Canada Industrial Relations Board Conseil canadien des relations industrielles

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BY FAX

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Dear Sir/Madam:

In the matter of the *Canada Labour Code (Part I–Industrial Relations)* and an application for certification filed pursuant to section 24(1) thereof by the Local Union No. 213 of the International Brotherhood of Electrical Workers, applicant; Telecon Inc., employer. (32433-C)

A panel of the Canada Industrial Relations Board (the Board), composed of Mr. Paul Love, Vice-Chairperson, and Messrs. Richard Brabander and Gaétan Ménard, Members, considered the above-noted application.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

I. Nature of the Application

On January 16, 2018, the Local Union No. 213 of the International Brotherhood of Electrical Workers (the union) filed an application with the Board, pursuant to section 24(1) of the *Code*, to represent all technical field and warehouse employees employed by Telecon Inc. (Telecon or the employer) in British Columbia, excluding office and sales employees, and managers. The proposed bargaining unit consists of 71 employees.

The employer opposes the union's application on two grounds. The employer says that the labour relations of the parties are subject to provincial rather than federal legislation. The employer further argues that if the Board grants the application, it should exclude eight positions described as "Team Leads" from the bargaining unit as they are managers and have access to confidential information.

The membership cards filed by the union with the Board show that the union has the support of the majority of the employees, either in the bargaining unit description proposed by the union or as submitted by the employer.

The Board examined the documents on file, as submitted by the parties, and decided to grant the union's application. In the bottom-line decision *Telecon Inc.*, 2018 CIRB LD 3933, the Board promptly notified the parties of its decision to certify the union to represent the bargaining unit it had proposed (certification order no. 11227-U) and of its intent to provide full written reasons for its decision in due course.

The Board's reasons for granting the application are set out below.

II. Background and Facts

The employer's operations are described in the documents filed with the Board. Telecon was incorporated in 1967, with its headquarters located in Montréal, Quebec.

The employer has approximately 572 employees in western Canada. It is involved in design, infrastructure installation and wireline and wireless connectivity to the telecommunications infrastructure. Its work involves providing, constructing, installing, testing and maintaining services for third parties including wireless towers, small cells and Wi-Fi networks.

More specifically, the employer's connectivity services include providing materials and installing wireline services, such as fibre-to-the-home, including in-suite cabling for residences and businesses as well as constructing, testing, repairing and maintaining wireless towers, small cells and Wi-Fi networks for third parties.

In its submissions filed with the Board, the employer describes its business as:

> ... Canada's leading telecommunications network infrastructure services provider. [The employer] leverage[s] [its] national presence, network of 3,000 professionals, client relationships, and 50-year history to offer industry-leading design, infrastructure and connectivity solutions to telecommunications companies nationwide.

In summary, Telecon designs, builds, installs, services and maintains telecommunications infrastructure, including residential and business connections to wireless and wireline services.

The proposed bargaining unit consists of 71 employees, with the number of employees classified as follows:

- Agent, Warehouse (1);
- Commissioner (1);
- Team Leads (8);
- Technicians, Installation & Repair (57);
- Technicians, Structures Wiring (4).

One of the Team Lead positions is currently vacant.

III. Positions of the Parties
A. Constitutional Arguments
1. The Employer's Argument

The employer argues that the labour relations of the parties are subject to provincial rather than federal legislation. The employer argues that, presumptively, labour relations are not a matter assigned to the federal Parliament but are a matter of provincial competence. It also refers to the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*:

> 91. ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
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> ...
>
> (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> ...
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.
>
> ...

...

13. Property and Civil Rights in the Province.

The employer states that its business is not a federal work, undertaking or business as defined in section 2 of the *Code*. The employer refers to the definition of federal undertaking in section 2 of the *Code* and argues that the *Code* does not apply by virtue of section 4:

> **4** This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

The employer argues that Telecon's activities fall under provincial jurisdiction as they are concentrated in the construction, installation and inspection of telecommunications infrastructure. To support its position, the employer relies on the Supreme Court of Canada's decision in *Construction Montcalm Inc.* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754 (*Construction Montcalm*):

> The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". ...
>
> ...
>
> ... Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.
>
> (pages 770 and 776)

The employer also relies on *Piotrowski* (1986), 67 di 19 (CLRB no. 586):

> After careful analysis of the facts before us we cannot, with respect, accept counsel's characterization of the work as being maintenance. We are of the view that the employer is engaged in the construction industry and the work being done here is reconstruction of a portion of the pipeline. We appreciate the difficulty in distinguishing construction from maintenance as evidenced by the dissenting views of the Supreme Court of Canada in *Northern Telecom, supra.* Each case has to turn on its own facts. Once it has been determined however that a subsidiary operation is part of what is commonly accepted as the construction industry then it is our opinion that provincial competence over labour relations should govern—see *Construction Montcalm Inc.* v. *Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754.
>
> (page 6)

Furthermore, the employer refers to a letter from an inspector working for the Labour Program at Employment and Social Development Canada (formerly known as Labour Canada) dated May 11, 2015. The letter expresses the opinion that the undertaking of Telecon Design Inc. was within provincial rather than federal jurisdiction. It appears that Telecon Design Inc. may be a subsidiary of the employer, but that is not entirely clear from the letter. The letter does not refer

to any facts relating to the undertaking and does not recite any law. It is not a decision of the Board, nor does it appear to be the product of any adjudicative process involving the admission and consideration of evidence.

2. The Union's Argument

The union argues that the employer's undertaking is subject to federal legislation. The union states that the employer operates, constructs and maintains telecommunications infrastructure. The union points to other certifications granted by the Board in which some of the employers perform work almost identical to that of Telecon.

To support its position, the union relies on the analysis of the Federal Court of Appeal (FCA) in *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, 2011 FCA 179, affirming *XL Digital Services Inc., doing business as Dependable HomeTech*, 2010 CIRB 543, at paragraphs 32–85.

B. Should the Team Lead Position Be Included In or Excluded From the Bargaining Unit?
1. The Employer's Argument

The employer argues that the Team Lead positions should be excluded from the bargaining unit as they are not employees within the meaning of the *Code*. It states that the Team Leads are its representatives on a project site and that they are responsible for discipline, hiring and dismissal, observation and evaluation of employees, performance appraisal, assignment of job priorities and work for technicians, and authorization of overtime. They have access to confidential information about other employees.

The employer did not provide job descriptions for the different types of employees. According to the documentation on file, it appears that the Team Leads:

- Screen and conduct interviews of employees and subcontractors;
- Observe and evaluate employees;
- Identify performance issues;
- Investigate substandard performance;
- Implement performance improvement plans;
- Instigate the termination process by making recommendations;
- Determine year-end awards and communicate accolades to employees exceeding performance standards;
- Ensure work is dispatched and scheduled;
- Approve overtime for technicians; and
- Ensure site support and mentoring.

With the exception of granting employees overtime, the Team Leads do not have final responsibility for making decisions about the terms and conditions of employment.

The Team Leads have access to technician's performance improvement plans, attendance reports and letters about performance issues. There is no suggestion in the documents filed that they have access to confidential financial or business information.

The employer states that the Team Leads perform management functions, they have access to confidential information that their overall compensation differs from a technician's compensation. The employer notes that the confidentiality exclusion should apply to the Team Leads and that they should be excluded from the bargaining unit.

The employer relies on the following authorities in support of its argument: *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91); *Island Telephone Company Limited* (1990), 81 di 126 (CLRB no. 811); *Alberta Wheat Pool*, 1999 CIRB 34; and *Greater Moncton Airport Authority Inc.*, 1999 CIRB 20.

2. The Union's Argument

The union states that the burden rests with the employer to show that the Team Lead positions should be excluded from the bargaining unit. This type of exception is narrowly interpreted by the Board in *G4S Secure Solutions (Canada) Ltd.*, 2017 CIRB 850, at paragraphs 45–46; *Garda Security Screening Inc.*, 2017 CIRB 856, at paragraphs 28–29 and 45; and *Freedom Mobile Inc.*, 2017 CIRB 857, at paragraph 36.

The union submits that there is a distinction between supervisory work and work that is managerial for the purpose of exclusion under the *Code*. The union relies on *Freedom Mobile Inc.*, *supra*, at paragraphs 38–41. The union argues the employer supplied no evidence such as job descriptions, correspondence and documentation other than three organizational charts and a promotional brochure.

In particular, the union states that the Team Leads are paid hourly, with no additional compensation, and that they are expected to perform technician duties as required. Team Leads do not make decisions regarding hiring or dismissal and they do not exercise any independent decision-making authority. Employees are dispatched by Dispatch and Resource Planning. While the Team Leads may participate in performance management and discipline, they identify issues and address them through coaching—they have no authority to impose discipline. On this subject, the union relies on *Garda Security Screening Inc.*, *supra*, at paragraphs 38–41.

The union argues that the employer relies on cases such as *Island Telephone Company Limited*, *supra*, which predate significant *Canadian Charter of Rights and Freedoms* developments. The Team Leads perform none of the management tasks as set out in that case.

While the Team Leads may have brief access to the personal information of technicians, there is no persuasive evidence to demonstrate that they are involved in confidential matters about labour relations. In this regard, the union relies on *Freedom Mobile Inc.*, *supra*, which states:

> [47] Further, the Board will deny employee status within the meaning of the *Code*, where individuals, as a regular part of their duties, have access to or are involved with sensitive information the disclosure of which would adversely affect the employer. The information at issue in this context must be specific to industrial relations. In this case, no persuasive or indeed any evidence was submitted to justify a conclusion that the Team Lead – RTA is involved in confidential matters related to labour relations.

The union submits that some access to confidential information about other employees will not preclude including Team Leads within the bargaining unit (see *Garda Security Screening Inc.*, *supra*, at paragraphs 14, and 47–48). It particularly relies on paragraph 48 of *Garda Security Screening Inc.*, *supra*, which refers to the following paragraph of *Cominco Ltd.* (1980), 40 di 75; [1980] 3 Can LRBR 105; and 80 CLLC 16,045 (CLRB no. 240):

> ... To say because a person is the sole supervisor present at a time or place creates a conflict because he must be the "management presence" is to think of conflicting loyalties in an outdated framework. Many employees in innumerable circumstances act alone and perform responsible tasks. The fact they also engage in collective bargaining has no impact on their loyalty to their employer or dedication to their job. Supervision by its nature has always required persons to act as the final on-the-site authority.
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> (pages 90; 118; and 725)

IV. Analysis and Decision

A. Constitutional Issue

According to the case law, most labour relations in Canada are subject to provincial jurisdiction unless the employer's business is a "federal work, undertaking or business," which is defined in section 2 of the *Code* as follows:

> **2** In this Act,
>
> ***federal work, undertaking or business*** means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> **(a)** a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,
>
> **(b)** a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,
>
> ...
>
> **(h)** a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,
>
> **(i)** a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces.

That definition is non-exclusive and it requires the Board to analyze the nature of the employer's business.

In assessing whether a business is a federal work, undertaking or business, the Board typically applies the functional approach set out in *Northern Telecom* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115:

> In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, *i.e.*, the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.
>
> (page 133)

Furthermore, when performing this assessment, as stated in *Northern Telecom* v. *Communications Workers of Canada*, *supra*, it is important to:

> ... look to continuity and regularity of the connection and not to be influenced by exceptional or casual factors. Mere involvement of the employees in the federal work or undertaking does not automatically import federal jurisdiction. Certainly, as one moves away from direct involvement in the operation of the work or undertaking at the core, the demand for greater interdependence becomes more critical.
>
> (page 135)

The nature of Telecon's work is designing, building, maintaining and connecting telecommunications infrastructure, including connections from a home or business to the communications system.

The daily operations and normal activities of Telecon go well beyond those of a local work or undertaking. The Board distinguishes the undertaking at issue in this case from the undertaking of the employer in *Construction Montcalm*, *supra*—a construction company whose construction business did not deal solely with the construction of airports.

Telecon is not simply a construction company, though it does engage in construction activities. Its daily and normal activities involve supplying a telecommunications system, connecting residential and non-residential customers to the telecommunications system and building and maintaining that system.

The existing case law supports a finding that Telecon is engaged in a federal undertaking. In *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*, affirming, *XL Digital Services Inc., doing business as Dependable HomeTech*, *supra*, the FCA upheld the Board's decision that installing cable and related equipment to residential customers' equipment to provide cable, telephone and internet services, as well as customer service work related to technical problems, is work related to the operation of a federal undertaking as defined in section 2 of the *Code*. The FCA also upheld the Board's decision that equipment connecting customers to the "headend of the cable was a vital link to the network and part of the federal undertaking.

In *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*, the FCA stated the following:

> [19] ... While the courts have not addressed the precise point that arises in this case, they have consistently refused to divide up the components of a cable network in order to identify parts that have no extra-provincial reach. Thus, in *Public Service Board* v. *Dionne*, [1978] 2 S.C.R. 191, 197–8, the Court stated:
>
> > ... [W]here television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide.
> >
> > ... [T]he very technology employed by the cable distribution enterprises in the present case establishes clearly their reliance on television signals and on **their ability to receive and transmit such signals to their subscribers**. In short, they rely on broadcasting stations, and **their operations are merely a link in a chain which extends to subscribers who receive the programmes through their private receiving sets**. [Emphasis added]

In *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*, the FCA applied the test set out in *Northern Telecom* v. *Communications Workers of Canada*, *supra*, and held that:

> [29] Nearly all the facts point to the conclusion that HomeTech's employees were highly integrated into the federal undertaking. In particular, HomeTech's operations "as a going concern" consisted of connecting Rogers' customers to the network and to providing related services. ...

The Board finds the analysis in *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*, compelling and determinative of the employer's constitutional objection. The purpose of an internet network, whether hardwired or wireless, is to ensure that a customer can connect and use the system, transmitting or receiving electronic information from intraprovincial, interprovincial and international sources. The bargaining unit members perform work that is vital and integral to this federal undertaking. While an employer can have multiple undertakings, it makes no constitutional or labour relations sense to divide up this telecommunications undertaking. To use the words of the FCA in *XL Digital Services Inc.* v. *Communications, Energy and Paperworkers Union of Canada*, *supra*, at paragraph 31, "[e]ach part of the network is essential to the transmission of signals to customers."

In making this decision about whether Telecon is a federal undertaking, the Board places no reliance on the inspector's letter about Telecon Design Inc. It is uncertain why the inspector wrote the letter, but clearly, it is not a decision of the Board. The letter does not describe the nature of the undertaking of Telecon Design Inc. It does not refer to facts and it provides limited analysis. The inspector's letter is not a final decision between the employer and the union, and it has no binding or persuasive value. Lastly, it does not meet the formal requirements for an issue estoppel as set out in *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44; [2001] 2 S.C.R. 460, at paragraph 25, where it was stated that the same question must have been finally decided between the same parties or their privies.

For all of the above reasons, the Board finds that Telecon is a federal undertaking and that the labour relations between the parties are subject to the *Code*.

B. Appropriate Bargaining Unit

When considering an application for certification, the Board has a broad discretion under section 27 of the *Code* to ensure that the bargaining unit is appropriate for collective bargaining:

> **27 (1)** Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
>
> **(2)** In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.
>
> ...
>
> **(5)** Where a trade union applies for certification as the bargaining agent for a unit comprised of or including employees whose duties include the supervision of other employees, the Board may, subject to subsection (2), determine that the unit proposed in the application is appropriate for collective bargaining.

The parties differ on whether Team Lead positions should be included in or excluded from the bargaining unit. The employer argues that the Team Leads should be excluded as they perform management functions and are employed in a confidential capacity in matters relating to labour relations.

Section 3 of the *Code* defines an employee as follows:

> **3** ***employee*** means any person employed by an employer and includes a dependent contractor and a private constable, but does not include a person who performs management functions or is employed in a confidential capacity in matters relating to industrial relations.

The issue of whether a Team Lead is a manager or is employed in a confidential capacity in labour relations matters is a question of fact to be assessed on a case-by-case basis. In this case, both parties have identified case law applicable to the analysis.

The labour relations purpose behind the managerial exclusion was highlighted by the Board recently in *Garda Security Screening Inc.*, *supra*, at paragraphs 44–46. The focus is on whether the employee would be placed in a conflict of interest position, owing incompatible duties to both the union and the employer.

The Board has a narrow approach to deciding the exclusion of employees based on a management function. The Board looks beyond the job titles and looks at the actual duties performed by the employees. As outlined in *G4S Secure Solutions (Canada) Ltd.*, *supra*, at paragraph 54, the performance of some supervisory duties does not necessarily create a conflict of interest between the employer and the union such that it is necessary to exclude the employee from the benefits of collective bargaining.

In the present case, the Team Leads work with and alongside technicians. They have a reporting responsibility to management, but they have no independent decision-making powers over hiring, dismissing or assessing the performance of other employees. The Team Leads do not have access to confidential information of the nature required so as to exclude these positions from the bargaining unit in order to protect the position of the employer in collective bargaining or in the administration of a collective agreement.

It is the Board's view that the Team Leads are lead hands and that they should be included in the bargaining unit. There is no clear labour relations reason or benefit for the collective bargaining to exclude the Team Leads from the bargaining unit. The Board has stated on many occasions that lead hands or line supervisors are employees within the meaning of the *Code* and not excluded managers.

The Board's policy is to favour broader-based bargaining units. The Team Leads have similar interests to the technicians in collective bargaining. They are expected to assist the technicians "on the tools." The argument that they may be entitled to different remuneration than a technician does not merit an exclusion from the bargaining unit. It is open to the parties to specify the difference in compensation, if any, in any first and subsequent collective agreement(s).

V. Conclusion

For the reasons contained within, the Board finds that it has the required constitutional jurisdiction to consider this application for certification, that the Team Leads are employees within the meaning of section 3 of the *Code* and should be included in the bargaining unit. It also finds that the union has the majority support of the employees in the bargaining unit, as described in the Board's certification order no. 11227-U issued on February 19, 2018.

This is a unanimous decision of the Board, and it is signed on its behalf by

Paul Love
Vice-Chairperson

c.c.: Ms. Lisa Rotatore (CIRB–Toronto)