Canada Industrial Relations Board

Conseil canadien des relations industrielles

ANNUAL REPORT

2017–18
2018–19

Encouraging Fair and Productive Workplaces

Canada

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The Board supports fair and productive workplaces by ensuring the right to free collective bargaining and the prompt and constructive resolution of disputes. By doing so, the Board meets the Parliament of Canada's objective of supporting labour and management in the cooperative development of good relations and positive collective bargaining practices.

—Ginette Brazeau, Chairperson, Canada Industrial Relations Board

MESSAGE FROM THE CHAIRPERSON

I am pleased to present the Annual Report for the Canada Industrial Relations Board (the Board or the CIRB). This report covers fiscal years 2017–18 and 2018–19. It also marks the Board's 45th anniversary of its inception.

In 1972, significant amendments to the *Canada Labour Code* (the *Code*) were enacted that laid the foundation for a new era of labour relations in Canada. The new *Code* moved away from the model that had previously been established in the *Industrial Relations and Disputes Investigation Act* and established an independent, full-time, quasi-judicial tribunal responsible for promoting and contributing to effective industrial relations and the constructive settlement of labour disputes. Prior to the introduction of these legislative changes, the Canada Labour Relations Board operated as a branch within the Department of Labour and all Board members were appointed on a part-time basis.

The legislation gave the newly constituted Board considerably broader powers than it previously had in a number of areas. For example, the Board gained jurisdiction over unfair labour practices and could declare strikes and lockouts to be unlawful. It also gave the Board the power to declare a single employer or to inquire into successor rights resulting from a sale of business.

Reflecting on the Board's 45-year history, we have added a timeline of important milestones since 1972. That timeline, as well as the rest of the report, demonstrate how the Board delivers on the objectives and intent set out in the original framework. The appointment of extraordinary members and the dedication of expert staff over time have shaped the Board into a credible, independent and neutral labour relations agency. I believe it is fair to say that today, the Board is recognized as a world-class dispute resolution agency.

In the two years covered in this report, labour relations in the federal private sector have remained relatively stable. This has translated in a declining caseload from the previous period and allowed the Board to keep its pending caseload in check. While the timely appointment of Board members is critical to the Board's success in ensuring it has sufficient adjudicative capacity to promptly address applications and complaints, internal review and monitoring of processes and procedures is also an important component of maintaining or improving our rate of disposition.

We must always keep in mind the reasons labour boards were established in the first place. The objective was to take the workplace disputes away from the courts and to have an independent and expert institution deal with those disputes expeditiously, economically and with less formalism. While we recognize that the issues requiring the Board's intervention may raise complex legal questions, it is our responsibility to find the right balance and deliver efficient and expedient justice for workplace partners.

This is even more critical at this juncture as the Board's mandate is set to expand with the adoption of Bill C-44. Under this legislation, the Board will now be responsible for the adjudication of appeals under Part II of the *Code* (Occupational Health and Safety) and under the *Wage Earner Protection Program Act*. The Board will also mediate and adjudicate individual employment disputes under Part III of the *Code* (Standard Hours, Wages, Vacations and Holidays).

I am very pleased and honoured by the Government's confidence in the Board. We are working closely with our colleagues from the Occupational Health and Safety Tribunal and the Labour Program of Employment and Social Development Canada to ensure a smooth transition. While implementing this new and expanded mandate will present its challenges, I know I have the full support of my colleagues as we work together to effectively and innovatively integrate and implement the new functions to deliver results for federally regulated workplaces.

SECTION 1

WHAT IS THE BOARD?

WHAT IS THE BOARD?

Composition

The *Canada Labour Code* (the *Code*) establishes that the Board is composed of the following decision-makers, to be appointed by the Governor in Council:

- A Chairperson, for a term not exceeding five years
- At least two full-time Vice-Chairpersons, for a term not exceeding five years
- Any other part-time Vice-Chairperson, for a term not exceeding five years
- At most, six full-time Members, equally representing employers and employees, for a term not exceeding three years
- Any other part-time Member, equally representing employers and employees, for a term not exceeding three years
- Any other part-time Member needed to carry out the Board's functions under Part II of the *Code*.

The appointments of two full-time Members and two part-time Vice-Chairpersons in 2017–18 were greatly welcomed and helped stabilize the Board's decision-making capacity.

Full-time Board Members

Ginette Brazeau, Chairperson
(Term ending December 27, 2019)

Louise Fecteau, Vice-Chairperson
(Term ending November 30, 2020)

Allison Smith, Vice-Chairperson
(Term ending January 4, 2020)

Annie G. Berthiaume, Vice-Chairperson
(Term ending January 25, 2020)

Norman Rivard, Member
(Term ending December 21, 2017)

André Lecavalier, Member
(Term ending December 17, 2018)

Richard Brabander, Member
(Term ending December 20, 2020)

Gaétan Ménard, Member
(Term ending December 13, 2020)

Thomas Brady, Member
(Term ending May 28, 2021)

Lisa Addario, Member
(Term ending June 18, 2021)

Daniel Thimineur, Member
(Term ending January 28, 2021)

Part-time Members

Lynne Poirier, Vice-Chairperson
(Term ending November 28, 2020)

Paul Love, Vice-Chairperson
(Term ending November 30, 2020)

Barbara Mittleman, Member
(Term ending December 20, 2020)

Paul Moist, Member
(Term ending December 20, 2020)

Our Jurisdiction

The CIRB is an independent, representational, quasi-judicial tribunal responsible for the interpretation and application of Part I (Industrial Relations) and certain provisions of Part II (Occupational Health and Safety) of the *Code*. Part I of the *Code* establishes the framework for collective bargaining, the acquisition and termination of bargaining rights, unfair labour practices and protection of the public interest in the event of work stoppages affecting essential services.

The CIRB has jurisdiction in all provinces and territories with respect to federal works, undertakings or businesses in the following sectors:

- Broadcasting (radio and television)
- Chartered banks
- Postal services
- Airports and air transportation
- Marine shipping and navigation
- Canals, pipelines, tunnels and bridges (crossing provincial borders)
- Railways and road transportation that involves the crossing of a provincial or international border
- Telecommunications
- Grain handling and uranium mining and processing
- Most public and private sector activities in the Yukon, Nunavut and the Northwest Territories
- Some First Nations undertakings
- Federal Crown corporations (for example, the national museums)

The federal jurisdiction covers some 900,000 employees and their employers (12,000), and includes enterprises that have a significant economic, social and cultural impact on Canadians from coast to coast. The variety of activities conducted in the federally regulated private sector, as well as its geographical scope and national significance, contribute to the uniqueness of the federal jurisdiction and the role of the CIRB.

Since 2013, the Board is responsible for the interpretation and administration of Part II (Professional Relations) of the *Status of the Artist Act*, which, in addition to broadcasters and Crown Corporations, applies to federal government departments and agencies.

Our History

Fourty-five years have passed since the inception of the Board

1968

Task Force led by H.D. Woods issues The Report of Task Force on Labour Relations and recommends the establishment of a full-time, independent labour board.

1972

The Canada Labour Relations Board (CLRB) is established.

1973

- Marc Lapointe is appointed Chairperson of the CLRB.
- The CLRB's first decision, *Reimer Express Lines Limited et al.* (1973), 1 di 12; and 74 CLLC 16,093 (CLRB no. 1), authored by Marc Lapointe, is issued.

1989

J.F.W. Weatherill is appointed Chairperson of the CLRB on May 1, 1989.

1998

J. Paul Lordon is appointed Chairperson of the CLRB on March 16, 1998.

1999

On January 1, 1999, Parliament establishes the Canada Industrial Relations Board (CIRB). J. Paul Lordon is the first Chairperson of the CIRB.

2004

Warren R. Edmondson is appointed Chairperson of the CIRB on January 1, 2004.

2008

Elizabeth MacPherson is appointed Chairperson of the CIRB on January 1, 2008.

2013

On April 1, 2013, the CIRB becomes responsible for the *Status of the Artist Act*, Part II.

2014

- Ginette Brazeau is appointed Chairperson of the CIRB on December 28, 2014.
- On November 1, 2014, the Administrative Tribunals Support Service of Canada is established.

SECTION 2

WHAT DOES THE BOARD DO?

WHAT DOES THE BOARD DO?

The Board fulfills a vital role in recognizing and protecting the rights of employees, trade unions and employers. In accordance with the policy set forth in the *Canada Labour Code*, the Board promotes the well-being of Canadian workers, trade unions and employers through the encouragement of free collective bargaining and the constructive settlement of disputes.

The Board undertakes a wide variety of industrial relations activities in matters under its jurisdiction. More specifically, it:

- grants, modifies or terminates collective bargaining rights;
- investigates, mediates and adjudicates complaints of unfair labour practice;
- issues cease and desist orders in cases of unlawful strikes and lockouts;
- renders decisions on jurisdictional issues;
- deals with the complex labour relations implications of corporate mergers or acquisitions; and
- determines the level of services that must be maintained during a legal work stoppage.

The Board engages in these activities with a firm commitment to process, hear and determine matters fairly, expeditiously and economically. Before adjudication, the Board actively works to help parties resolve their disputes through mediation or alternative dispute resolution.

Outreach

The Board supports the collective efforts of unions and employer organizations to develop good relations and pursue constructive dispute resolution practices. As such, the Board actively participates in outreach activities, both nationally and internationally. These outreach efforts allow the Board to learn about the needs of employers, workers and the union organizations that represent them as well as develop and maintain exemplary practices in its service delivery. Some of the Board's outreach activities are further described here.

DURING THE FISCAL YEAR

The Board issued:

2017–18	2018–19
● **169 letter decisions**, **115 orders** and **22 Reasons for decision**.	● **162 letter decisions**, **126 orders** and **27 Reasons for decision**.
● **37% of matters** were settled **without** requiring a decision by the Board.	● **38% of matters** were settled **without** requiring a decision by the Board.
● **12 certifications were renewed** under the *Status of the Artist Act.*	● **5 certifications were renewed** under the *Status of the Artist Act.*

The CIRB's Client Consultation Committee

The Board maintains dialogue with its clients through the Client Consultation Committee (the Committee) to strengthen linkages and obtain feedback from its client communities. The Committee provides advice and recommendations to the Board Chairperson on ways in which the Board can best meet the needs of its clients.

The Committee is composed of the Chairperson, the Board's Executive Director and General Counsel, and representatives selected by the Board's major client groups, including:

- Federally Regulated Employers in Transportation and Communication (FETCO)
- Canadian Labour Congress (CLC)
- Confédération des syndicats nationaux (CSN)
- Canadian Association of Labour Lawyers (CALL) (representing counsel for the unions)
- Canadian Association of Counsel to Employers (CACE) (representing counsel for the employers).

The Committee convened twice in both 2017–18 and 2018–19. The discussions in 2017–18 addressed updates on legislative developments and Board performance. The discussions in 2018–19 continued to focus on Board performance and also centred on the implementation of legislative changes.

National Industrial Relations Conference

The Board again partnered with the Federal Mediation and Conciliation Service in holding another successful National Industrial Relations Conference in September 2017. The Conference offers a unique program which brings together representatives from labour and management from across Canada to discuss key issues of the day. The topics presented at the Conference focused on the theme "**Collaboration for Stronger Partnerships**" and included discussions regarding compassionate workplaces, advancing human rights in the workplace and success stories of union-management partnerships.

The Conference attracted over 200 delegates from all sectors of the federal jurisdiction. Its success speaks to the dynamic nature of industrial relations in the federal sector and the necessity of maintaining these forums to allow employer and union representatives to forge relationships and build on them to encourage productive and harmonious workplaces.

MARK YOUR CALENDARS!
THE NEXT NATIONAL INDUSTRIAL RELATIONS CONFERENCE WILL BE HELD ON SEPTEMBER 18–20, 2019

Other National and International Forums

The Chairperson of the Board and other Board members also engage in outreach activities on the national and international level.

The Chairperson participates in the annual meeting of chairpersons of labour relations boards in Canada. This meeting provides an opportunity to take stock of the realities in which all labour relations boards in Canada operate and identify trends across the country in order to prepare and implement mechanisms to better react and respond to the needs of the parties that appear before the Board.

The Board also plays a leading role in international organizations whose objective is to support government agencies responsible for promoting dispute resolution based on the shared interests of the parties and harmonious labour relations. The CIRB's active participation in the Association of Labor Relations Agencies and the International Forum of Labour and Employment Dispute Resolution Agencies allows for broader dialogue on the new challenges and dynamics arising in modern workplaces. These forums also provide the Board with invaluable access to best practices that it can emulate and adopt to improve its performance, maximize the use of its resources and increase the impact of its services.

THE BOARD

PARTICIPATES IN THE LASKIN MOOT COURT COMPETITION

AND

THE NATIONAL LABOUR ARBITRATION COMPETITION,

WHICH BOTH PROVIDE LABOUR LAW STUDENTS PRACTICAL LEARNING OPPORTUNITIES

SECTION 3

HOW DID THE BOARD DO?

HOW DID THE BOARD DO?

The Board's Performance

Volume of Matters

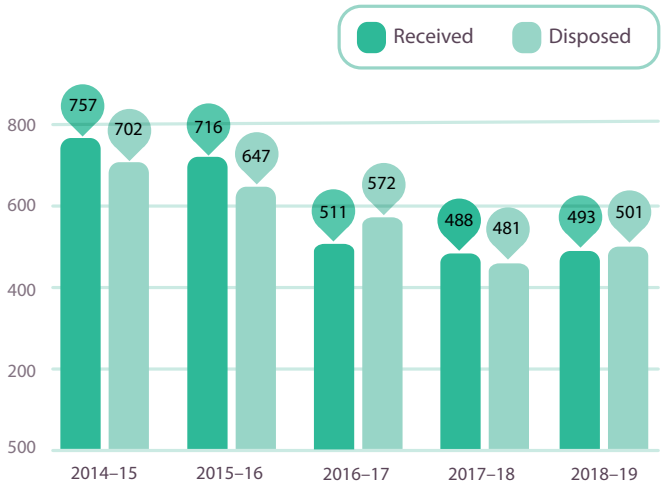
The nature of the demand for the Board's services varies from year to year, based on various factors, such as the economy. The number of applications and complaints received in the last two (2) years decreased significantly from the previous years. A total of 493 applications/complaints were received in 2018–19, a figure similar to the number of files received in 2017–18. These numbers reflect the labour relations stability in Canada over the last two (2) fiscal years.

The number of cases disposed of by the Board in the last two (2) years has decreased when compared to previous years. This is due largely to the complexity of files and a reduced contingent of decision-makers during that period.

NUMBER OF CALLS FOR INFORMATION RECEIVED THROUGH THE BOARD'S 1-800 LINE:

1,909 (2017–18)

1,584 (2018–19)



Number of Incoming Matters by Region

The Board's regional offices in Vancouver (British Columbia), Toronto and the National Capital Region (Ontario), Montréal (Quebec) and Dartmouth (Nova Scotia) shared the workload as illustrated in the chart below.

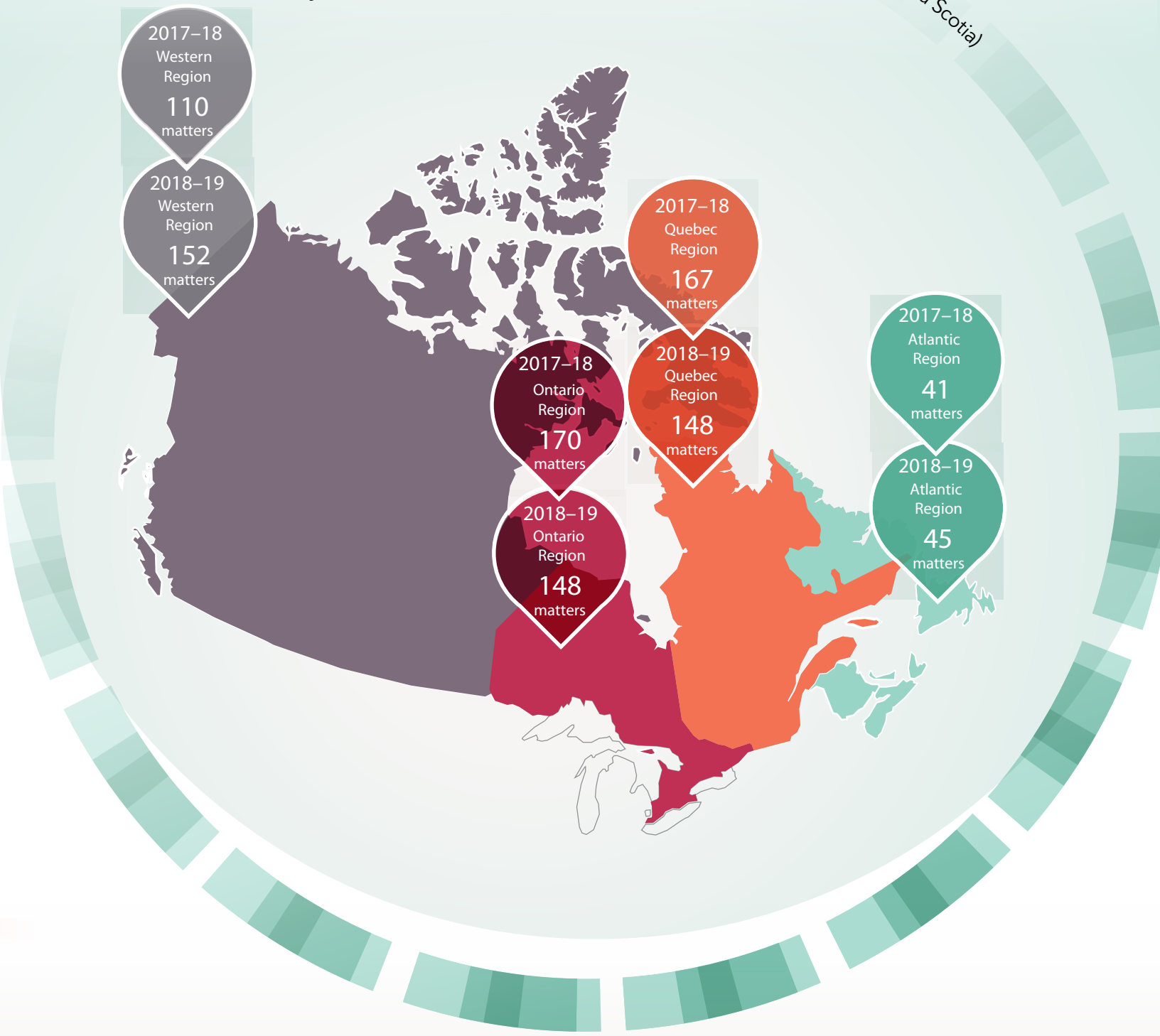
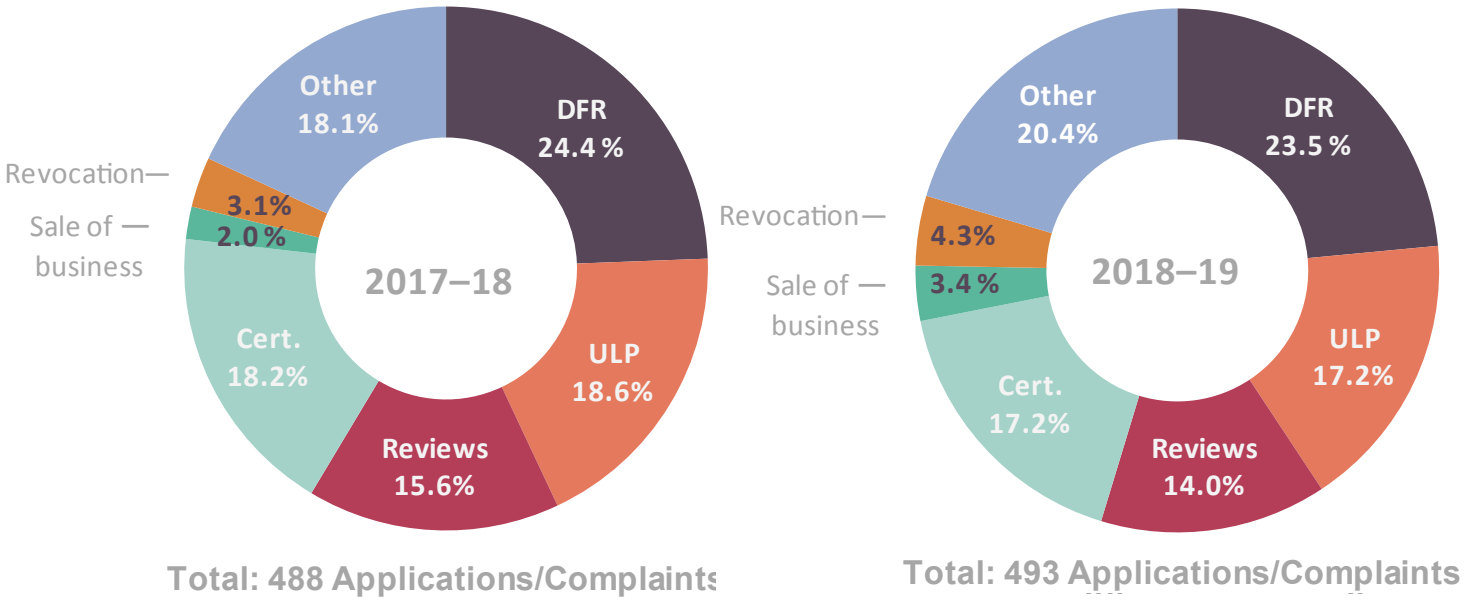


Chart 1–Types of Matters Filed



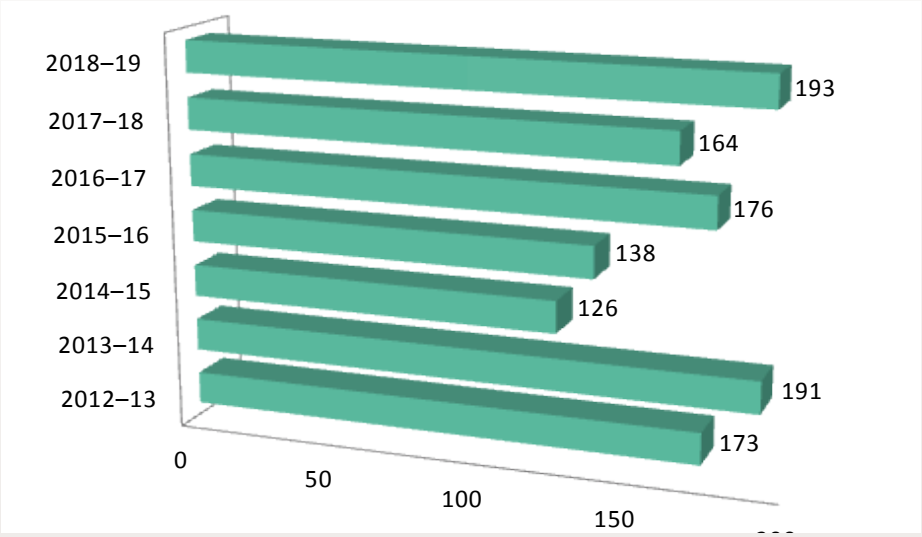
Unfair labour practice (ULP) complaints, including duty of fair representation (DFR) complaints, represent between 40 and 45% of incoming matters in a year. Applications for certification and reviews also represent a significant portion of incoming matters.

Processing Times

The Board is committed to rendering fair and timely decisions to encourage fair and productive workplaces. In 2018–19, the Board's files were processed, on average, within 193 calendar days. This increase in processing time over the previous two (2) years is due to the reduced number of decision-makers during that year. The processing time improved in 2017–18.

Among the types of matters processed in both fiscal years, certification files were processed within the shortest timeframes. This is a result of the application of the *Employees' Voting Rights Act* from June 2015 to June 2017 (under which a vote was mandatory in all applications for certification or revocation). The procedures that the Board put in place impose short and strict time limits for submissions and involve priority processing at all levels internal to the Board.

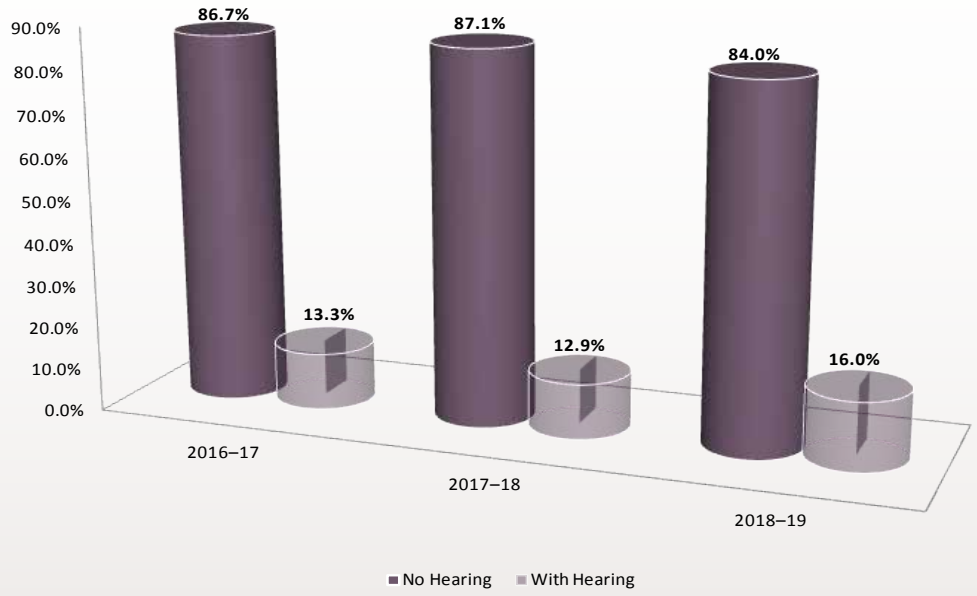
Figure 1–Average Processing Time (Days)



Decision-Making

The Board strives to provide timely and legally sound decisions that are consistent across similar matters in order to establish reliable and clear jurisprudence. The Board issues detailed Reasons for decision in matters of broader national significance and precedential importance. For other matters, the Board issues concise letter decisions which accelerates the decision-making process and brings more expedient solutions to the parties in labour relations matters. The Board also disposes of certain matters by issuing an order that summarizes its decision. One component of the overall processing time is the length of time required by a Board panel to prepare and issue a decision following the completion of the hearing of a matter. A panel may decide a case without a hearing on the basis of written and documentary evidence on file, such as investigation reports and written submissions, or it may schedule an oral hearing to obtain further evidence and arguments in order to decide the matter. Whether there is a hearing, as well as the length of the hearing, will impact the overall processing time.

Figure 2–Matters Decided With and Without Oral Hearing



Section 14.2(2) of the *Canada Labour Code* (the Code) stipulates that a panel must render its decision and give notice of it to the parties within 90 days after the day on which it reserved its decision or within any further period that may be determined by the Chairperson. The Board met this objective, as the average decision-making time during the 2017–18 fiscal year was 77 days; and 88 days in 2018–19. The Board continues to demonstrate commitment and resolve in maintaining its rate of disposition to ensure that it does not allow a backlog of cases to occur.

Applications for Judicial Review

Another measure of the Board's performance, as well as a measure of quality and soundness of its decisions, is the frequency of applications for judicial review of Board decisions, and the percentage of decisions upheld as a result of these reviews. In this respect, the Board continues to perform very well.

During the 2017–18 fiscal year, 8 applications for judicial review were filed to the Federal Court of Appeal (FCA).

During that same period, 11 applications for judicial review were disposed of by the FCA. The majority (8) were dismissed and one was withdrawn. Two (2) judicial review applications were successful and returned to the Board for redetermination.

During the 2018–19 fiscal year, 15 applications for judicial review were filed with the FCA. During the same period, the FCA dealt with 10 applications and dismissed 4. The other matters were withdrawn.

SECTION 4

CHANGES AND CHALLENGES MOVING FORWARD

CHANGES AND CHALLENGES MOVING FORWARD

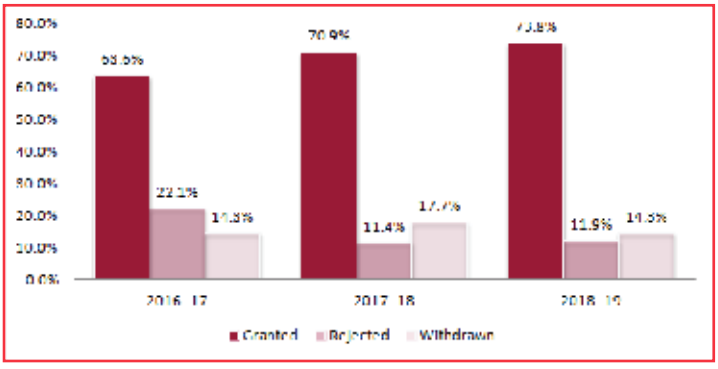
Bill C-4

During the period under review, the Board navigated through several changes relating to certification and revocation applications.

Bill C-4 (*An Act to amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act*) was implemented on June 22, 2017. This Act restored the *Canada Labour Code* (the *Code*) requirements for certification and revocation of certification of bargaining agents as they existed prior to June 16, 2015, when Bill C-525 took effect. Details of these latter amendments were provided in the Board's previous report.

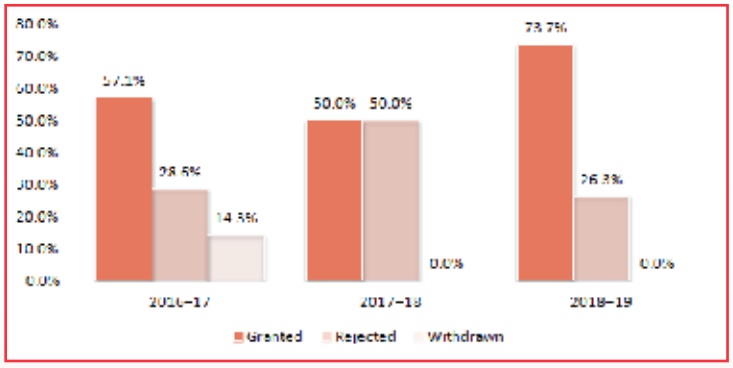
The provisions of Bill C-4 now provide the Board with the discretion to certify a trade union on the basis of the membership evidence submitted with an application for certification if it is satisfied that a majority of the employees in the unit wish to be represented by the applicant union, without the requirement to hold a representation vote.

Figure 3–Applications for Certification



With the changing requirements, the Board was able to adapt and adjust in order to ensure the timely processing of applications during the changes that resulted from these statutory amendments. With the lessons learned under the mandatory vote system, the Board established new procedures and processing schedules aimed at ensuring the expedited processing of these applications. The Board now has in place updated forms and information circulars with detailed instructions to guide applicants through the Board's process. These improvements have led to better outcomes in processing times which in turn reduce or prevent workplace conflicts that may arise during a certification or a revocation process which sometimes result in complaints of unfair labour practice. At the end of fiscal year 2017–18, the average processing time for certification applications was 53 days. After the coming into force of C-4, the average processing time increased to 80 days. This increase reflects the time required to conduct a full investigation of the membership evidence filed with applications. It is also of note that the number of applications for certification that were granted in 2018–19 increased over the previous two years.

Figure 4–Applications for Revocation



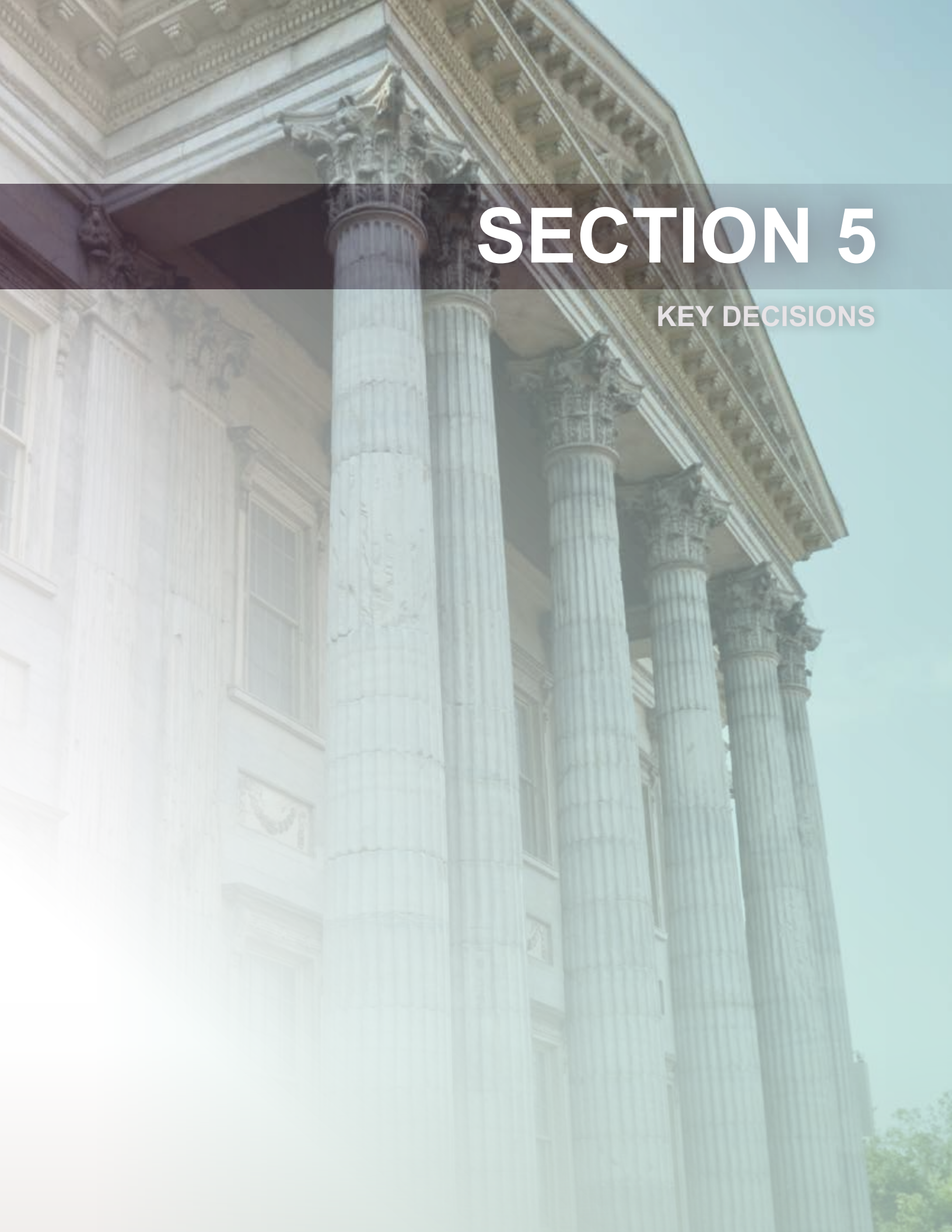
New Areas of Responsibility for the Board

The *Budget Implementation Act, 2017, No. 1,* better known as Bill C-44, received Royal Assent on June 22, 2017. This Act contains provisions that amend the *Canada Labour Code* and transfers additional responsibilities to the Board pursuant to Part II (Occupational Health and Safety) and Part III (Standard Hours, Wages, Vacations and Holidays). In particular, the Act:

- transfers to the Board the powers, duties and functions of the Appeals Officers under Part II of the *Code*;
- transfers to the Board the powers, duties and functions of the adjudicators (unjust dismissals) and referees (wage recovery) under Part III of the *Code*;
- provides a new complaint mechanism for reprisals for exercising rights under Part III where the Board will have jurisdiction to adjudicate (similar to the current complaints of reprisals under Part II);
- creates a new Part IV to the *Code* and establishes an administrative monetary penalty scheme to supplement enforcement under Parts II and III of the *Code*. Under this scheme, a Minister's review of a notice of violation could be appealed to the Board;
- transfers to the Board the powers, duties and functions of adjudicators under the *Wage Earner Protection Program Act* (WEPPA); and
- provides the Chairperson with the power and authority to appoint external adjudicators to determine matters under Parts II and III and WEPPA.

Many of these provisions are subject to regulations being developed and adopted before they are brought into force. Work is currently underway to establish the Board's budget for these new responsibilities and preparations are also required to develop rules of procedures, forms and guidelines in order to ensure a smooth transition of these new responsibilities. It is expected that most provisions will come into force and be implemented starting in mid-2019.

These changes are significant for the Board as they could represent a doubling of its caseload. They will also involve the Board in expanded areas of workplace conflict. However, members of the Board and the employees supporting it are enthusiastic about the challenges and opportunities brought forward with these new responsibilities.



SECTION 5

KEY DECISIONS

KEY DECISIONS

The following is a summary of the key decisions rendered by the Board and appelate bodies in the 2017–18 and 2018–19 fiscal years. They are presented by subject and include a hyperlink to the complete text.

2017–18 Key Decisions

Constitutional Jurisdiction

Conseil des Innus de Pessamit, 2017 CIRB 861

In the context of an application for reconsideration of a decision rendered by the Board concerning three complaints of unfair labour practice alleging that the employer changed the conditions of employment during the term of the collective agreement without negotiating with the union (*Conseil des Innus de Pessamit*, 2016 CIRB 831), the Board considered the decision rendered in *United Food and Commercial Workers, Local 503* v. *Wal-Mart Canada Corp.*, 2014 SCC 45, which, according to the union's claims, creates a paradigm shift that must apply to the freeze provisions set out in section 24(4) of the *Code*, following the new certification issued by the Board. The Board reiterated the findings of the initial panel of the Board on this issue, i.e., that the decision rendered in *Wal-Mart Canada Corp.*, *supra*, did not substantively change the Board's case law in terms of its analysis and application of the provision concerning the freeze on conditions of employment. In that sense, the Board was still required to determine whether there was, in fact, a unilateral change in a condition of employment during the freeze period. However, an employer may still change the conditions of employment during the freeze period insofar as these changes are part of the employer's normal practices or are consistent with actions that a reasonable employer would have taken under the circumstances. The Board therefore affirmed the decision of the initial panel of the Board.

Swissport Canada Handling Inc., 2017 CIRB 863

The Board was seized with two complaints filed by the Teamsters Local 419 against Swissport Canada Handling Inc. The first complaint alleged that Swissport violated its duty to bargain in good faith and the statutory freeze provision and interfered with the union's representation of its members when it hired more than one hundred agency workers and offered pay incentives to employees after notice to bargain was served. The second complaint alleged that the employer breached section 94(2.1) of the *Code* by using replacement workers for the purpose of undermining the union's representational capacity during a lawful strike.

During the course of the hearing into the first complaint, the parties reached a new collective agreement, which was ratified by the majority of employees in the bargaining unit after an 11-week strike. The Board, on its own initiative, asked the parties whether a labour relations purpose would be served by proceeding with the first complaint.

At the outset, the Board emphasized that, as master of its own proceedings, it has the authority to raise, on its own motion, the question of whether a labour relations purpose would be served by proceeding with a complaint in light of a change in circumstances. The Board then examined two issues: first, whether there was still a live controversy between the parties given that a collective agreement had been concluded, and second, whether a labour relations purpose would be served by hearing and determining the complaint.

First, the Board noted that the conclusion of a collective agreement does not automatically render a complaint of bad faith bargaining moot. However, in this case, after carefully reviewing the nature of each of the union's allegations, the Board found that there was no longer a live controversy with respect to the underlying issues which led

to the first complaint because the collective agreement reached by the parties addressed these key issues. Indeed, the collective agreement provided higher rates of pay for ramp employees and allowed the parties to conclude mid-term contracts. In addition, the parties' return-to-work protocol specifically stipulated that the employer would make every best effort to eliminate the services of agency/replacement workers within 60 days following ratification and acknowledged that these workers may be hired into the bargaining unit.

Second, the Board turned to the question of whether a labour relations purpose would be served by proceeding with the complaint despite the fact that it was moot. A number of allegations were raised and addressed in this aspect of the decision. In essence, the Board was not persuaded by the arguments advanced by the union on the existence of a labour relations purpose. The Board noted, among other things, that although the employer's actions may have contributed to the length of the strike, the parties were able to find a common ground through a freely negotiated collective agreement. Therefore, the Board was of the view that pursuing the complaint at this stage would serve no labour relations purpose.

The union had argued that the complaint was not moot because it was still requesting a remedy which included an order "that the employer concede that the collective agreement between the parties shall contain a provision prohibiting the employer from contracting out bargaining unit work." The Board dismissed the union's argument. It indicated that maintaining a request for a remedy cannot, in and of itself, serve to create live controversy when the complaint has become moot. In the Board's view, the remedy requested by the union would have the effect of imposing a new term in the collective agreement, which had just been concluded between the parties through the process of free collective bargaining. Therefore, granting such a remedy would constitute a significant intrusion into the parties' freely negotiated collective agreement, in the absence of exceptional and compelling circumstances.

In the circumstances of this case, the Board found that no labour relations purpose would be served by proceeding with the second unfair labour practice complaint, which dealt with the issue of replacement workers, because the outcome of the second complaint was dependent upon the first one.

Lutchman, 2018 CIRB 865

The Board was called upon to interpret section 39 of the *Canada Industrial Relations Regulations, 2012* (the *Regulations*), in the context of an application for revocation that was filed less than two months after an initial application for revocation was dismissed. Both applications concerned a group of employees, represented by the Teamsters, assigned to the ground handling services of Swissport Canada Handling Inc. at the Montréal international airports. The Board dismissed the initial application for revocation because it had not been filed during the open period and because the applicant had not provided the individual employee statements as required by the *Regulations*. The second application was filed by another employee in the bargaining unit.

An initial reading of the French version of section 39 of the *Regulations* seems to suggest that the waiting period only applies to employees whose previous application for revocation was rejected, while the English version has a much broader scope. The union invited the Board to apply the English version of the *Regulations*, claiming that it better reflected the intention of Parliament.

Based on the rules of bilingual interpretation and the objective of the waiting period provided in the *Regulations*, the Board concluded that the intention of section 39 of the *Regulations* was to impose a waiting period of six months on any employee of the unit who filed a new application for revocation after the date on which a previous application for revocation was rejected. According to the Board, this interpretation better reflects the objective of section 39, which is to ensure a period of stability and industrial peace, in order to allow the existing union to negotiate a collective agreement without having to deal with repeated voting within the unit that it represents.

However, in the circumstances of this case, the Board exercised its discretion under section 46 of

the *Regulations* to shorten the six-month waiting period in order to deal with the application for revocation. The Board weighed the objective of the waiting period and the objective of the open periods provided in the *Code*. An open period consists of a very specific period during which employees can make their voices heard and signal their desire to no longer be represented by a union. Given the fact that the Board did not contemplate the merits of the initial application for revocation and therefore did not assess the wishes of the employees, the Board deemed that imposing the six-month waiting period under the circumstances would have the effect of preventing the employees from exercising their right to choose whether or not they wanted to be represented by the union during the open period, which is not the objective of imposing a waiting period.

After assessing and rejecting the other grounds raised by the union concerning evidence in support of the application for revocation and allegations of employer influence, the Board decided to order that a representation vote be held.

Admissibility of Surreptitiously Recorded Evidence

Valenti, 2018 CIRB 866

This case concerned an application for reconsideration of a decision that dismissed a duty of fair representation complaint against the Canadian Union of Postal Workers. The Federal Court of Appeal referred the case to the Board after finding that the reconsideration decision had not taken excerpts of audio transcripts of meetings between the applicant and the union into account. The Court therefore ordered a review of the decision by a different composition of the Board.

Following the instructions of the Court, the Board considered the application for reconsideration and reviewed the case file of the initial complaint concerning the union's duty of fair representation, in order to take cognizance of the recordings provided by the applicant. Indeed, these recordings were not part of the reconsideration file. In the initial file, the applicant had filed audio recordings of two meetings between himself and union representatives into evidence. These recordings had been made without the knowledge of the union but the union did not object to the filing of this evidence in the context of this duty of fair representation complaint.

In the context of the reconsideration, the Board took the opportunity to reiterate its policy on the admissibility of audio recordings. It recalled that it was not its usual practice to accept this type of audio evidence in the context of its proceedings. The Board indicated that the considerations set out in *D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147) are all the more important today, given the technological advances which now make it much easier to record anyone without their knowledge.

The Board set out the key factors that it would take into consideration before accepting audio evidence recorded without the knowledge of other people present. These factors include the burden of proof that must be satisfied; the negative impact of the recordings on the labour relations climate between the parties; the reliability of the audio evidence; the ability of the parties to have witnesses heard, thereby allowing for cross-examinations; the need to ensure a fair process and the need to ensure the disclosure of all pieces of evidence, thereby facilitating a quick resolution of the matter.

In terms of the procedure, before accepting an audio recording, the Board will require the party trying to file this evidence to disclose it to the parties and to the Board as soon as possible. Moreover, the party in question must demonstrate that it could not obtain this evidence in any other way and that the probative value is such that it supersedes any negative or prejudicial impact on the handling of the case or on the relationship between the parties. The Board noted that it would be more inclined to accept this type of evidence when the parties concerned do not object to the admissibility of the evidence.

In this case, the Board listened to the audio recordings and determined that these pieces of evidence did not provide any new information that would have the effect of changing the decision of the original panel of the Board.

In his application for reconsideration, the applicant raised an error of fact as well as an error of law concerning the analysis of the original panel of

the Board, relating to a legal opinion obtained by the union. Indeed, the applicant claimed, on the one hand, that the date of the legal opinion was incorrect in the initial decision and, on the other hand that the content of the verbal opinion differed from the written opinion. The Board found that the error made with respect to the date did not change the analysis of the merits. With respect to the argument concerning the content of the opinion, the Board indicated that the reconsideration process was not the time to reiterate or supplement arguments in order to obtain a favourable decision. Consequently, the Board was not convinced that there were grounds to justify reconsideration of the initial decision.

Procedural Matters

Laurentian Bank of Canada, 2018 CIRB 869

The Board was required to render a decision on the union's objection to the admission of evidence filed in the context of the examination-in-chief of a witness. The objection concerned the admissibility into evidence of communications between a witness and counsel for the applicant at the time of the application for revocation, in the context of preparing the case files. The Board had to determine whether these communications were protected by litigation privilege or solicitor-client privilege. The Board reiterated that it was the master of its own procedure with respect to the rules of evidence, specifying that it may sometimes play a more interventionist role than the common law courts. Echoing the relevant case law of the Supreme Court of Canada, the Board affirmed that litigation privilege is intended to protect communications between counsel and third parties with the objective of creating a zone of confidentiality while also ensuring the effectiveness of the adversarial process and allowing the parties involved in a dispute to prepare their case privately, without interference from the opposing party. In that respect, it is not intended to protect a lawyer-client relationship like the solicitor-client privilege. The Board determined that the primary objective of the communications between the witness and counsel for the applicant was to prepare for the case. Consequently, litigation privilege applied and created immunity from disclosure for all documents and all verbal communications that the witness may have had with counsel for the primary purpose of preparing for the case. The Board indicated that the union did not provide any evidence to demonstrate any of the applicable exceptions to privilege, i.e., reprehensible conduct, abuse of process or waiver of privilege.

Federal Court of Appeal Decision

Conseil de la Nation Innu Matimekush-Lac John v. *Association of employees of Northern Quebec (CSQ)*, 2017 FCA 212

The Federal Court of Appeal (FCA) dismissed the application for judicial review filed by the Innu Nation of Matimekush-Lac John Band Council (the employer), which challenged the certification granted by the Board to the Association of employees of Northern Quebec (CSQ) (the union), for the purpose of representing a bargaining unit comprising teachers working at a school located on an Indigenous reserve, on the grounds that the Board did not have the constitutional jurisdiction to do so.

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In the context of this application for judicial review, the employer challenged the certification granted to the union by the Board concerning a bargaining unit comprising teachers at the Kanatamat Tshitipenitamunu school (the KT school), located on the territory of the Innu Nation of Matimekush-Lac John. The employer argued that the union did not succeed in rebutting the presumption of provincial jurisdiction over labour relations.

The employer and the union argued that the correctness standard should be applied, as they were of the opinion that the issue in dispute involved the division of powers. For the FCA, the issue in dispute was not a genuine constitutional issue; instead, the issue to determine was whether the KT school was a federal undertaking governed by the *Code*. This constitutional analysis was therefore based on severable findings of fact for which the FCA was required to show judicial deference.

The FCA, like the Board, based its analysis on the principles reiterated in *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45; [2010] 2 S.C.R. 696. According to the first principle, federal

jurisdiction in matters related to labour relations is an exception and must be narrowly interpreted. In order to determine whether labour relations fall within the federal exception, a two-step inquiry must be conducted: the first step is to apply the functional test; then, if the analysis of the first test is inconclusive, the second step is to apply the core test. The FCA recalled that the functional test would require an inquiry into the nature, habitual activities and daily operations of the entity in question.

Based on an application of the functional test, the Board concluded that the education services provided by the employer constituted a governance activity which fell under federal jurisdiction.

For its part, the FCA analyzed the background to the establishment of the KT school. It noted that the school had been established by the employer strictly for Indigenous students, by occupying the area that had been left open by the Minister of Indian and Northern Affairs Canada, who had the power to establish schools under the *Indian Act*. The FCA also noted that the employer was actually the teachers' employer as it signed their employment contracts directly and managed their day-to-day schedules.

The FCA noted that the employer had chosen to adopt the school curriculum of Quebec's Ministry of Education and Higher Education while also adding an Indigenous component, thereby allowing students to obtain a permanent code issued by the Ministry. Lastly, even though the employer, the Government of Quebec and the Government of Canada had signed an agreement in order to support academic success, the FCA stressed that this agreement should not lead to the conclusion that there was a delegation of federal jurisdiction with regard to education on Indigenous reserves in favour of the Government of Quebec.

The FCA then reviewed the jurisprudence cited by the parties, while emphasizing that an analysis based on the functional test was first and foremost a fact-based exercise which required a case-specific analysis.

The FCA noted that in this case, the establishment of a school on a reserve "derives from federal jurisdiction over Indians." Based on the decision rendered in *Attorney General of Canada* v. *St. Hubert Base Teachers' Association*, [1983] 1 S.C.R. 498, the FCA concluded that the employer's choice to follow the provincial school curriculum was insufficient to serve as a basis for provincial jurisdiction. Even though the KT school voluntarily opted to follow the provincial curriculum, the FCA noted that it was not connected to any school board and was also not considered to be a private school governed by the *Act Respecting Private Education*. Moreover, it was the *Indian Act* which governed the school attendance obligations for Indigenous students living on reserves.

In light of the analysis based on the functional test, the FCA concluded, like the Board, that the school in question fell into the category of a federal work, undertaking or business subject to the *Code*.

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2018–19 Key Decisions

Bargaining Unit Review

Rogers Communications Canada Inc., 2018 CIRB 879

This decision was the redetermination of a section 18 application filed by the Metro Cable T.V. Maintenance and Service Employees' Association (the union) seeking to expand an existing bargaining unit. The matter was remitted to the Board by the Federal Court of Appeal (FCA) on judicial review. The FCA asked the Board to determine two questions: the extent to which, if at all, the amendments made to Division III of the *Code* impacted the union's application; and, whether the union had demonstrated that there was double majority support, having noted the Board's conflicting jurisprudential approaches to the issue.

The Board first described its longstanding policy and procedure for determining bargaining unit reviews as set out in *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198) (*Teleglobe*),—the decision which established the double majority rule. It confirmed the importance of this rule and its underlying principles and policy objective aimed at preventing a union from sweeping employees into an altered unit based on its initial support, without regard for the wishes of those employees to be added. It then took the opportunity to clarify and modernize its guiding principles in this matter and to communicate the manner in which the double majority rule would be applied in the future, with a view to resolving any confusion and conflicting statements and approaches contained in the Board's previous jurisprudence.

The Board, in answering the first question, determined that the *Employees' Voting Rights Act*, which introduced the statutory requirement that a secret ballot vote be held to determine majority support in all instances of certification and revocation applications, had no impact on the expansion application. The legislative amendments did not introduce the mandatory vote requirement into any other Board processes and did not remove the Board's broad discretion to determine the manner by which it would measure union support in other circumstances, including section 18 expansion applications. The Board further rejected the employer's suggestion that the Board was obligated to "read in" Parliament's public policy choice of a mandatory vote into all of its other processes, finding no evidence of legislative intent to explicitly or implicitly remove the Board's discretionary power under any other provision of the *Code*. In the Board's view, if Parliament had intended for the mandatory vote system to apply to all of the Board's processes, including the section 18 process for determining bargaining unit reviews, it could have and would have done so expressly

through additional legislative amendments; however, it did not do so.

In answering the second question, the Board confirmed that the union had demonstrated majority support within the expanded unit. The Board reviewed its case law that applied the double majority test, noting the Board's struggle to apply the methods outlined in *Teleglobe* for demonstrating overall majority support in a practical or meaningful way. It noted the Board's approach stated in *Royal Canadian Mint*, 2003 CIRB 229, whereby the Board would be prepared to accept that a union had continuing support of a majority of its members unless serious questions arose. The Board viewed this as a reasonable approach, maintaining that a union should be entitled to rely on the ongoing effect of its existing certificate to establish majority support of those within the existing unit. There is no labour relations reason to doubt that continued support unless serious questions arise causing it to do so. The Board held that going forward, it may presume continuing majority support, and will not be required to test the level of support within the existing unit without compelling reasons to do so. The Board rejected the employer's suggestion that this gutted the protections that the double majority test put into place and effectively eliminated the second double majority requirement, stating that the Board retains the ability and discretion to test the union's level of overall support where it deems it appropriate.

The Board did, however, eliminate the consent requirement outlined in *Teleglobe*, which required a union to demonstrate that a majority of its members supported the addition of new employees to the unit, noting that it is up to the Board to make any determinations as to the appropriateness of the unit or any addition to a unit.

The Board then applied the double majority test to the application at hand. It confirmed majority support amongst those employees sought to be added, as evidenced by way of membership cards filed (and not by secret ballot vote) and presumed the ongoing majority support of the union's existing bargaining unit members on the basis that it had no reason to doubt that continuing support. Considering the situation as a whole, the Board was satisfied that the union enjoyed majority support within the overall expanded unit and had thus demonstrated it satisfied the requirements for double majority support. It granted the application to expand the existing unit.

Remedial Certification

669779 Ontario Limited O/A CSA Transportation, 2018 CIRB 882

The Board granted an unfair labour practice complaint (ULP) filed by Teamsters Local Union No. 31 (the union) alleging that 669779 Ontario Limited O/A CSA Transportation (the employer) had violated sections 94(1)(a), 94(3)(a) and 96 of the *Code* by terminating the employment of three key union supporters over a period of less than a week during the organizing campaign. In parallel, an application for certification pursuant to section 24 of the *Code* was also filed by the union.

After examining each of the terminations individually, the Board found a pattern to the employer's conduct. The coincidence in timing of all three terminations was persuasive in establishing the existence of anti-union animus. All three terminations took place within one week, which happened to be the culminating week of the union's drive, before the filing of the certification application. The three individuals who had been terminated happened to be the three main organizers and supporters who had been actively speaking with employees about unionization and soliciting memberships during that time. The terminations all came about quite suddenly and in relation to an incident or conduct that appears to have taken on somewhat exaggerated significance. In all three cases, the actual alleged misconduct was not clearly established by the employer to have occurred or to have been contrary to the employer's disciplinary practices.

Ultimately, in the Board's view, it was not unreasonable in all of the circumstances to infer that the employer indeed had some knowledge of the union's organizing drive and knowledge of who the main supporters were and that anti-union animus played a part in the employer's decision to terminate the employment of the three key organizers during the organizing drive.

The Board also extensively analyzed the relevancy of outright certification under section 99.1 of the *Code*. It is an extraordinary form of relief available to the Board where it feels the circumstances warrant granting it. As a general principle, such a remedy is designed to deter the employer from engaging in unlawful tactics by denying it the fruits of its misconduct and also to attempt to repair the harm caused by the employer's conduct to the ability of employees to choose freely and voluntarily when deciding whether or not they wish to have union representation. Its purpose is directed at remedying those circumstances where the employer's conduct renders true employee wishes and the level of support for the union impossible to determine by the usual means, that is, by way of membership evidence filed or by way of a representation vote. When the employer's conduct renders those means of verifying employee support ineffective or unreliable, then such a remedy pursuant to section 99.1 may be resorted to, and certification granted, without evidence of majority support. This may only be done, however, if the Board is also able to find that, but for the illegal conduct, the union could reasonably be expected to have majority support.

The two types of employer conduct that may be influential in these types of cases would be: terminating the employment of known union organizers and threatening job security and working conditions, such as loss of benefits, or layoffs, shutdowns and plant closures. However, there are no set criteria and in any given case, the Board must look at the nature and severity of the employer's unlawful conduct and the impact it is likely to have on the employees and their ability to freely express their true wishes in the particular circumstances.

It was during the brief period of legislated mandatory votes that the application for certification was filed. The evidence established that the employees would be attending the vote with the knowledge that if they supported the union, they might suffer the same fate as the union organizers and lose their jobs or otherwise suffer adverse terms and conditions of employment. In the circumstances, the Board concluded that the results of the vote that had been ordered previously would not likely reflect the true wishes of the employees.

The Board was also satisfied on the facts of the case and the sufficiency of the membership evidence filed with the Board in support of its certification application that but for the actions of the employer, the union could reasonably have been expected to have had the support of a majority of the employees in the unit. The conditions for warranting the exercise of the Board's discretion pursuant to section 99.1 of the *Code* were met in the circumstances of this case.

Ultimately, the Board stated that it would prefer that certification be based on the exercise of free choice of employees. However, where the actions of the employer, as in this case, have seriously compromised or interfered with the free choice of the employees by its violations of the *Code*, the Board will certify the union, despite a lack of evidence of majority support, where it is reasonable to expect that the union would otherwise have had majority support.

Delegation of Bargaining Agent's Powers

Innotech Aviation Limited, 2018 CIRB 884

The Board was seized with an unfair labour practice complaint filed by Innotech Aviation Limited (Innotech or the employer) for violation of sections 95(a), 95(b) and 96 of the *Code*, which alleged that Unifor substituted its authority for that of the certified bargaining agent, the Innotech Aviation Limited Employees' Association (the Association), by usurping its prerogatives through two service agreements. According to the employer, the service agreements in question constituted a complete delegation of the Association's powers to Unifor. The employer also argued that Unifor violated the certification provisions of the *Code* by using the Unifor logo and adding "Local 2410 Unifor" (translation) to the Association's name in various communications with its members. Innotech viewed these actions as a tactic used by Unifor to force the employer to bargain collectively with it and to generate confusion among the bargaining unit members concerning the real identity of their bargaining agent. As a result, the Association was in the same position as any other duly certified Unifor local. According to the employer, such a delegation of powers constituted an unfair labour practice to the extent that Unifor became the de facto

certified bargaining agent without having had to follow the process set out in the *Code*, thus circumventing sections 24(2) and 43 of the *Code*.

The Board first reiterated the principle relating to the exclusivity of the bargaining agent's role. Through the certification procedure provided in section 24 of the *Code*, the Board grants a union the exclusive right to bargain and to represent members covered by a bargaining certificate. However, it indicated that the *Code* does not specify that the union must represent the members in its bargaining unit using its own officers. A union has the right to manage its affairs and to choose its representatives for that purpose. In addition, it is well established that the union has the freedom to choose its representatives at the bargaining table and that it can even choose people who are neither in the bargaining unit nor employees of the employer named in the certification order. In that sense, the Board reiterated that unions sometimes use the services of a legal counsel to negotiate collective agreements and for representation in grievance proceedings. Unions may also hire or appoint agents to carry out certain tasks on a regular basis or in special cases through a service agreement or by other means. Such agreements in themselves do not contravene the *Code* on the condition that the agent acts on behalf of the certified bargaining agent rather than on its own behalf. In that sense, the issue of whether a certified bargaining agent has completely given up its exclusive representation authority is a question of fact, which must be determined based on the circumstances of each matter.

Furthermore, the Board considered the purpose of sections 95(a) and 95(b) of the *Code*. It determined that section 95(a) protects the integrity of the collective bargaining process by prohibiting unions that are not the exclusive bargaining agent from seeking to compel an employer to bargain with them. It also determined that section 95(b) of the *Code* protects bargaining units as described by the Board in a certification order by prohibiting a union from concluding or trying to conclude a collective agreement that would infringe on a certification order belonging to another union.

The Board found that the testimony heard confirmed that Unifor had neither sought to compel nor forced the employer to bargain with it so as to claim the bargaining agent's rights. In that sense, it found that the Association had remained autonomous and had retained its control in any decision-making process, despite the service agreements. It specified that it would not intervene in service agreements or regarding their details unless their terms amount to a *Code* violation. The Board also found that there could be no confusion for the employer or the employees regarding Unifor's role, which was to assist the bargaining agent in its obligations, not to replace it.

Intended Scope of Certification Order–SAA

TVA Group Inc., 2018 CIRB 889

The Syndicat des employé(e)s de TVA, Local 687, CUPE (the union) filed an application pursuant to section 18 of the *Code*. It asked the Board to declare that Mr. Denis Lévesque was an employee covered by the scope of the bargaining unit it represents, pursuant to sections 16(p)(i) and (vii). In their respective responses, TVA Group Inc. (TVA) and the Union des artistes (UDA) submitted that the duties of host performed by Mr. Lévesque were instead covered by the scope of the UDA's certification order and that Mr. Lévesque was an independent contractor within the meaning of the *Status of the Artist Act* (SAA).

The Board first examined the duties performed by Mr. Lévesque. It found that Mr. Lévesque was a host and that his involvement in the programs he hosts could not be compared to that of the unionized employees working as journalists.

In light of the evidence suggesting that the position of host has existed since 1970, the history of the union's certification order and the comparison between Mr. Lévesque's duties and those of various hosts who are members of the UDA, the Board also considered that the position of host was not covered by the intended scope of the union's certification order.

The Board then sought to determine whether Mr. Lévesque was an artist within the meaning of the SAA and whether he was covered by the intended scope of the UDA's certification order.

The evidence established that the UDA negotiates scale agreements with producers, which set out all of the working conditions of performers, including hosts who are independent contractors. The UDA and TVA have signed many collective agreements since 1970, and the current collective agreement contains a definition of the position of host that has not changed for almost 50 years. The evidence also established that, for many years, all the hosts who have hosted programs broadcasted on the TVA network have signed contracts with the UDA. In the Board's view, this meant that the position of host falls within the purview of the UDA.

The Board was satisfied that Mr. Lévesque performs or acts in a dramatic work within the meaning of section 6(2)(b) of the SAA 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. It explained that TVA, 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 two programs for TVA. In concluding these employment contracts, Mr. Lévesque became subject to the terms and conditions of the collective agreement between the UDA and TVA as a "performer who is an independent contractor" hired by a producer governed by the SAA.

Moreover, this case raised the issue for the first time before the Board 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*.

The Board was of the opinion that the test for determining whether a worker is an independent contractor should be applied, taking into consideration the reality of artists and fulfilling the purpose of the SAA. Artists may have a relationship of subordination to a certain degree with the producer and be integrated into the business for a given period while maintaining independence with respect to their working conditions and freedom of choice as to how to benefit from their creative talent.

As for Mr. Lévesque specifically, even though his duties as host in his programs have not changed since 2006 in the context of his programs, the Board was of the opinion that his status did indeed change when he severed the employer-employee relationship with TVA and entered into employment contracts with it, pursuant to the scale agreement between the UDA and TVA.

The evidence established that Mr. Lévesque is in a true bargaining relationship with TVA, including in regard to the value of the services and work he provides. Since 2014, he no longer gets paid every two weeks; instead, he bills TVA once a week. He also maintains control over his working conditions by choosing, among other things, when he goes on vacation and whom he works with. Moreover, Mr. Lévesque has great freedom of choice when he performs his duties as host, particularly with respect to the topics chosen and his hosting style, which is the backbone of his work. Mr. Lévesque also performs several other artistic activities at the same time, and his business's revenues are not solely derived from TVA—he takes part in advertising and sometimes writes articles for newspapers. In addition, Mr. Lévesque fulfills a role that is similar to that of other performers hired by TVA and covered by the UDA's certification order.

In light of the above, the Board found that Mr. Lévesque is an "artist" within the meaning of the SAA and that he performs the duties of a host, which are covered by the scope of the UDA's certification order.