

Canada Industrial Relations Board



Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

FAX TRANSMISSION MESSAGE PAR TÉLÉCOPIEUR

Date : April 2, 2012

Total pages (including cover page)

Nombres de pages (incluant la page couverture): 13

**IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL THE OPERATOR AT 613-947-5408
SI VOUS NE RECEVEZ PAS TOUTES LES PAGES, VEUILLEZ TÉLÉPHONER À L'OPÉRATRICE AU 613-947-5408**

This communication, and any files or attachments transmitted with it, is intended only for the use of the individual or entity to which or to whom it is addressed. This communication may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this communication is not the intended recipient, or the employee or agent responsible for delivering the communication to the intended recipient, you are notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender by return email, telephone or fax immediately, and delete this communication and destroy all copies. We thank you in advance for your cooperation.

Cette communication, ainsi que tout fichier ou toute pièce qui y est jointe, est à l'intention du destinataire seulement. Cette communication peut contenir des renseignements protégés, confidentiels et soustraits à la divulgation en vertu de la loi applicable. Si vous n'êtes pas le destinataire, ni la personne ou l'agent responsable de la livraison de ce message au destinataire, soyez avisé que toute distribution ou reproduction de ce document est strictement interdite. Si vous avez reçu ce message par erreur, vous êtes prié d'en aviser immédiatement l'expéditeur par courriel, téléphone ou télécopieur, d'effacer la communication et d'éliminer toute copie. Nous vous remercions de votre collaboration.

Canada

Canada Industrial Relations Board



Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8
Fax/Télécopieur: 613-995-9493

Our File: 29281-C

Document No.: 400162

April 2, 2012

2012 CIRB LD 2767

BY FAX

Cavalluzzo Hayes Shilton McIntyre & Cornish
Barristers & Solicitors
Suite 300
474 Bathurst Street
Toronto, Ontario
M5T 2S6 **416-964-5895**

Attention: Mr. Sean FitzPatrick

McInnes Cooper
Lawyers
Suite 1300
1969 Upper Water St. B3J 3R7
P.O. Box 730, Stn. Central
Halifax, Nova Scotia
B3J 2V1 **902-425-6350**

Attention: Mr. Bradley D.J. Proctor
Deputy Managing Partner

Dear Sirs:

In the matter of the *Canada Labour Code (Part I-Industrial Relations)* and an application for certification filed pursuant to section 24 thereof by the Canadian Media Guild, applicant; Maritime Broadcasting System Limited, employer. (29281-C)

Canada

A panel of the Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*), considered the above-noted application.

Having reviewed the written submissions of the parties, the Board is satisfied that an oral hearing is not required and exercises its discretion pursuant to section 16.1 of the *Code* to determine the matter without an oral hearing.

I-Background

On February 21, 2012, the Canadian Media Guild (the CMG or the union) filed an application, pursuant to section 24 of the *Code*, seeking to represent a unit of employees of Maritime Broadcasting System Limited (MBS or the employer) composed of:

all employees of Maritime Broadcasting System Limited employed in its Maritime News Network operation in the City of Halifax, Nova Scotia.

The employer operates some 25 radio stations in Nova Scotia, New Brunswick and Prince Edward Island. MBS' Maritime News Network is located in Halifax, Nova Scotia and employs two full-time and three part-time news reporters and a manager who reports to the MBS Vice-President, Programming. The employer objects to the inclusion of the Manager - Maritime News Network in the bargaining unit, alleging that the incumbent performs management functions and in the future could be involved in a confidential capacity in matters related to industrial relations. The employer also seeks the exclusion of casuals, freelancers and students from the bargaining unit.

II--Analysis and Decision

A--Manager - Maritime News Network

The parties disagree on whether the Manager - Maritime News Network (sometimes known as the "News Director") performs management functions within the meaning of the *Code*. The Board does not base its decision-making on the title of a position, but on the duties ascribed to the incumbent of the position.

In *Algoma Central Marine, a division of Algoma Central Corporation*, 2010 CIRB 531 (*Algoma 531*), application for judicial review dismissed by the Federal Court of Appeal in *Algoma Central Marine v. Captains and Chiefs Association*, 2011 FCA 94, the Board confirmed its longstanding practice of narrowly interpreting the managerial exclusion contained in the *Code*:

[10] Unlike some provincial labour relations boards, the CLRB and subsequently the CIRB have interpreted the managerial exclusion narrowly. The Board's approach was explained in *Cominco Ltd.* (1980), 40 di 75 (CLRB no. 240). After a lengthy review of the commitments that the Government of Canada has made to freedom of association, including that contained in the Preamble to the *Code*, the Board went on to say:

In this context it is no longer apposite to view the conflict of interest rationale for the managerial exclusion in terms of sworn oaths of membership in unions and unswerving loyalty to the brotherhood of membership. These terms are clearly outdated. The potential conflict of interest to be considered is one between employment responsibilities and the union as an instrument for collective bargaining in a climate where there is legal protection for the individual in his relationship to the union both as bargaining agent and organization. **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.**

The fact that employees influence corporate policy or commit an enterprise to expenditures is equally not grounds for finding a conflict. These are common characteristics of the functions of professionals. They have been given collective bargaining rights. They are also common characteristics of the functions of specialists generally, whether tradesmen, technicians or other groups of employees.

Similarly, **the fact a person is a supervisor and as such directs the work of others, corrects and reprimands where necessary, allocates work among men**

and equipment, evaluates or assesses new and longstanding employees, authorizes overtime when necessary, calls in manpower when needed, trains others, receives training to supervise, selects persons for advancement, authorizes repairs, can halt production when problems arise, schedules holidays and vacations, verifies time worked, authorizes shift changes for individuals, and requisitions supplies when needed does not create the conflict or potential conflict that disentitles him to the freedom to associate. The loyalty and integrity of such a person is not altered by union membership or representation.

(page 90, emphasis added)

[11] In *Cominco Ltd.*, *supra*, the CLRB also remarked on the difference between it and other labour boards in the approach to the determination of management functions:

While at least one provincial Board found masters of vessels not to be employees (*British Columbia Ferry Corporation* [1979] 1 Can LRBR 116 (BCLRB), in the federal jurisdiction, masters of vessels have traditionally been represented by a trade union. As a second example, the weighted value ascribed to the ability to effectively recommend by the Ontario Board (*McIntyre Porcupine Mines Limited* [1975] 2 Can LRBR 234 at pp 241-2, OLRB) is not shared by this Board (see *Vancouver Wharves Ltd.*, *supra*, and *British Columbia Telephone Company*, 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC ¶16,015). But under Part V [now Part I] of the *Canada Labour Code*, the assessment made by the Board in 1974 stands today tested by time and the experience with several certifications issued by the Board:

“There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a basic right which will not be withdrawn from any employee unless there are very serious reasons.” (*Vancouver Wharves Ltd.*, *supra*, pp 52-3; p 167; and pp 966-7).”

(pages 92-93)

In this case, according to the employer, the core functions of the Manager - Maritime News Network consist of:

- overall responsibility for ensuring that news content, both “on-air” and “on-line” is accurate, timely and reflective of the local community;
- coordinating the five news reporters in the Maritime News Network regarding news story sourcing and reporting;
- ensuring reporting is balanced and free from editorial content; and
- ensuring that all reporting does not contain slanderous, libelous, defamatory or plagiarized materials and/or statements.

The employer states that the position is responsible for the supervision of five news reporters. The duties associated with this responsibility include:

- interviewing, recruiting and selecting news reporters;
- assigning work and tracking and reporting hours and attendance;
- scheduling on-air shifts;
- coaching and mentoring news reporters;
- taking appropriate remedial action when errors are identified;
- developing and enforcing news room standards;
- completing performance evaluations and giving performance feedback on a regular, on-going basis;
- approving requests for leave and vacation and ensuring adequate coverage;
- imposing appropriate discipline, up to and including termination of employment, for violation of CRTC regulations or other misconduct.

The organization chart supplied by the employer reveals that the position reports to the Vice-President of Programming. The employer supplied copies of two letters signed by the incumbent of the position, one dealing with the termination of a news reporter in March 2011 and the other imposing a disciplinary suspension on another news reporter in June 2011. The employer also suggests that, should the union be certified to represent the news reporters, the Manager - Maritime News Network would be involved in collective bargaining and would likely be the first level of the grievance procedure.

The dismissal and discipline letters provided by the employer have not convinced the Board that the incumbent of the disputed position exercises independent decision-making authority. The dismissal letter clearly indicates that the decision to terminate the recipient's employment was made collectively ("We have made a business decision...") rather than by the author alone. The union's evidence was that the discipline letter was sent at the express direction of the Vice-President, Programming rather than on the initiative of the Manager - Maritime News Network; this was not denied by the employer. While the employer suggests that the incumbent plays an active role in the

hiring process, it did not refute the three specific examples provided by the union, which indicate that the hiring decisions were made by either the Acting Operations Manager or the Vice-President, Programming.

While the Manager - Maritime News Network clearly has important responsibilities with respect to the quality of the product produced by the news room, and undoubtedly exercises a number of supervisory functions in this regard, the Board cannot find that this position has the necessary degree of independent decision-making authority to warrant a finding that the incumbent performs managerial functions within the meaning of the *Code*. On the basis of the evidence supplied by the employer, the Board is of the opinion that the position is that of a first-line supervisor, not a manager within the meaning of the *Code*. The incumbent is thus an employee entitled to exercise the right to collective bargaining protected by the *Code*.

However, the Board's enquiry does not end with a finding that an employee is a supervisor, not a manager. While the Board is entitled to include supervisory employees in a bargaining unit with the employees they supervise (see section 27(5) of the *Code*), in each case the Board must ask itself whether it is appropriate to do so.

In this case, the bargaining unit proposed by the union consists of just six employees: the Manager - Maritime News Network and five news reporters. There is no other obvious bargaining unit within the organization to which the position of Manager - Maritime News Network could belong. Nor does the Board consider it appropriate to create a separate bargaining unit for the one supervisory employee working in this division of the employer's operations. The Board is satisfied that the nature of the incumbent's current supervisory responsibilities are not such as to place her in a conflict of interest with those whom she supervises. Furthermore, the Board is satisfied that, given the nature of the work, the incumbent has a community of interest with the news reporters. Accordingly, the Board finds that it is appropriate to include the position of Manager - Maritime News Network in the bargaining unit.

B-Students

The union agrees to the exclusion of summer students, but not of “students” generally. The employer advises that it hires students for short-term employment from time to time, not necessarily during the summer, and generally as part of an internship or work placement from a broadcasting school or college. It suggests that these students are on site for a very short duration, do not subsequently return to work for MBS, and thus do not have a community of interest with the other employees in the bargaining unit.

The Board agrees that summer students and unpaid interns do not have a community of interest with the regular employees and should be excluded from the bargaining unit.

C-Freelance and Casual Employees

The employer indicates that freelancers are commonly used in all types of media and, in particular, in the radio broadcasting industry, that these individuals are essentially self-employed and should be excluded from the bargaining unit. The union suggests that this employer does not hire freelance employees for the Maritime News Network and, thus, that there is no basis on which to exclude them from the bargaining unit.

As the Board has noted in previous cases involving these parties, true freelance employees are independent contractors and therefore do not meet the definition of “employee” found in the *Code*. The relationship between true freelancers and federally regulated employers, such as MBS, is governed by the *Status of the Artist Act*, S.C. 1992, c.33, and the Board has no authority to include freelancers in a bargaining unit of employees under the *Code*. However, the Board also reminds the parties that so-called “freelancers” who are actually dependent contractors are employees within the meaning of the *Code*, and to the extent that they perform bargaining unit work, such dependent contractors are employees within the scope of the bargaining unit.

The parties are in agreement that MBS does not currently have any casual employees working in the Maritime News Network. Neither party provided evidence of any occasions in the past in which casual employees were employed by the Maritime News Network. Given the nature of this industry, and in order to remove any temptation to institute the use of casual workers to perform bargaining unit work, the Board declines to exclude casual workers from the scope of the bargaining unit at this time.

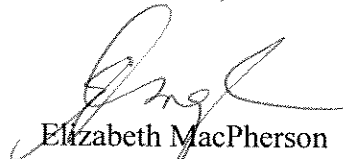
D-Conclusion

For the reasons given above, the Board has determined that the appropriate bargaining unit is one comprised of:

all employees of Maritime Broadcasting System Limited employed in the operation of its Maritime News Network in Halifax, Nova Scotia, *excluding* freelancers, unpaid interns and summer students.

The Board has satisfied itself that the applicant has the support of a majority of the employees in the unit described above. The parties will find attached a certification order issued pursuant to section 28 of the *Code*.

For the Board,



Elizabeth MacPherson
Chairperson

c.c: Ms. Caroline Mann (CIRB-Dartmouth)

Canada Industrial Relations Board



Conseil canadien des relations industrielles

Order No.: 10243-U

IN THE MATTER OF THE

Canada Labour Code

- and -

Canadian Media Guild,

applicant,

- and -

Maritime Broadcasting System Limited,
Halifax, Nova Scotia,

employer.

WHEREAS the Canada Industrial Relations Board (the Board) has received from the applicant union an application for certification as bargaining agent for a unit of employees of Maritime Broadcasting System Limited, pursuant to section 24 of the *Canada Labour Code (Part I-Industrial Relations)* (the Code);

AND WHEREAS, following investigation of the application and consideration of the submissions of the parties concerned, the Board has found the applicant to be a trade union within the meaning of the Code; has determined the unit described hereunder to be appropriate for collective bargaining and is satisfied that a majority of the employees of the employer in the unit wish to have the applicant trade union represent them as their bargaining agent;

NOW, THEREFORE, it is ordered by the Canada Industrial Relations Board that the Canadian Media Guild be, and it is hereby certified to be, the bargaining agent for a unit comprising:

Canada

Order No.: 10243-U

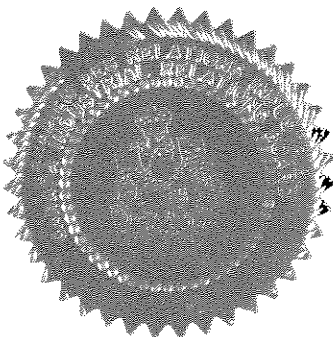
*"all employees of Maritime Broadcasting System Limited employed in the operation of its Maritime News Network in Halifax, Nova Scotia, **excluding** freelancers, unpaid interns and summer students."*

ISSUED at Ottawa, this 2nd day of April, 2012, by the Canada Industrial Relations Board.



Elizabeth MacPherson
Chairperson

Reference: File No. 29281-C



Canada Industrial Relations Board



Conseil canadien des relations industrielles

N° d'ordonnance : 10243-U

CONCERNANT LE

Code canadien du travail

- et -

La Guilde canadienne des médias,

requérante,

- et -

Maritime Broadcasting System limitée,
Halifax (Nouvelle-Écosse),

employeur.

ATTENDU QUE le Conseil canadien des relations industrielles (le Conseil) a reçu du syndicat requérant une demande d'accréditation à titre d'agent négociateur d'une unité d'employés de Maritime Broadcasting System limitée, en vertu de l'article 24 du *Code canadien du travail (Partie I – Relations du travail)* (le Code);

ET ATTENDU QUE, après enquête sur la demande et examen des observations des parties en cause, le Conseil a constaté que le requérant est un syndicat au sens où l'entend ledit Code; a déterminé que l'unité décrite ci-après est habile à négocier collectivement et est convaincu que la majorité des employés dudit employeur, faisant partie de l'unité en question, veut que le syndicat requérant les représente à titre d'agent négociateur;

EN CONSÉQUENCE, le Conseil canadien des relations industrielles ordonne que La Guilde canadienne des médias soit accréditée, et l'accrédite par la présente, agent négociateur d'une unité comprenant :

N° d'ordonnance : 10243-U

« tous les employés de Maritime Broadcasting System limitée qui travaillent à l'exploitation de son réseau Nouvelles Maritimes à Halifax (Nouvelle-Écosse), à l'**exclusion** des pigistes, des stagiaires non rémunérés et des étudiants embauchés pendant l'été ».

DONNÉE à Ottawa, ce 2^e jour d'avril 2012, par le Conseil canadien des relations industrielles.



Elizabeth MacPherson
Présidente

Référence : n° de dossier 29281-C

