4, 2015. A discussion of that news story follows, with three columnists. At the bottom of the screen appears a scrolling ticker that is displayed continuously on LCN and also during the TVA newscast. Later in the broadcast, Mr. Lévesque discusses the trial of Guy Turcotte and has an exchange with three unionized reporters from TVA Nouvelles. Mr. Portelance points out that the image appearing on the screen is the same as the one used by TVA Nouvelles.

[53] On another show—“Le Québec parle,” on December 14, 2015—Mr. Lévesque discusses the Cédrika Provencher case. The same subject is discussed again on “Denis Lévesque.” Interviews are performed with the TVA reporters, all of them unionized. Mr. Portelance also points out that, during the “Denis Lévesque” broadcast of December 14, 2015, a blurb for Ms. Thibault comes up, promoting the newscast. According to Mr. Portelance, that demonstrates that this broadcast was using a current affairs story that is covered again on the news. Several other recordings involving unionized TVA reporters and outside guests were examined during the hearing.

[54] Mr. Portelance commented on another “Denis Lévesque” episode in which collaborators were brought on to provide information regarding current affairs or give their opinion about a topic in the news. Mr. Portelance indicates that because these people are collaborators, they are not unionized.

[55] Mr. Portelance is of the opinion that Mr. Lévesque’s role is that of a news reader and a host—in fact, he concedes, it is somewhere “between the two” (translation).

[56] Several witnesses indicated that the work remained the same after Mr. Lévesque resigned from TVA in 2014. Mr. Portelance admits, however, that it was in 2006 that the CRTC allowed LCN to stop being just an all-news network, and he acknowledges that the format of “Denis Lévesque” as of 2006 was not the same as it was in 2005.

[57] The show’s website was designed by Mr. Benoit Leroux, who is the video editor for the show and a unionized TVA employee. There is also a Facebook page. The content is generally a summary of what was covered during the broadcast. The rights to the show and its archives belong to TVA.

3. “Le Québec Parle”

[58] Mr. Lévesque indicates that a new, open-line show was created in 2014 entitled “Le Québec parle.” During the show, a guest personality is also invited on to give his or her point of view on a subject. Topics are chosen based on current events.

[59] There is a contract between the UDA and TVA for the “Le Québec parle” show. Mr. Lévesque is a UDA member. He indicates that he is not subject to a journalist’s duty of restraint. The witness states that he conducts interviews, defends his point of view and does not have to follow defined rules, apart from showing some discretion. Even just through his body

language, Mr. Lévesque feels that his expressions and behaviour are significant on television. He argues that a news reader could never act or express himself the way he does.

[60] Mr. Jodoin is the show's editor-in-chief and producer. It is an open-line, or call-in, show. A topic is chosen and posted on the Facebook site, and a debate is opened up between Mr. Lévesque and the television audience. The news desk editor and the researcher screen the calls. The rules are simple for Mr. Lévesque: he has to host the show and express himself. The only things he is not allowed to do are to be rude, to curse or to insult people. Otherwise, Mr. Lévesque has free rein.

[61] The show airs at 1:00 p.m. There is a conference call between Mr. Lévesque, his news desk editor and Mr. Jodoin the morning of the show to choose the topic. If the three do not agree, the producer, namely, Mr. Jodoin, has the final say. The news desk editor chooses the images and sound bites that will be used during the broadcast. Sometimes, the images come from the TVA archives. Questioned by UDA counsel, Mr. Jodoin indicated that he was not involved in hiring Mr. Lévesque's news desk editor. Regarding "Le Québec parle," Mr. Jodoin indicates that Mr. Lévesque, his news desk editor and he decide on the topic to be discussed. He adds that he has the last word on the matter, but Mr. Lévesque still has to be comfortable with discussing the subject.

[62] Regarding whether Mr. Lévesque's work on the "Le Québec parle" show can be done by a TVA journalist, Mr. Jodoin answers no, explaining that a journalist's job is to deal with facts and to do so objectively, that is, impartially. On "Le Québec parle," Mr. Jodoin explains, Mr. Lévesque expresses his opinions and sometimes confronts viewers. In contrast, he would not accept Mr. Bruneau or Ms. Thibault, who are news readers, acting that way.

[63] Mr. Lévesque confirms that he took part in the taping of some broadcasts outside of TVA studios prior to 2014. As far as he can recall, he had done some broadcasts as part of the Grand Prix de Montréal and shows featuring Paul McCartney and Larry King. At the time, he was accompanied by unionized TVA employees.

[64] His schedule has changed since he started hosting "Le Québec parle." He arrives at about 11:00 a.m. and goes into makeup. He appears on the Mario Dumont show at about 11:30 a.m. to explain what the topic will be on his own show. At about 12:15 p.m., he does a promotional blurb with Mr. Bruneau, a news reader. Although the director decides what visuals will be used on the air, Mr. Lévesque meets with him at about 11:45 a.m.

[65] Most of the guests on the show are paid a fee, including his collaborators and the journalists from the Journal de Montréal and the Journal de Québec. They are paid by TVA. Mr. Lévesque indicates that he has an office at TVA. He is there Monday to Friday, from noon to 7:00 p.m. He is on vacation from June 17 to August 30. For “Le Québec parle,” he is not replaced when he has to take time off.

[66] The Twitter account for “Le Québec parle” is managed by the show’s news desk editor. The program also has a Facebook page. For “Le Québec parle,” the news desk editor writes the copy, but Mr. Lévesque is involved beforehand in the choice of subjects. The rights to the show and its archives belong to TVA.

B. The Other TVA and LCN Programs, Hosted by Union Members and Non-Union Members

[67] Mr. Jodoin is chief editor and in charge of the following programs: “Le Québec matin” (LCN), “LCN maintenant,” “Dumont,” “Le Québec parle,” “100% nouvelles,” and “Denis Lévesque.” Producers and assignment editors report to him. Mr. André Chevalier, also chief editor, is in charge of newscasts on both TVA and LCN.

[68] Regarding the show “Le Québec matin” on LCN, hosted by Ms. Julie Marcoux, Mr. Jodoin admits that all collaborators, news desk editors, researchers, journalists and directors working on that program are unionized. According to Mr. Jodoin, it is a program that is 90 percent news and 10 percent interviews.

[69] Mr. Jodoin also indicates that the news readers, like Mr. Bruneau and Ms. Thibault, are unionized. As for the show “J.E.,” of which Mr. Jodoin is also the producer, the topics are decided on by the journalists following up on suggestions from the public. Mr. Larocque is the host of the show, and many journalists are contributors. All of these people are unionized, including Mr. Larocque. According to Mr. Jodoin, Mr. Larocque introduces the reports, and his experience enables him to have exchanges with the reporters. Mr. Jodoin adds that Mr. Larocque is a news reader four days per week; on Fridays, he replaces Mr. Bruneau. As for the show “La joute,” also hosted by Mr. Larocque, Mr. Jodoin indicates that Mr. Bernard Drainville and Mr. Luc Lavoie, who appear on the show, are not unionized. Mr. Jodoin adds that Mr. Larocque, in contrast to Mr. Lévesque, does not express his opinions on the shows he hosts.

[70] Mr. Jodoin was also asked about the program entitled “Coup de chapeau,” hosted by Mr. Réjean Léveillé. According to Mr. Jodoin, that program featured stories paying tribute to a person or organization. Mr. Léveillé produced the segment, which was aired once a week during Mr. Bruneau’s program. Questioned again on the subject, Mr. Jodoin said that Mr. Léveillé acted as a journalist on that program.

[71] Commenting on Mr. Dumont’s program, Mr. Jodoin indicates that he produces that one as well. A team meeting is held in the morning to review the news. The broadcast is two hours long, and guests and columnists appear on it. After viewing a few recordings of the program “Dumont,” Mr. Jodoin stated that Mr. Dumont is not unionized and that a journalist could not host that program because the host conducts interviews based on a news story and comments on it, that is, expresses his own opinion. Cross-examined on the status of Mr. Dumont and his show “Dumont,” Mr. Jodoin admitted that Mr. Larocque replaced him at the helm of the show, but not as a journalist.

[72] As for the program “Franchement Martineau,” which is no longer on the air, Mr. Jodoin indicates that he would not have allowed a journalist to host such a program. The same is true for Mr. Paul Arcand’s show, broadcast in 2005. These programs revolved around interviews with guests, which, according to the witness, goes beyond the role of a journalist.

[73] Mr. Jodoin also commented on the shows hosted by Messrs. Mongrain and Poirier, which are no longer on TVA or LCN. Messrs. Mongrain and Poirier, who were not unionized, expressed their personal opinions.

[74] Ms. Blais, an advisor with the research department of CUPE–Quebec, explains that all of the programs on LCN appear on the CRTC registry and CRTC website. She explains that, according to the information in the CRTC registry, the show “Le Québec parle,” hosted by Mr. Lévesque, and the one entitled TVA Nouvelles are both category “1.” Ms. Blais indicates that she followed the steps for renewing the LCN licence and admits that the CRTC does not impose any restrictions on LCN with respect to what can be presented on the air. She also admits that programs may be in the wrong category on the CRTC registry.

C. The Scope of CUPE's Certification Order

1. The Position of Journalist-Host and the Memorandum of Understanding of 2004

[75] Mr. Leboeuf, CUPE Union Advisor since January 2005, took part in the negotiation of the collective agreement following the Board's decision to merge the four bargaining units (journalists, directors, technicians and office employees). Mr. Leboeuf relates the difficulties that arose in 2003-2004 in terms of applying the new collective agreement to employees assigned to public affairs programs, including journalist-hosts. According to him, these hosts did not pay union dues. He cites the public affairs programs "J.E." and "Dans la mire" as examples.

[76] On cross-examination, Mr. Leboeuf indicated that the position of journalist-host was included in the Memorandum of Understanding (MOU) signed in September 2004. According to the witness, that MOU covered all employees working on public affairs programs, including journalist-hosts who were permanent and regular journalists, like Ms. Jocelyne Cazin.

[77] Mr. Leboeuf admits that the host position on the public affairs show "Salut Bonjour" is not unionized. He attributes this to the fact that that show is not under the control of the newsroom.

[78] Mr. Jodoin, for his part, points out that Mr. Lévesque's becoming unionized as of 2006 was the result of an employer error; he admits that Mr. Lévesque has paid union dues for all these years.

[79] Mr. Jodoin indicates that the role of journalists is to report the news and that they must not taint it with their own personal opinion. He adds that there are no journalist-columnists at TVA or LCN.

2. Various Grievances Relating to the Use of Non-Unionized Employee Services

[80] Mr. Beaudet, CUPE Provincial President, testified regarding the different grievances filed in evidence by the union, including those relating to the use of services provided by non-unionized employees or employees from other units. One of those grievances related to Mr. Martineau's assignment as news reader for the "Le Québec matin" show. Another grievance concerned Mr. Jean Pagé and the fact that the employer had assigned news reader duties to him for the LCN program "Le Québec matin week-end," even though he was not a union member.

[81] Mr. Beaudet adds that when a program is produced outside of TVA, the union is powerless to demand representation of positions created within the framework of that particular program.

Be that as it may, Mr. Beaudet insists that TVA must adhere to the collective agreement with the union if a program is aired on TVA, regardless of whether it was produced on the outside.

[82] On cross-examination, Mr. Beaudet indicated that it is possible that the grievance relating to Mr. Pagé is not yet resolved. On the other hand, he asserts that the union never asked for Mr. Pagé to be included in the bargaining unit.

[83] Mr. Beaudet also commented on the case of Mr. Claude Poirier. He indicates that Mr. Poirier was a “specialized” (translation) person who hosted a show on TVA allowing him to express his opinions. He feels that no one else could have done this type of work at TVA. Mr. Poirier, who was never unionized, hosted a daily program for five years that was aired on LCN. Mr. Beaudet admits that Mr. Poirier sometimes appeared on newscasts.

[84] Mr. Beaudet submits that Mr. Lévesque was a member of the bargaining unit and that, without explanation, he was excluded from the unit. Regarding Mr. Pagé, the witness indicates that the union grieved the fact that the employer had used a non-union employee to perform unit work.

[85] According to Mr. Beaudet, the unionized journalists also perform host or co-host duties, but they are journalists, not hosts. For example, he points to Messrs. Bruneau and Larocque and Ms. Thibault, who are unionized. Mr. Beaudet acknowledges that the collective agreement does not govern the host function.

[86] Still on cross-examination, Mr. Beaudet admits that no grievance filed in evidence concerned host work. He submits that if a unionized employee is used to replace a unit member, it is possible that he or she will perform hosting duties.

[87] Mr. Beaudet admits that Mr. Gino Chouinard, who hosts the program “Salut Bonjour,” is not unionized. As for the late Mr. Jean Lapierre, Mr. Beaudet indicates that he was never unionized, but that the union treated him as a commentator. He adds that grievances had been filed concerning Mr. Lapierre when the union thought he was performing journalist work.

[88] Regarding the program “Larocque-Lapierre,” on the air for five years, Mr. Beaudet admits that it was never the subject of grievances. He indicates that the union considered the hosts of that show to be doing political analysis. As for Mr. Lévesque, Mr. Beaudet is of the opinion that a member of the bargaining unit could do his work.

[89] As for Mr. Martineau, who hosted the program “Franchement Martineau,” Mr. Beaudet indicates that his program was never the subject of any grievance. He believes that Mr. Martineau gave his opinion on subjects, whereas a journalist cannot do that. That, in his view, is why no grievance was filed in his regard.

[90] Concerning the program “Salut Bonjour,” Mr. Beaudet admits that it never had a unionized host. Thus, Ms. Ève-Marie Lortie is not unionized. As for Mr. Benoît Gagnon, Mr. Beaudet does not know whether he was unionized or not.

[91] Regarding the program “Vlog,” hosted by Mr. Dominic Arpin, Mr. Beaudet indicates that he used to be unionized, but that he resigned from TVA and was hired by TVA Productions as a producer. He asserts that Mr. Arpin changed status and program and that this explains why he was excluded from the bargaining unit. He adds that none of the employees on “Vlog” are unionized. Mr. Beaudet believes that Mr. Lévesque’s show has not changed and that he has the same status as before.

[92] As for Mr. Mario Dumont and his show “Dumont,” Mr. Beaudet admits that he has never been unionized, and he does not know whether a grievance has ever been filed in his regard. Mr. Jean-Luc Mongrain was never unionized, according to Mr. Beaudet, as he was considered to be a collaborator.

[93] Cross-examined by counsel for the UDA, Mr. Beaudet said that he did not know whether Messrs. Martineau, Arcand and Mongrain had obtained hosting contracts with the UDA. The same is true for Ms. Lortie, who became the host of “Salut Bonjour Week-end.”

[94] Mr. Beaudet believes that Mr. Lévesque is a news reader in accordance with the collective agreement. Mr. Beaudet indicates that the host function is not referred to in the collective agreement because that task belongs to journalists.

[95] According to Mr. Beaudet, Mr. Lévesque prepares his shows with unionized employees. Furthermore, he believes that when Mr. Lévesque is dealing with current events, he remains within the limits of a news reader’s duties. According to the witness, Mr. Lévesque is not the only one doing this, that is, hosting a show and gathering, compiling and analyzing information.

[96] Re-examined by the UDA, Mr. Beaudet stated that the situation of a news reader making inappropriate comments to guests would be covered by the code of ethics.

D. The Scope of the UDA's Certification Order

[97] Ms. Auger has been the Assistant Director of Labour Relations at the UDA since 2014. She is responsible for member and employee services. Ms. Auger indicates that the UDA has 54 scale agreements signed with broadcaster-producers and producers. These agreements govern several areas of activity, including theatre, stage, television, dance and shows. The host function is also covered by the scale agreements. The witness indicated, however, that Société Radio-Canada hosts do not fall within the scope of the UDA's certification; instead, they are covered by the certification order of the Syndicat des communications de Radio-Canada (FNC-CSN).

[98] Ms. Auger adds that the UDA was founded in 1937 to represent artists. The UDA has 13,000 members, including 1,000 hosts. The UDA's Quebec certification was granted in 1993 and the federal government certification was granted in 1996.

[99] With regard to Mr. Lévesque, Ms. Auger indicates that the UDA thought he was a journalist and employee of TVA. However, he was a UDA "permittee" (translation) for the purposes of appearances at a gala. She testified that the UDA was informed in 2014 that Mr. Lévesque had resigned as a TVA employee. According to the UDA, Mr. Lévesque has not been an employee of TVA since 2014, and he owns his own production company. However, Ms. Auger admits that he does the same shows for TVA as before.

[100] Ms. Auger adds that, to her knowledge, all of the other TVA hosts have been covered by the UDA certification order since 2000. That is the case, according to her, for Messrs. Poirier, Dumont, Chouinard and Martineau and for Ms. Lortie. Ms. Auger indicates that the artist's work is the property of the producer, but that a fee is paid to the artist. Artists are always self-employed workers and are used as needed by the producer.

[101] On cross-examination by counsel for the union, Ms. Auger explained that host positions are held by journalists at Société Radio-Canada and that that is why this particular function no longer falls under the scope of the UDA certification order.

[102] Ms. Auger states that she had never seen the "Denis Lévesque" show prior to 2014. She adds that only one agreement was signed with TVA for all stations and that the scale agreement also covers TVA Productions. Ms. Auger confirms that the UDA signed contracts with Mr. Lévesque following the call from his wife in 2014.

[103] As executive producer for TVA Productions, Ms. Joly liaises with the broadcaster and handles negotiations with the UDA. A list of programs produced by TVA Productions was filed in evidence, along with the list of hosts. All of the hosts are UDA members. Ms. Joly stated that if she has to hire TVA staff, those employees will be represented by the union. She adds that there has been an agreement between TVA and TVA Productions for 10 years regarding the hiring of TVA employees.

[104] As for the program "Salut Bonjour," hosted by Mr. Chouinard, Ms. Joly indicates that no grievance has been filed by the union with a view to representing that position. If Mr. Chouinard is replaced by Mr. Pothier or Ms. Lortie, those individuals will be represented by the UDA for the replacement periods.

[105] Cross-examined by counsel for the union, Ms. Joly indicates that the type of duties performed by the person will determine which union will represent them: the union or the UDA. The UDA encompasses all things artistic, on-screen talent or hosting. Ms. Joly admits that a journalist may perform work covered by the scope of the UDA's certification as well as work covered by that of the union. She gives the example of a person presenting the daily weather forecast: their duties are encompassed by the unit represented by the union, but when they are creating vignettes for the 375th anniversary of Montréal, their work comes under the scope of the UDA's certification. The person will be compensated according to the rates set out in the scale agreement between the UDA and the employer for the time they spent on the 375th anniversary vignettes.

[106] Ms. Joly indicates as well that when she employs technical personnel, she uses unionized TVA employees. The same is true for news desk editors and columnists. However, she adds that she can choose whomever she wants.

[107] Ms. Joly indicates that there are no unionized employees at TVA Productions.

[108] A document presented by counsel for TVA demonstrates that employees have, or have had, dual status, namely, the status of employees represented by the union and status as UDA members. That is the case, for example, of Mr. Benoît Gagnon, a host until 2005 who was represented by the UDA and also by the union. Since then, he has been represented by the UDA alone. He therefore no longer has dual status. Ms. Leclerc, a human resources advisor at TVA, indicates that this situation has never been challenged by the union.

IV. The Arguments

[109] The union and the UDA presented written arguments in addition to their oral arguments. What follows is simply a summary of the three parties' written and oral arguments.

A. The Union

[110] The union is of the opinion that Mr. Lévesque has been an employee covered by the scope of its certification order since 2005 and that he pays union dues and participates in union life. According to the union, it was only in 2014 that TVA and Mr. Lévesque negotiated an agreement culminating in the decision to exclude him from the bargaining unit.

1. The Scope of the Certification Order

[111] The union, however, is of the opinion that the work performed by Mr. Lévesque is that of a news reader. It provided the example of Mr. Larocque, host of the programs "La route" and "J.E.," who is part of the bargaining unit as a news reader. It also provided the example of Mesdames Jocelyne Cazin and Annie Gagnon, who were the hosts of the program "J.E." and who were also part of the union's bargaining unit. The union explains that journalists are now expected to express their opinions in a manner similar to hosts.

[112] The union believes that the behaviour of the parties demonstrates that Mr. Lévesque's duties come within the scope of its certification order because:

- in 2005, TVA gave Mr. Lévesque the title of news reader and journalist-presenter, whereas TVA knew very well that Mr. Lévesque would be assigned to a program in the nature of "Denis Lévesque";
- the shows "Le Québec parle" and "Denis Lévesque," hosted by Mr. Lévesque, are declared by TVA to the CRTC as being "information – news" and "information – analysis and interpretation," shows of the same type as the "J.E." show;
- the employment contract signed by Mr. Lévesque and TVA on August 4, 2008, stipulates that Mr. Lévesque is an employee and makes reference to the journalism activities performed by Mr. Lévesque; it also stipulates that the collective agreement applies, that Mr. Lévesque's minimum compensation is based on the salaries set out in the collective agreement and that vacation and selection of vacation are subject to the provisions of the collective agreement;

- Mr. Lévesque's name has been written on the seniority list appended to the union's collective agreement for at least nine months;
- Mr. Lévesque voluntarily signed his union membership card in 2010 and attended a union meeting; and
- "Denis Lévesque" is categorized under "public affairs programs," as is "J.E.," and those programs are described by Gala Artis as journalistic programs.

[113] The union indicates that it did not seek to represent the host position for a number of people because the employer is TVA Productions, which is under provincial jurisdiction. Indeed, the union points out that some of the TVA hosts resigned from TVA to transfer into the employ of TVA Productions, hence their exclusion from the scope of the bargaining unit represented by the union.

[114] The union is of the opinion that the scope of its certification order is universal and that only those positions that are expressly identified therein as being excluded may be excluded from it. The union points to the history of certifications issued by the Board since 1985. All news and on-air employees are included in the bargaining unit that certified the Syndicat de l'information de Télé-Métropole (CUPE)—its predecessor before the merger in 2000—and the collective agreement encompasses all types of programs, including "national and international public affairs programs and other programming that may be entrusted to them" (translation). This agreement also provided for the payment of a bonus to hosts.

[115] The union submits that its bargaining unit includes hosts as well as journalist-hosts, as well as persons in all other news positions and in on-air positions, and that no distinction can be made on the basis of the type of program.

[116] The union submits that the parties cannot decide to modify the scope of the certification order and that only the Board has the power to do so.

[117] The union argues that it did not withdraw its request to represent the host function, as attested by the copies of the numerous grievances filed in evidence, in which the union contested the work that should have been performed by employees of the unit it represents.

[118] The union argues that it is, rather, the UDA that has withdrawn its request to include Mr. Lévesque in its unit; the UDA has apparently taken no concrete action in that regard since 2006, even though it already represents numerous TVA "hosts." The union submits that, every year, UDA officers check the employment contracts against what is actually happening on-

screen to validate compliance. It adds that the UDA examined the recordings of the “Denis Lévesque” broadcasts in 2008 and sought guest fees, yet did not seek to represent Mr. Lévesque’s position. It would appear that the UDA also admitted, when presenting its evidence, that it believed in 2009 that Mr. Lévesque was a TVA employee and that he was a journalist. It admitted that it could have filed a grievance.

2. The Concept of “Employee” and “Dependent Contractor”

[119] The union argues that the burden of proof is on the party seeking to exclude a position from a bargaining unit or challenging its status.

[120] The union points out that, in light of the case law in such matters, one must take into account the degree of control that the employer exerts over the worker’s activities as well as the worker’s degree of economic dependence to determine whether a person is an employee within the meaning of the *Code* or an independent contractor. The union explains that the Board is not bound by any contractual agreements modifying the scope of the bargaining unit, and that the creation of a company like Mr. Lévesque’s in 2014 does not constitute an obstacle to the recognition of employee or dependent contractor status under the *Code*.

[121] The union emphasizes that the facts in this case demonstrate first and foremost that Mr. Lévesque is an employee or dependent contractor within the meaning of the *Code* and that TVA exerts control over him.

[122] The union submits that the contracts signed in 2008 and 2014 demonstrate that TVA exerts total control over Mr. Lévesque, that he is integrated into the business, that he works with the unionized employees of TVA (graphic designers, directors, archivists, editors, etc.), that he has no shows other than on TVA, that he deals daily with the unionized journalists of TVA to obtain information and contacts, that he identifies the topics covered by the TVA network and by the newsroom to determine what topics to discuss and that he deals with Mr. Fortin of TVA to determine his vacation time, absences, etc.

[123] The union also reminds the Board of the numerous “Denis Lévesque” broadcasts that were viewed in which unionized journalists made appearances. It submits that the scrolling news ticker at the bottom of the screen during these broadcasts also appears during TVA newscasts. It adds that the subjects discussed on the “Denis Lévesque” show are often the same as those covered on the newscasts. The union submits as well that the news readers, who are unionized, also perform interviews as Mr. Lévesque does on his show.

[124] As for the other show hosted by Mr. Lévesque, “Le Québec parle,” the union submits that it is the show’s producer who has the final say over what subjects are discussed.

[125] The union refers the Board to the testimony of Mr. Jodoin, TVA Chief Editor, who asserted that the fact that Mr. Lévesque was not excluded from the bargaining unit for nine years was an honest mistake. Mr. Jodoin also indicated that if the ratings for a program were poor, he could terminate the program. According to the union, TVA approached Mr. Lévesque with an idea for a show in 2005. TVA and Mr. Lévesque worked together to define the show concept; no change has occurred since 2014 between the parties, despite the fact that Mr. Lévesque now deals through the intermediary of a company. TVA must be informed of any changes made to broadcasts and decides on when shows will be recorded and where they will be placed in the program schedule. Mr. Lévesque provides his services to TVA on an exclusive basis; any other project he considers must be submitted to TVA. In that sense, he is not free to negotiate with a third party, according to the union.

[126] Mr. Lévesque negotiates his terms and conditions of employment with Mr. Fortin of TVA. He works full time at TVA, which makes it unlikely that he would be able to perform any other work in a meaningful way. All of the material used by Mr. Lévesque belongs to TVA. He has a free parking spot provided by TVA and is reimbursed for his wardrobe-related expenses. His hair and makeup are done by unionized TVA staff. He has to inform TVA of his absences. All show archives, broadcast images and rights belong to TVA, and all episodes are taped and broadcast like other TVA programs. The social media accounts linked to the shows belong to and are managed by TVA. TVA imposes its choices regarding what shows to repeat. TVA and Mr. Lévesque develop the sets together. Ultimately, Mr. Lévesque is bound to TVA on an exclusive basis until 2019 and has no other programs of this type anywhere else.

[127] As for the criterion of economic dependence, the union submits that Mr. Lévesque takes no financial risk, has no potential to make a profit and runs no risk of losing income; he has a fixed pay period, that is, every two weeks, upon presentation of invoices, which are always for substantially the same amount. In the event of a lawsuit, Mr. Lévesque would not be liable for damages, except in the event of gross fault. He does not hire anyone on his team, since hiring is the responsibility of TVA. He does not contribute to the costs associated with his broadcasts, and TVA pays all guest fees. All advertising revenues associated with the broadcasts are TVA’s. Ultimately, if TVA terminated the agreement with Mr. Lévesque, he would be left without a livelihood.

[128] In conclusion, the union believes that denying employee status to Mr. Lévesque would run counter to the objectives of the *Code*.

[129] The union is asking the Board to grant the application and to declare that TVA is Mr. Lévesque's employer, that Mr. Lévesque is an employee within the meaning of the *Code*, and that he is covered by the scope of the union's certification order and governed by the collective agreement between the union and the employer.

B. TVA Group

1. Intended Scope of the Certification Order

[130] TVA argues that the intended scope of the certification order concerns functions, not persons. TVA feels that the case of Mr. Lévesque being a union member was an anomaly.

[131] TVA acknowledges that the intended scope of the certification order is all employees and that it is therefore of general application, but states that, historically, the host function was never contemplated by the union's certification order.

[132] TVA submits that this function has been under the jurisdiction of the UDA ever since the latter started signing agreements with it, that is, since 1970. TVA points out that the host function is therefore not new.

[133] In that sense, TVA explains that the collective agreements entered into between the union and TVA, namely, those of 1993 and 1996, referred to the host position as being outside the agreement. It submits that the Board is still seized of the description and intended scope of the bargaining units and that the parties are not at liberty to model the bargaining units as they see fit and circumvent their initially intended scope.

[134] Relying on the previous decisions of the Board, TVA submits that a certification can have universal scope without necessarily encompassing everything not directly included in it, and that it is ultimately up to the Board to determine the scope of a certification order. It argues that, regardless of the scope of the literal wording of the certification, one must consider the circumstances in which the certification was granted and, in that light, try to determine what actual employment or function categories were being targeted.

[135] In the present matter, TVA believes that the behaviour of the parties confirms that the host function was never contemplated by the certification order. Although there is a presumption to

the effect that an order of general application encompasses all employees, the activities in question, according to TVA, must still have been included initially in the certification order.

[136] TVA points out that there used to be four distinct bargaining units applying to its employees, namely, for directors, for technical personnel, for office employees and for journalists. It explains that, while it may be possible for a unit to evolve, it is not possible for it to evolve to the point where a function never covered by the scope of the orders would be included in it, like the host function.

[137] As for the hosts Poirier, Martineau and Arcand, TVA points out that the union admitted that their duties were similar to those performed by Mr. Lévesque. However, the union never presented grievances seeking their inclusion in the bargaining unit.

[138] TVA adds that the application for referral filed by the union in 2003 before the Board and the agreement between the parties dated April 28, 2003, indicate that the only functions covered are those of reporter, journalist, journalist-researcher, researcher and journalist-host. The host position is not covered. TVA also refers the Board to the letter of agreement signed by the parties on September 27, 2004, following an unfair labour practice complaint filed by the union. That letter of agreement concerns journalists assigned to public affairs working on the programs “J.E.” and “Dans la mire.” TVA submits that this letter of agreement confirms once again that the host function was never included in the bargaining unit.

2. The Situation of Mr. Lévesque

[139] TVA acknowledges that Mr. Lévesque was included in the bargaining unit represented by the union for a certain period. He was hired on at LCN during a period of time where there were only newscasts. At that time, he was a journalist. TVA submits that in 2011, Mr. Lévesque noted that Mr. Mongrain was not unionized and enjoyed certain advantages that he did not. In 2014, Mr. Lévesque resigned and accordingly lost his employee status. According to TVA, Mr. Lévesque has not been covered by the scope of the certification order since that time.

[140] TVA submits that it is impossible to assert, as the union is trying to do, that Mr. Lévesque is a news reader. The evidence demonstrates that Mr. Lévesque expresses opinions, provokes debates and is even allowed to be “argumentative” (translation), whereas, unlike Mr. Lévesque, a journalist must convey facts, be neutral and present both sides of any issue.

[141] Mr. Lévesque enjoys tremendous freedom; topics do not need to be approved by anyone. TVA believes that Mr. Lévesque's program is a "talk show" that includes a gossip column. TVA indicates that the "Denis Lévesque" show seeks to produce emotions and to provoke rather than to inform. TVA adds that hosts, like Mr. Lévesque, can express opinions freely, make comments and engage in unusual discussions.

[142] TVA argues that Mr. Lévesque is a host and that the intended scope of the union's certification order never encompassed the host position.

3. Mr. Lévesque's Independent Contractor Status

[143] Regarding the independent contractor status conferred on Mr. Lévesque, TVA believes that the Board should assess the following elements: the worker's economic dependency, the seasonal nature of the contract, Mr. Lévesque's broadcast and replacement times, the nature of the agreement signed by the UDA and the creation of Mr. Lévesque's company of which he became a co-owner with his wife.

[144] TVA submits that an artist like Mr. Lévesque can agree to work for an employer without necessarily becoming its employee. It argues that the control exerted by the employer must be compatible with the guest artist's status as an independent contractor.

[145] TVA points out that Mr. Lévesque and TVA signed a five-year contract in 2014. It submits that the parties' intent, in the context of that contract, demonstrates that it truly is an independent contractor relationship that Mr. Lévesque has with TVA. Indeed, there are direct consequences associated with independent contractor status; the producer can unilaterally terminate the host's show.

[146] TVA is of the opinion that Mr. Lévesque is an artist within the meaning of the SAA and that he is not covered by the scope of the union's certification order.

C. The UDA

[147] The UDA submits that Mr. Lévesque began performing his hosting duties, within the meaning of its certification, in January 2006, when the broadcasting licence of LCN, specializing in news, changed to allow TVA to produce analysis and interpretation programs. Thus, according to the UDA, Mr. Lévesque ceased to be a news reader and became the host of his own public affairs show in April 2006.

[148] The UDA acknowledges that neither TVA nor the UDA made the necessary changes with respect to Mr. Lévesque's new status in 2006. That error persisted until 2014, the UDA submits. The UDA indicates that it also did not seek to make the required change to Mr. Lévesque's status in the years that followed because it always assumed, in good faith, that he held a unionized journalist position as a TVA employee.

[149] The UDA indicates, moreover, that Mr. Lévesque performed various artistic engagements as of 2006 that brought him under the jurisdiction of the UDA and into the "permittee" (translation) category. After he resigned from TVA in fall 2014, Mr. Lévesque became a member in good standing of the UDA. Accordingly, in December 2014, Mr. Lévesque signed contracts pursuant to the scale agreement between UDA and TVA for his two shows, "Denis Lévesque" and "Le Québec parle." Mr. Lévesque also receives income from other contracts entered into through that scale agreement.

1. Intended Scope of the Union's Certification Order

[150] The UDA recognizes that the union's certification is universal in scope, but applies only to employees. According to the UDA, the history of labour relations between the union and TVA demonstrates that the union never sought to represent the host position. The UDA argues that the host function has in fact been under the jurisdiction of the UDA since long before the union's certification in 1975, which, at the time, applied only to employees in the news department.

[151] The UDA also submits that the collective agreements between the union and TVA show that hosts in the pure sense of the term are not covered by the scope of the union's certification order. The UDA argues that the Board, in the case that came before it in 2003, determined that journalist-hosts assigned to public affairs programs are part of the unit (see *TVA Group Inc.*, 2003 CIRB LD 932). The hosts were therefore not included in the union's bargaining unit. The UDA argues that the application initially brought before the Board by the union sought to include the host position in its bargaining unit, which the Board refused. The UDA submits that it was never a party to that case and was unable to assert its position in that regard.

[152] The UDA further submits that the journalist-host function has also never been included in the collective agreements between the union and TVA to date and that all of the letters of understanding resulting from litigation between TVA and the union confirm that the collective agreement applies only to journalists and excludes hosts.

[153] The UDA is of the opinion that hosts, like Mr. Lévesque, do not share a community of interest with the journalists of TVA. These two groups have competing labour relations interests. The distinguishing factors for hosts are their notoriety, their ability to maintain high ratings and the complete editorial freedom associated with their work as communicators. Hosts, according to the UDA, are sitting on an ejection seat at all times—and their terms and conditions of employment must reflect this reality, which is different from that of TVA's permanent journalists.

[154] In short, the UDA argues that the sole possible and logical inference to be made from the labour relations history between the parties and their respective behaviours since the union's initial certification is that the certification in no way applies to hosts. The UDA submits that to conclude otherwise would be tantamount to disregarding nearly 50 years of harmonious relations between the parties, including the UDA, and would engender innumerable conflicts in addition to disrupting industrial peace.

2. Intended Scope of the UDA's Certification

[155] The UDA states that it was founded in 1937 and that it has signed numerous voluntary recognition arrangements as well as scale agreements, notably with TVA. Furthermore, in 1970, the UDA and TVA signed a first scale agreement for French-language freelance artists that expressly covered hosts. The UDA adds that all subsequent agreements to the present day have also included the host function. The UDA submits that the definition of the host function has remained unchanged for the past 50 years: "the person who directs, presents or connects the various parts of a program" (translation). The UDA adds that the host function came under its purview long before the union's certification order issued by the Board in 1975, which, at the time, applied only to employees in the news department.

[156] It was in 1996 that the UDA obtained its certification under the new SAA. The tribunal at the time approved the list of functions established by the UDA, including the host function. The UDA emphasizes that its constitution and by-laws stipulate that hosts form one of the four function categories of its membership. Of its 12,000 members, the UDA has 1,000 hosts.

[157] The UDA submits that the scale agreement does not apply to the employees of the producer but to the artists, in accordance with the SAA. It indicates that, based on the evidence, Mr. Lévesque has held a position covered by the UDA's certification since his show started in 2006, but did not claim his artist's status under the SAA until September 1, 2014.

[158] The UDA submits that since that date, Mr. Lévesque has been in a host position with TVA, in that he is an artist, is engaged by a producer governed by the SAA, and performs or acts in any manner in a dramatic work broadcast, presented or performed in Quebec. The UDA points out that a television public affairs program is considered to be a dramatic work by the case law. The UDA submits that, on that basis, Mr. Lévesque's terms and conditions of employment are explicitly governed by the scale agreement between the UDA and TVA.

[159] The UDA also submits that abundant, uncontradicted evidence demonstrates that, for many years, all hosts who have hosted programs broadcast on TVA have signed contracts pursuant to the scale agreement between the UDA and the employer.

[160] The UDA asserts that the intended scope of its certification has been unambiguous for nearly 50 years. The UDA represents performers who are in host positions not only at TVA, but with a near-majority of producers. Factors such as intended scope, community of interest, organizational structure, history of collective bargaining, behaviour of the parties and the preservation of industrial peace or sound labour relations support the UDA's position.

[161] The UDA alleges that it has not waived its jurisdiction with respect to Mr. Lévesque. It points out that the certifications on both sides are a matter of public record and that an association cannot waive jurisdiction through its behaviour, even if it has been negligent. In that sense, the fact that the UDA only dealt with grievances of guest artists and columnists on the "Denis Lévesque" show is not a significant factor. Moreover, the UDA has always believed, in good faith, that Mr. Lévesque was a journalist at TVA and was therefore covered by the scope of the union's certification order. Had it known beforehand, it would have claimed artist status for him and requested that a contract be signed with the UDA.

3. Mr. Lévesque's Position: Journalist or Host?

[162] The UDA submits that Mr. Lévesque is a true host and that his work has nothing to do with that of a journalist or news reader. Mr. Lévesque makes editorial comments and has complete editorial freedom, unlike journalists. Also unlike journalists, Mr. Lévesque has no duty of restraint. The UDA cites the testimony of Mr. Jodoin in that regard. He explained that, on the "Denis Lévesque" show, Mr. Lévesque has carte blanche and does not have to seek approval. Mr. Lévesque takes a subject that is in the headlines and looks at it from a different angle to find its emotional aspects. Mr. Jodoin also confirmed that a journalist cannot do this type of program, or the work done by Mr. Lévesque on the program "Le Québec parle"; TVA expects the host to

give his opinion and to provoke controversy. Mr. Jodoin therefore confirmed that Mr. Lévesque cannot be replaced by a journalist or a news reader and that another host would have to be called upon. Indeed, the UDA indicates that the replacement of Mr. Lévesque by unionized employees on his broadcasts has been exceptional and of a very short duration.

[163] The UDA submits that the job description of a news reader, based on the TVA employee seniority list, bears no resemblance to the work done by Mr. Lévesque. The UDA also argues that the clause of the collective agreement providing that journalists can perform hosting duties cannot be applied to someone who does not have journalist duties. The entirety of Mr. Lévesque's time is devoted to hosting.

[164] The UDA also submits that the evidence demonstrated that some hosts, including Mr. Gagnon and Ms. Lortie, TVA employees at the time, became independent contractors without the union challenging their exit from the bargaining unit. This behaviour confirms, according to the UDA, that the union never intended to represent hosts.

4. Is Denis Lévesque an independent contractor or an employee?

[165] The UDA submits that it represents performers who are independent contractors pursuant to its bargaining certificate issued under the SAA. It points out that the SAA institutes an atypical labour relations scheme to govern relations between producers and artists. Artists can provide their services to more than one producer at the same time or in succession, depending on the nature of the contract. Scale agreements under this scheme establish the artist's minimum terms and conditions of employment, while the artist is free to negotiate better conditions. Because of this scheme, artists, who are independent contractors within the meaning of the SAA, are nevertheless in a subordinate relationship with the producers for whom they work.

[166] The UDA indicates that a producer's retention of an artist's services is at the heart of the relationship between the parties. It involves a producer's commitment to retain the services of an artist and the artist's commitment to deliver an artistic performance for compensation. In that sense, it is completely normal and common for a producer to retain control over programming and the concept of the programs, scheduling and broadcasts. The producer's control over the artist is not an impediment to the artist's status as an independent contractor within the meaning of the SAA. If it were, the entire scheme would be in peril. Accordingly, the UDA asks the Board to interpret the notion of independent contractor taking into account the particularities of this

atypical scheme and applying the required nuances to established principles of traditional labour law.

[167] The UDA argues that Mr. Lévesque must be considered an independent contractor even though he has, to some extent, a subordinate relationship with TVA. Mr. Lévesque uses his talent to contribute to the work of the producer, who remains solely responsible for the production of the programs to which it holds the rights. In that context, Mr. Lévesque must follow the requirements set by the producer, as do all artists working in Canada. In that sense, the scale agreement sets out the artist's duty to comply with the producer's policies on programming, work schedules, promotional activities, etc. All of the artists and unionized stakeholders involved must respect the concept of the work and the requirements associated with recording and producing a program.

[168] The UDA submits that Mr. Lévesque is a true independent contractor for several reasons. He has had two booking contracts with the employer since 2014 pursuant to the SAA. Other UDA contracts were also signed. Mr. Lévesque has the benefit of an agreement dating back to 2014 that addresses several aspects of his performance and establishes his independent contractor relationship with TVA. He is a member in good standing of the UDA, he has a relationship of strength with TVA regarding contract negotiations and terms and conditions of employment, and he has the chance to share in the profits, is subject to the risk of losing his contract and enjoys tremendous latitude in the context of production. The UDA indicates that although the producer retains a certain amount of control, Mr. Lévesque performs his hosting duties through a separate company and has other artistic projects underway outside of TVA from which he is deriving income. Mr. Lévesque could make third parties work through his company and generate revenue. According to the UDA, the Board must analyze all of the revenue generated by Mr. Lévesque's company to evaluate the degree of independence. In any case, the UDA submits, Mr. Lévesque could have just one client and still be an independent contractor.

[169] Moreover, insists the UDA, it is Mr. Lévesque who controls all of the content of his shows. That he provides his services exclusively to TVA is the norm in the artistic community, in order to protect the employer's reputation and interests. The fact that Mr. Lévesque cannot be replaced is also normal in the artist-producer relationship because that relationship is necessarily and always focused on the person and the "physical."

[170] The UDA submits that the criterion of Mr. Lévesque's integration into TVA's operations must be qualified by the fact that many artist-hosts provide their services for several years without necessarily becoming employees. The very nature of his contract justifies the fact that Mr. Lévesque spends a lot of time at TVA. Mr. Lévesque's presence is temporary; he could be removed from his job at some point, yet would not be left without options, as he could still pursue his professional activities with other producers. This demonstrates that he is not an integral part of TVA.

[171] The UDA adds that Mr. Lévesque is an independent contractor and that, as a result, he is a performer within the purview of the UDA. The Board must therefore apply the criteria of the SAA and declare that Mr. Lévesque is a performer.

[172] The UDA also argues that Mr. Lévesque cannot be considered a dependent contractor within the meaning of the *Code*. The definition of economic dependence does not apply in this particular case. Mr. Lévesque is famous and has significant bargaining power with TVA, in addition to enjoying a great deal of independence with respect to the content of his shows. This situation is not consistent with the idea of an employee or dependent contractor within the meaning of the *Code*.

[173] Furthermore, the UDA points out that Mr. Lévesque voluntarily resigned from his position to acquire his autonomy and operate his business. From sources other than the employer, his company brings in revenues of approximately 25 to 30 percent of its total turnover, which is considerable when one takes into account the amount of time Mr. Lévesque devotes to TVA. He has numerous projects underway that are going to bring in other revenue, or are already doing so; in that sense, the UDA argues that he is not in a state of economic dependence and could sign other contracts quickly thanks to his notoriety.

[174] The UDA indicates that, generally speaking, artists are subject to producers' decisions on a daily basis, producers can terminate artists' contracts at any time, and the case law principles applicable to the dependent-contractor concept must be qualified and applied cautiously in the context of the artistic community. In this regard, submits the UDA, TVA exerts little control over Mr. Lévesque's work.

[175] The UDA emphasizes that the free and voluntary resignation of Mr. Lévesque and the irrevocable nature of that resignation must be taken into account by the Board. Mr. Lévesque must be free to join the union of his choice, and the union he chose was the UDA.

[176] In conclusion, the UDA is asking the Board to declare that Mr. Lévesque is an independent contractor, that the hosting duties he performs are under the jurisdiction of the UDA and that all of Mr. Lévesque's terms and conditions of employment are stipulated in the scale agreement between the UDA and TVA.

V. Analysis and Decision

[177] Thus, the Board has before it an application filed by the union pursuant to section 18 of the *Code*, alleging that the duties performed by Mr. Lévesque are covered by its certification order. The description of the bargaining unit represented by the union is universal. It covers all TVA employees, except for the positions specifically excluded.

[178] The UDA, for its part, is an artists' association recognized under the SAA that obtained certification from the CAPPRT on August 29, 1996. That certification was confirmed by this Board on April 29, 2013, when the CAPPRT was abolished. The UDA is asking the Board to declare that Mr. Lévesque is covered by the intended scope of its certification order issued pursuant to the SAA. Thus, the activities associated with TVA Group come under the Board's jurisdiction pursuant to the *Code* as well as the SAA. These are two parallel jurisdictions.

[179] The present matter raises two questions:

1. Is Mr. Lévesque covered by the intended scope of the union's certification order?
2. If the answer to the first question is "no," is Mr. Lévesque an artist within the meaning of the SAA covered by the intended scope of the UDA's certification order?

A. Is Mr. Lévesque covered by the intended scope of the union's certification order?

[180] Section 18 of the *Code* allows the Board to specify the intended scope of certification orders. In relation to any application under section 18, the Board may, pursuant to sections 16(p)(i) and (vii) of the *Code*, decide any question that may arise, including whether a person is an employee within the meaning of the *Code* and whether a person is bound by a collective agreement.

[181] The Board will examine hereunder the duties performed by Mr. Lévesque as well as the scope of the certification order.

1. Mr. Lévesque's Duties and Terms and Conditions of Employment

[182] It is admitted that Mr. Lévesque signed an employment contract as a news reader in 2005. This employment contract indicates that Mr. Lévesque is a news reader and journalist-presenter for LCN. Mr. Jodoin stated that the fact that Mr. Lévesque was unionized as of 2006 was an error on the part of the employer, but also admitted that Mr. Lévesque had paid union dues for all those years.

[183] TVA submits that, although Mr. Lévesque was hired as a journalist-presenter and news reader, those assignments ended on March 17, 2006, that is, after the CRTC amended LCN's broadcast licence in 2006. Prior to that amendment, LCN was an all-news network restricted to the broadcast of news, reporting and current affairs. Mr. Jodoin's testimony is clear in this regard. Before 2006, LCN could only broadcast news shows, and it was only after LCN's licence was amended in 2006 that Mr. Lévesque stopped doing the work of a reporter-journalist and stopped reading the news. As of April 17, 2006, Mr. Lévesque became the host of the program "Denis Lévesque." For its part, the UDA also submits that Mr. Lévesque began performing the host function within the meaning of the UDA's certification after LCN's broadcast licence was amended, although it always assumed that Mr. Lévesque held a journalist position at TVA. According to the testimony, that in fact was the reason why the UDA did not try to argue that Mr. Lévesque's position came under its jurisdiction.

[184] The union essentially submits that Mr. Lévesque's legal status did not change in 2006, and even less in September 2014 when he resigned. In the Board's view, it was not really Mr. Lévesque's resignation at the end of August 2014 that triggered a change in his duties. Indeed, TVA acknowledges that the duties performed by Mr. Lévesque did not change in September 2014, but that he has been performing host duties since 2006, and that they are not covered by the union's certification order. This leads the Board to the question of whether the duties Mr. Lévesque has been performing since 2006 are those of a host, as submitted by TVA and the UDA, or those of a journalist-presenter-news reader, duties similar to those performed by the unionized employees working in the news department, like the journalists.

[185] Evidence was adduced at length by the union in the form of recorded episodes of "Denis Lévesque" and "Le Québec parle," both hosted by Mr. Lévesque. The show entitled "Denis Lévesque" debuted in April 2006, that is, following the amendment of LCN's licence by the CRTC. The other show, entitled "Le Québec parle," came into being on December 9, 2014. The

union also submitted job descriptions for the positions of news reader, public affairs reporter and reporter—all of them unionized and covered by its certification order.

[186] According to Mr. Beaudet's testimony, journalists also do some hosting or co-hosting work. They are journalists and not hosts. He gave the example of Messrs. Bruneau and Larocque, who are unionized employees. Mr. Beaudet nevertheless acknowledged that the host function was not included in the union's collective agreement, submitting that this duty is subsumed within the duties of journalists. Indeed, no grievance has ever been filed by the union with respect to host duties.

[187] Mr. Portelance, who, like Mr. Beaudet, fulfills union duties, also worked for the "Denis Lévesque" show for several weeks in 2005. According to him, there is no distinction between Mr. Lévesque's work and that of a "news reader" performed by Ms. Thibault and Mr. Bruneau. On cross-examination, Mr. Portelance nevertheless admitted that the "Denis Lévesque" show, as presented after 2006, does not have the same format as it did in 2005.

[188] Mr. Portelance also commented on the recordings of the "Denis Lévesque" and "Le Québec parle" episodes that were viewed. He wanted to show that the topics discussed on the shows hosted by Mr. Lévesque were repeated in the newscasts on TVA and LCN. As an example, he cited the case of Cédrika Provencher. The topic was covered again on the "Denis Lévesque" show and in the interviews that were done by TVA reporters, all of them unionized. In fact, Mr. Portelance believes that Mr. Lévesque's role is that of a news reader and a host—he concedes that it is somewhere in between. Mr. Portelance also acknowledges that the topics addressed on "Salut Bonjour" are also discussed on other programs. The same is true, according to the witness, for Mr. Dumont's show.

[189] Mr. Leboeuf, who also fulfills union duties and took part in negotiating the collective agreement following the 2004 merger of four bargaining units, submits for his part that the position of journalist-host was included in the settlement agreement reached in September 2004. That agreement, the witness submits, covered all employees working on public affairs programs, including journalist-hosts. He gives the example of Ms. Cazin. He admits, however, that the host position on the public affairs program "Salut Bonjour" is not unionized, which he attributes to the fact that this program is not under the control of the newsroom.

[190] Mr. Jodoin's testimony persuades the Board that the shows hosted by Mr. Lévesque are to be distinguished from those of news readers like Ms. Thibault or Mr. Bruneau. What

differentiates Mr. Lévesque from journalists-hosts and news readers, according to the witness, is the fact that Mr. Lévesque gives his personal opinion. According to the witness, journalists and news readers cannot express their personal opinions in the performance of their work. It should be noted that Mr. Jodoin today holds the position of Chief Editor, TVA News; he is in charge of programs at TVA, including the ones hosted by Mr. Lévesque. TVA is in fact the producer of those programs.

[191] Mr. Jodoin was categorical on the question of whether Mr. Lévesque's work on the shows "Le Québec parle" or "Denis Lévesque" can be done by a TVA journalist: the job of a journalist is to deal with facts and to deal with them objectively, that is, impartially. Mr. Lévesque, according to the witness, expresses his opinions and sometimes argues with his television audience. He adds that he would not accept Mr. Bruneau or Ms. Thibault, who are news readers, acting or conducting themselves in that manner.

[192] As for the "Denis Lévesque" show, Mr. Jodoin indicates that Mr. Lévesque has tremendous freedom when it comes to choosing topics and how to approach them. He adds that Mr. Lévesque "has carte blanche" (translation). Indeed, Mr. Jodoin does not approve the topics that are discussed on the program. The concept is that of a "talk show" in which current affairs are discussed and interviews are conducted, according to the witness. One or more guests participate, and occasionally journalists, who describe a situation.

[193] Mr. Jodoin also commented on a few of the episodes that were viewed during the course of the hearing, including those of May 14, 2014, and April 11 to 15, 2016. Mr. Jodoin states that a journalist could not have dealt in that way with the topics that were discussed. He refers to the interview with the singer "Boule Noire." Mr. Lévesque was trying to get the singer and his wife to express their emotions. To show the complete freedom Mr. Lévesque enjoys with respect to the subjects discussed on his shows, Mr. Jodoin also gave the example of the launch of Mr. Lévesque's CD. He played it on his own show.

[194] Mr. Jodoin also commented on the program "Mario Dumont," in which guests and columnists participate. Following the presentation of a few recordings of that program, Mr. Jodoin asserted that a journalist could not do that show because Mr. Dumont conducts his interviews on the basis of a news story and then makes comments and gives his own opinion. Mr. Dumont is not unionized, although the union is seeking to represent Mr. Dumont's position.

[195] Mr. Jodoin also commented on the programs that were hosted by Messrs. Mongrain and Poirier. These two hosts also used to express their personal opinions and were not unionized.

[196] Regarding Mr. Larocque, who is unionized and hosts a public affairs program entitled “J.E.” as well as “La Joute,” Mr. Jodoin states that he introduces reports and his experience allows him to have exchanges with the reporters. Mr. Jodoin does not feel that Mr. Larocque is expressing his personal opinion during the shows he hosts.

[197] Mr. Jodoin also commented on the programs hosted by Messrs. Martineau, Arcand, Mongrain and Poirier—respectively, “Franchement Martineau,” “Arcand,” “Mongrain” and “Claude Poirier.” None of these hosts were unionized and all of them expressed their personal opinions, according to Mr. Jodoin.

[198] Mr. Jodoin’s testimony concerning the distinction between the role of a journalist, a news reader or a journalist-host, on the one hand, and on the other hand, the role played by hosts like Messrs. Lévesque, Arcand, Mongrain, Poirier or Martineau, was not contradicted by the union. Indeed, Mr. Beaudet, the union’s witness, confirmed that journalists cannot give their opinion on a subject. The fact that journalists or news readers cannot express their personal opinions in the performance of their duties as Mr. Lévesque does when he is hosting his programs distinguishes his work, without question, from that of others, be they journalist-hosts or news readers.

[199] In the Board’s view, the evidence demonstrates that Mr. Lévesque is a host, not a journalist-host, and his role in the programs he hosts cannot be considered equivalent to that fulfilled by the unionized employees, as the union would have it. Mr. Lévesque enjoys a freedom of expression similar to what hosts Arcand, Mongrain, Martineau and Poirier had, and they were never represented by the union. At this point, therefore, the Board must determine whether the host position is covered by the intended scope of the union’s certification order.

2. Intended Scope of the Union’s Certification Order

[200] It is admitted by all parties that the union’s certification is universal, which means any new classifications or any new positions must be included, unless the parties agree to their exclusion or they are specifically excluded.

[201] In 2012, the Board analyzed the scope of the union's bargaining unit in the context of an application seeking a declaration that the positions of TVA Interactif employees were included in the bargaining unit. In *TVA Group Inc.*, 2012 CIRB 665, the Board stated the following:

[94] In the instant matter, in view of the Board's policies and jurisprudence, and based on the fact that the description of the bargaining unit at issue contains the words "all employees," the Board finds that the bargaining unit is a universal unit. Consequently, any new classifications or new positions in TVA Group are included in the bargaining unit unless the parties agree to their exclusion or they are specifically excluded either because the positions meet the exclusion criteria set out in section 3 of the *Code* or because the positions are held by employees of other TVA Group employers which business place is located at 1600 De Maisonneuve Boulevard East.

[202] The host position, however, is not new. The evidence demonstrated that the host function has existed since 1970, long before the union and the UDA were certified.

[203] The certification order issued to the union by the Board on May 10, 2000, describes the bargaining unit as follows: "all employees working at TVA Group Inc. in Montréal, excluding the positions identified in the attached Appendix A." The position of host is not excluded from the unit. In *TVA Group Inc.*, *supra*, the Board summarized the three types of exclusions listed in the union's certification order:

[96] The three types of exclusions set out in Appendix A of the certification order issued on May 10, 2000 (no. 7776-U) are as follows:

- persons employed in a managerial or trustee position, comprising access to confidential information relating to labour relations;
- employees of employers other than TVA Group Inc., which business place is located at 1600 De Maisonneuve East, **namely** JPL Production Inc., JPL Production II Inc., TVA Ventes et Marketing Inc., HSS Canada Inc., TVA International Inc., TVA Direct Inc., Club TVAchat Inc.; and
- employees already covered by other bargaining certificates.

[204] Prior to the order issued in favour of the union in 2000, the Board had initially issued a certification order for the employees of Télé-Métropole Inc. (now TVA Group) for newsroom staff in 1975, and then another in 1985, for on-air employees. In 1992, these two units were merged. In 2000, directors and technical department staff were added—that is when the Board issued the certification order covering all employees of TVA Group (formerly Télé-Métropole), excluding the positions identified in the appendix.

[205] In March 2002, the union asked the Board to declare “all the regular and part-time employees working as reporters, journalists, journalist-researchers, hosts of public affairs broadcasts” (translation) for TVA Group to be part of its bargaining unit. The parties ultimately agreed that the reporter, journalist, journalist-researcher, researcher and journalist-host functions were part of the union’s bargaining unit. This agreement did not cover the “host” function, but rather the journalist-host function, for which hosting duties are accessory to the journalist role. The Board confirmed this agreement in *TVA Group Inc.*, 2003 CIRB LD 932, as follows:

In light of the file and all the relevant documentation, the investigation and the Board’s analysis, the Board finds that it is appropriate to declare that the positions and functions thus covered by the agreement between the parties are henceforth included in the bargaining unit represented by the union and that it is not necessary to amend the wording of the bargaining unit description.

Consequently, the Board declares that the positions and functions of reporter, journalist, journalist-researcher, researcher, and journalist-host assigned to public affairs programs broadcast on the TVA network are part of the bargaining unit represented by the union and certified by the Board on May 10, 2000 (order no. 7776-U).

(pages 2–3)

[206] Furthermore, the classification of jobs found in the collective agreement that was in effect from January 1, 2013, to December 31, 2016, does not include the host position in its Appendix 5. The job descriptions filed in evidence, namely, those for news reader, public affairs reporter, reporter and director, do not cover the host position either. Mr. Beaudet in fact indicated in his testimony that the collective agreement did not include the host position.

[207] Moreover, the dispute that occurred in 2003-2004, which was related by the witness Mr. Leboeuf, concerned journalist-hosts working on public affairs programs; they were permanent and regular journalists, like Ms. Cazin. In fact, that agreement, which is found in Appendix 2 of the collective agreement, covers ad-hoc hosting assignments performed by journalists and therefore does not apply to the full-time host position, such as the one that Mr. Lévesque has been performing since 2006. Nor does it seem—at least, the evidence does not indicate—that this agreement applied to the host position performed by Messrs. Mongrain, Martineau, Arcand or Poirier, who were hosts after the agreement signed in 2004 between the union and TVA.

[208] The evidence also demonstrates that hosts like Messrs. Poirier, Dumont, Martineau, Mongrain and Arcand, who were hosts over the years at TVA, signed contracts with the UDA;

these were filed in evidence. Indeed, the union has never sought, on the basis of its certification, to represent the functions performed by these hosts. The grievances filed in evidence by the union only concern journalists and news readers with accessory hosting duties and do not target the hosting function performed by Mr. Lévesque.

[209] The Board cannot, based on the evidence, conclude that the host position is one that was covered by the intended scope of the union's certification order. Moreover, the host position performed by Mr. Lévesque does not appear in Appendix 5 attached to the collective agreement between the union and TVA, nor does a job description associated with that position appear therein. Accordingly, the Board finds that Mr. Lévesque is not covered by the intended scope of the union's certification order.

3. If the answer to the first question is “no,” is Mr. Lévesque an artist within the meaning of the SAA covered by the intended scope of the UDA's certification order?

[210] The UDA is a recognized artists' association under both the SAA and provincial statute.

[211] The SAA came into effect in 1992. Section 7 of that Act sets out the purpose of Part II, dealing with professional relations, as follows:

7 The purpose of this Part is to establish a framework to govern professional relations between artists and producers that guarantees their freedom of association, recognizes the importance of their respective contributions to the cultural life of Canada and ensures the protection of their rights.

[212] An “artist” within the meaning of the SAA is an “independent contractor” included in section 6(2)(b), whose professional status is determined in accordance with section 18(b). The relevant provisions read as follows:

6 (2) This Part applies

...

(b) to independent contractors determined to be professionals according to the criteria set out in paragraph 18(b), and who

(i) are authors of artistic, dramatic, literary or musical works within the meaning of the *Copyright Act*, or directors responsible for the overall direction of audiovisual works,

(ii) perform, sing, recite, direct or act, in any manner, in a musical, literary or dramatic work, or in a circus, variety, mime or puppet show, or

(iii) contribute to the creation of any production in the performing arts, music, dance and variety entertainment, film, radio and television, video, sound-recording, dubbing or the recording of commercials, arts and crafts, or visual arts, and fall within a professional category prescribed by regulation.

...

18 The Board shall take into account

(a) in deciding any question under this Part, the applicable principles of labour law; and

(b) in determining whether an independent contractor is a professional for the purposes of paragraph 6(2)(b), whether the independent contractor

(i) is paid for the display or presentation of that independent contractor's work before an audience, and is recognized to be an artist by other artists,

(ii) is in the process of becoming an artist according to the practice of the artistic community, or

(iii) is a member of an artists' association.

[213] Section 17(p)(i) of the SAA allows the Board to determine whether a person is an "artist" within the meaning of that Act:

17 The Board may, in relation to any proceeding before it under this Part,

(p) decide any question that arises in the proceeding, including whether

(i) a person is a producer or an artist,

(ii) an artist is a member of, or is represented by, an artists' association,

(iii) an organization constitutes an association of producers, an artists' association, or a federation of artists' associations,

(iv) a group of artists constitutes a sector suitable for bargaining,

(v) a scale agreement has been entered into or is in force, and the dates that it comes into force and expires, and

(vi) any person or organization is a party to or is bound by a scale agreement.

[214] Although the Board was not directly seized of an application filed pursuant to the SAA, the UDA asked the Board early in the proceedings to declare that Mr. Lévesque is covered by its certification order and that he is bound by the scale agreement. In that regard, the UDA alleged

that Mr. Lévesque was an artist within the meaning of the SAA. A considerable portion of the testimony and pleadings in this matter in fact focused on the question of whether Mr. Lévesque is an independent or dependent contractor. To the extent that section 16(p)(i) of the *Code* allows the Board to determine whether a person is an “employee” within the meaning of the *Code*, the Board finds that it can examine the question of Mr. Lévesque’s status for the purposes of this case.

[215] The UDA’s bargaining certificate was issued by the Tribunal on August 29, 1996, and then confirmed by the Board on April 29, 2013, in order no. 10419-U. In the partial decision *Union des artistes (UdA)*, 1996 CAPPRT 017, which dealt with the UDA’s application for certification, the UDA described the proposed bargaining sector as follows:

[19] In order to clarify the scope of the proposed sector, the Tribunal asked the applicant to provide it with a list enumerating the professional categories included in the proposed sector. Without limiting the generality of its application, the applicant indicated that the following positions would be included in what it considers to be the “performer” category: actor (including principal actor, supporting actor, bit player, non-speaking role, extra), host, announcer, guest performer, circus performer, variety artist, stunt performer, assistant stunt performer, stunt coordinator, singer (including soloist, duettist, chorister/soloist, chorister, singer who plays a musical instrument for the vocal, non-instrumental portion of his/her performance), chorus director (unless he/she performs the function of orchestra conductor), group leader, troupe leader, orchestra conductor (if he/she performs the function of actor), columnist, clown, commentator, dancer (including soloist, duettist, chorister/soloist, chorister), demonstrator, coach, story teller, understudy, folklorist, illustrator, impersonator, interviewer, reader, magician, master of ceremonies, puppet player, model, puppeteer, mime artist (including soloist, duettist, chorister), musician (if he/she performs the function of actor), monologist, narrator, panellist, applicant, presenter, stand-in, cue person and reporter.

[216] The UDA negotiates scale agreements with producers, which set out all of the terms and conditions of employment of performers, including **hosts** who are independent contractors within the meaning of the SAA. The evidence in fact demonstrates that the UDA and TVA Group have signed numerous agreements dating back to 1970, one of which is still in effect and contains a definition of the host function in its section 1-1.02: “the person who directs, presents or connects the various parts of a program” (translation). That definition of the host function has not changed in nearly 50 years.

[217] The evidence also demonstrates that, for many years, all of the hosts who have hosted programs aired on the TVA network have signed contracts with the UDA. Such was the case of Mr. Poirier for the program “Le Vrai négociateur,” Mr. Dumont for “Mario Dumont,” Mr. Martineau for “Franchement Martineau,” Ms. Lortie for “Salut Bonjour Week-end,” Mr. Chouinard for “Salut

Bonjour,” Mr. Mongrain for “Mongrain,” Mr. Arcand for “Arcand,” and finally, Mr. Lévesque, since August 2015, for “Denis Lévesque.”

[218] In the view of the Board, as argued by the UDA, this means that the host function came under the jurisdiction of the UDA long before it obtained its certification in 1975.

[219] However, the scope of the UDA’s certification order is limited to performers who are “independent contractors” within the meaning of the SAA. Furthermore, section 9(3)(b) of the SAA excludes employees within the meaning of Part I of the *Code* “in respect of work undertaken in the course of employment.”

[220] The union asked the Board to first determine whether Mr. Lévesque is an employee within the meaning of the *Code*. Essentially, the union asserts that TVA had and still has true control over the performance of Mr. Lévesque’s work, even since his resignation in August 2014, and submits evidence that, according to the Board’s case law, could lead it to conclude that Mr. Lévesque is a dependent contractor within the meaning of the *Code*. The UDA, for its part, submits that the labour relations scheme between producers and artists is atypical and that artists under this legislative scheme are considered to be independent contractors who nevertheless have a subordinate relationship vis-à-vis the producers with whom they work.

[221] In the decision *Canadian Actors’ Equity Association*, 1996 CAPPRT 010, the Tribunal made the following observations concerning “independent contractor” status within the meaning of the SAA:

[29] For a variety of legal purposes, the law has had to distinguish between employees who work under contracts of service and contractors who perform work for another person on an independent basis in the context of contracts for service. A number of tests have been developed by the courts to determine when independent contractor status exists. The common feature of these tests is that each particular situation must be looked at on its own merits and that no blanket determination can be made on the basis of job title alone.

[30] Given that PACT and Equity have historically treated production stage managers, stage managers and assistant stage managers as independent contractors for the purposes of bargaining the CTA, the Tribunal suggests that an appropriate approach is for Equity and producers in the federal jurisdiction to continue to endeavour to agree on the status of these professionals on a case by case basis. If a dispute arises in a particular case, an application can be made to the Tribunal under ss. 17(p) of the *Status of the Artist Act* for a determination as to whether a particular person is an independent contractor bound by the scale agreement.

[222] To the Board’s knowledge, neither the Tribunal nor the Board has ever had to address the question of whether an artist is actually an independent contractor within the meaning of the

SAA. Indeed, the status of persons who perform functions referred to in section 6(2)(b) and who are “professionals” within the meaning of section 18(b) is commonly the subject of an agreement between the parties to the scale agreement.

[223] In this case, the Board is satisfied that Mr. Lévesque performs or acts in a dramatic work within the meaning of section 6(2)(b) and that he is a professional within the meaning of section 18(b), since he is a member of the UDA and is paid for his services as a host.

[224] TVA Group, the UDA and Mr. Lévesque agreed on Mr. Lévesque’s status when he decided to resign in 2014 and to enter into two employment contracts as a host of the two programs at TVA. In entering into these employment contracts, Mr. Lévesque became subject to the terms and conditions of the agreement between the UDA and TVA Group as a “performer who is an independent contractor” hired by a producer governed by the SAA.

[225] For the first time, this case raises the issue of whether an artist really is an independent contractor within the meaning of the SAA or, rather, a dependent contractor within the meaning of the *Code*.

[226] In support of its assertions, the union cited *Canadian Broadcasting Corporation* (1982), 44 di 19; and 1 CLRB (NS) 129 (CLRB no. 383), which concerned, among other things, the status of freelancers on contract with the CBC. The Board conducted a detailed analysis of what it means to be an “independent contractor” and concluded that, “in view of their integration into the organization and their economic and legal dependence, and for the sake of sound labour relations,” the freelancers were employees within the meaning of the *Code*. The Board at that time took the following criteria into account, while giving precedence to the criterion of economic dependence:

- Integration into the business and economic dependence;
- Control of work;
- Relationship with others performing similar work; and
- Exclusion of the position and the labour relations environment.

[227] That decision, rendered solely in the context of the *Code*, emphasized policy considerations associated with the objectives of the *Code*. For example, the Board stated the following:

If we are to ensure social peace and the continued existence of collective bargaining, the application of the law must extend to individuals performing similar functions under similar conditions of subordination to the same employer. Excluding these individuals would create tensions and unrest in labour relations, tensions which frequently boil over into open conflict. Experience has shown, too, that employers, to avoid having to deal on a collective basis with their employees, will, if the opportunity presents itself, attempt to transform them into “contractors” and thus escape the application of the *Code* (in this connection, see Arthurs, *supra*, pp. 96–101, “Denial or Rejection of Employee Status as a Source of Labour Relations Unrest”. We must also ask, then, whether denial of “employee” status runs counter to the objectives of the *Code*.

As we have seen, the Parliament of Canada, and indeed all the Canadian provinces, have recognized the merits of collective bargaining in the area of labour relations, as a means of counterbalancing the economic imbalance between the parties involved. On the other hand, society and Parliament have also recognized that it is essential, in the public interest, to promote competition, and illegal to permit groupings of contractors, if such groupings are intended to unduly restrain or injure such competition (*Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 32 ff; *Criminal Code*, R.S.C. 1970, c. C-34, s. 425). Section 4 of the *Combines Investigation Act* provides that it does not apply to combinations or activities of “workmen” or “employees” for their own reasonable protection as such workmen or employees. In other words, while Parliament encourages workers to group together for purposes of labour relations, it condemns the same action on the part of contractors, from a business point of view.

If we consider the aims and objectives of the *Code*, it is desirable, then, that the term “employee” be defined to include any person who, in his employment relations with his employer, is legally or economically dependent. In fact, such a person constitutes a natural member of the group on behalf of which certification or permission to engage in collective bargaining is sought. There is a limitation on that statement, however. This limitation lies at the point where the contradictory objectives of collective bargaining and free competition intersect. We observe, under our economic system, which, while ostensibly based on a free market, is in fact subject to ever increasing levels of regulation, that many people, and indeed many corporations, occupy positions of economic dependence in relation to others. We are living in an era of industrial, financial and commercial giants, and every week we see one takeover or another and the constant creation of such giants, which, with their stranglehold on specific markets, are constantly creating conditions of increasing dependence on themselves. Take, for example, a company like General Motors, which farms out contracts for the manufacturing of auto parts to companies which many themselves employ hundreds of employees. These companies are clearly economically dependent on General Motors. There are thousands of such examples.

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[228] It is important to note that that decision was rendered before the SAA came into effect and that, as a result, the Board did not have to analyze the issue of dependent or independent contractor status while also taking into account the objectives of that statute.

[229] In this regard, the Board notes the following principles, set out in sections 2 and 3 of the SAA:

2 The Government of Canada hereby recognizes

(a) the importance of the contribution of artists to the cultural, social, economic and political enrichment of Canada;

(b) the importance to Canadian society of conferring on artists a status that reflects their primary role in developing and enhancing Canada's artistic and cultural life, and in sustaining Canada's quality of life;

(c) the role of the artist, in particular to express the diverse nature of the Canadian way of life and the individual and collective aspirations of Canadians;

(d) that artistic creativity is the engine for the growth and prosperity of dynamic cultural industries in Canada; and

(e) the importance to artists that they be compensated for the use of their works, including the public lending of them.

3 Canada's policy on the professional status of the artist, as implemented by the Minister of Canadian Heritage, is based on the following rights:

(a) the right of artists and producers to freedom of association and expression;

(b) the right of associations representing artists to be recognized in law and to promote the professional and socio-economic interests of their members; and

(c) the right of artists to have access to advisory forums in which they may express their views on their status and on any other questions concerning them.

[230] In *The Writers' Union of Canada*, 1998 CAPPRT 028, the Tribunal expressed as follows the objective of the SAA:

[57] In the Tribunal's view, the *Status of the Artist Act* was intended to complement and supplement the regime provided in the *Copyright Act*. It is intended to do so by providing artists with an additional mechanism to obtain compensation for their work, thereby enhancing and promoting artists' freedom of choice as to how they will exploit the fruits of their creative talents.

[58] The statute must be given an interpretation that will fulfill Parliament's intention of improving the socio-economic status of artists in Canada. The *Act* mandates certified artists' associations to represent the socio-economic interests of artists. It follows, therefore, that any exclusions from the collective bargaining regime that Parliament has provided to self-employed artists would have to be clearly articulated in the *Act*. Parliament did not expressly exclude matters related to copyright from the ambit of collective bargaining. Indeed, the *Act* contains no express limitation on an artists' association's right to bargain with producers about any matters affecting the socio-economic interests of its members. This is consistent with Canadian labour law generally, in which the duty to bargain has been held to encompass any subject matter the parties consent to include in a collective agreement.

[231] The Board is of the opinion that the criteria for determining whether a worker is an independent contractor must be applied while taking into account the reality for artists and the purposes of the SAA. Artists may have a subordinate relationship to some extent with producers

and be integrated into the business for a given period while maintaining some independence with respect to their terms and conditions of employment as well as freedom of choice over how they will exploit the fruits of their creative talent.

[232] Accordingly, while there is, at least apparently, some control exerted by a producer over the artist with respect to programming, show concept, scheduling and broadcasting, as well as a certain degree of integration in terms of production, these factors in themselves cannot interfere with the artist's independent contractor status. Otherwise, the SAA would have no practical effect on the rights of performers who may have a relationship of subordination to some extent with the producer.

[233] In the present matter, the scale agreement entered into under the SAA does in fact provide for a certain degree of subordination on the part of the artist, to the extent that the artist must comply with the producer's policies, notably with respect to programming, work schedules and promotional activities.

[234] As indicated in *Canadian Actors' Equity Association, supra*, when determining whether a worker is an independent contractor, every situation must be assessed individually. As for Mr. Lévesque specifically, even though his host duties have not changed since 2006 in the context of his programs, the Board is of the opinion that his status did in fact change when he severed the employer-employee relationship with TVA Group and entered into booking contracts with TVA Group under the scale agreement between the UDA and TVA Group.

[235] Indeed, the evidence established that Mr. Lévesque is in a true bargaining relationship with TVA, notably with respect to the value of his services and the performance of his work. As of 2014, he stopped being paid every two weeks; instead, he invoices TVA on a weekly basis. He also maintains control over his terms and conditions of employment by choosing, among other things, when he goes on vacation and the persons with whom he works. Moreover, Mr. Lévesque has great freedom of choice when he performs his duties as a host, notably with respect to the topics chosen and his hosting style, which is really the essence of the work he does. Mr. Lévesque also carries out several other artistic activities at the same time, and his company's revenues are not solely derived from TVA: he takes part in advertising and sometimes writes articles for newspapers. In addition, as mentioned above, Mr. Lévesque fulfills a role that is similar to that of other performers hired by TVA Group and covered by the UDA's certification order.

[236] In light of the foregoing, the Board finds that Mr. Lévesque is an “artist” within the meaning of the SAA and that he performs host duties that are covered by the scope of the UDA’s certification order.

VI. Conclusion

[237] In conclusion, the Board dismisses the union’s application and declares that Mr. Lévesque is covered by the UDA’s certification order.

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

Translation

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