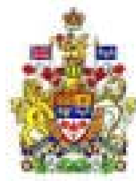
Federal Court of Appeal  Cour d'appel fédérale

Date: 20120301

Docket: A-268-10

Citation: 2012 FCA 69

CORAM: **NADON J.A.**
SHARLOW J.A.
MAINVILLE J.A.

BETWEEN:

EDUARDO BUENAVENTURA JR., UMER BUTT, DAMAN CHAWLA, FABIAN CHUNG, WILLIAM COS, ZHI YU DUAN, KARL EATON, JIAN DONG FENG, GARETH FRASER, PUKHRAJ GOHALWAR, CHANG HE, LIANG HE, BOB HOLOWENKO, JEFF HOLTEN, GRAYDON HOOGE, HE HUANG, SUCHAT JITMAS, MATTHEW KREMSER, HORACE KWAN, ANTHONY LAM, KEVIN LEE, JIN LIU, MARIO MATEJKA, RUSSELL METCALFE, MIKHAIL POPOVICH-KASERES, TONY QIN, KEN REDDING, JESSE REMPEL, JAMES RENNEBOOG, KEVIN RODRIGUES, TOM RUMBAL, MIKHAIL SEMESHKO, RAHAT SHARMA, ZHE SHI, BILL SOLACZEK, JAKE SWAFFIELD, LASZLO SZOCS, CHRIS SZYMANSKI, JOHN TANTON, FELIZARDO TORRES, SUNNY WAN, PETER WANG, KENJI WONG, RAYMOND WONG, ERIC YEH, KYLE ZACHER

Applicants

and

TELECOMMUNICATIONS WORKERS UNION (TWU)
and TELUS COMMUNICATIONS INC.

Respondents

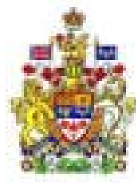
and

CANADA INDUSTRIAL RELATIONS BOARD

Intervener

Heard at Vancouver, British Columbia, on November 29, 2011.
Judgment delivered at Ottawa, Ontario, on March 1, 2012.

REASONS FOR JUDGMENT BY: SHARLOW J.A.
CONCURRED IN BY: NADON J.A.
MAINVILLE J.A.

Federal Court of Appeal  Cour d'appel fédérale

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] During the period relevant to this application, the applicants were apprentice technicians and employees of Telus Communications Inc. ("Telus") who were bound by a collective agreement between Telus and the Telecommunications Workers Union (the "TWU"). They submitted to the Canada Labour Relations Board a complaint against the TWU under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. As the complaint was made after the statutory time limit, they also asked the Board to extend the time limit. The Board refused to extend the time limit, and dismissed the complaint. The complainants have applied for judicial review of the Board's decision. Their application is opposed by the TWU and by Telus. The Board has exercised its right under section 22(1.1) of the Code to make submissions. To reflect the Board's participation, it has been added to the style of cause as an intervener.

[2] The TWU, in addition to opposing the application on its merits, has submitted that the Court should exercise its discretion to refuse to entertain the application, or to deny the complainants a remedy, because they failed to avail themselves of an adequate alternative remedy under the Code. That is the first issue to be considered. If the TWU's submission on that point is rejected, it will be necessary to determine the merits of the complainants' application.

[3] For the reasons set out below, I have concluded that this Court should consider the complainants' application, but that their application should be dismissed because the Board's refusal to extend the time limit was reasonable.

(1) Relevant provisions of the Code

(a) Complaints procedure

[4] As indicated above, the complainants are seeking a remedy from the Board for what they allege is a breach by the TWU of section 37 of the Code. Section 37 reads as follows:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.	**37.** Il est interdit au syndicat, ainsi qu'à ses représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi à l'égard des employés de l'unité de négociation dans l'exercice des droits reconnus à ceux-ci par la convention collective.

[5] The procedure for complaints to the Board is set out in section 97 of the Code. Subsection 97(1) sets out what complaints may be made, and subsection 97(2) stipulates a 90 day time limit for making a complaint. Those provisions read in relevant part as follows:

97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that	**97.** (1) Sous réserve des paragraphes (2) à (5), toute personne ou organisation peut adresser au Conseil, par écrit, une plainte reprochant :
(*a*) … a trade union … has contravened or failed to comply with … section 37 ….	*a*) soit […] à un syndicat […] d'avoir manqué ou contrevenu […] articles 37 […].
(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.	(2) Sous réserve des paragraphes (4) et (5), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon le Conseil, aurait dû avoir — connaissance des mesures ou des circonstances ayant donné lieu à la plainte.

<u>(b) The Board’s power to extend time limits</u>

[6] Paragraph 16 (*m.1*) of the Code permits the Board to extend the time for initiating a complaint. It reads as follows:

16. The Board has, in relation to any proceeding before it, power	**16.** Le Conseil peut, dans le cadre de toute affaire dont il connaît :
…	[…]
(*m.1*) to extend the time limits set out in this Part for instituting a proceeding.	*m.1*) proroger les délais fixés par la présente partie pour la présentation d’une demande.

[7] The practice of the Board permits a request for an extension of time to be submitted as part of a late filed complaint. The practice of the Board also permits a request for an extension of time to be refused without requiring the respondent to make submissions, and without an oral hearing.

<u>(c) The finality of Board decisions and the exceptions</u>

[8] By virtue of subsection 22(1) of the Code, decisions of the Board are final, subject to two exceptions. One exception is expressed in the opening words of subsection 22(1) (“subject to this Part”). That exception would include the Board’s reconsideration power under section 18 of the Code, which reads as follows:

18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.	**18.** Le Conseil peut réexaminer, annuler ou modifier ses décisions ou ordonnances et réinstruire une demande avant de rendre une ordonnance à son sujet.

[9] The other exception to the finality of Board decisions is an application for judicial review in accordance with the *Federal Courts Act* , R.S.C. 1985, c. F-7, on the grounds referred to in paragraph 18.1(4)(*a*), (*b*) or (*e*) of that Act. Neither the TWU nor Telus has suggested that the grounds for the present application for judicial review are outside the scope of those provisions.

(d) Procedure for applying for reconsideration

[10] Section 15 of the Code gives the Board the power to make regulations. Pursuant to that power, the Board enacted the *Canada Industrial Relations Board Regulations, 2001*, SOR/2001-520. Section 44 and 45 of the *Regulations* deal with applications for reconsideration of Board decisions. Section 45 sets out the application procedure (including the information required to be included in the application, the time limits and the requirements for service of the application and relevant documents). Section 44 deals with the grounds for reconsideration. It reads as follows:

44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the Code include the following:	**44.** Les circonstances dans lesquelles une demande de réexamen peut être présentée au Conseil sur le fondement du pouvoir de réexamen que lui confère l'article 18 du Code comprennent les suivantes :
(*a*) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;	*a*) la survenance de faits nouveaux qui, s'ils avaient été portés à la connaissance du Conseil avant que celui-ci ne rende la décision ou l'ordonnance faisant l'objet d'un réexamen, l'auraient vraisemblablement amené à une conclusion différente;
(*b*) any error of law or policy that casts serious doubt on the interpretation of the Code by the Board;	*b*) la présence d'erreurs de droit ou de principe qui remettent véritablement en question l'interprétation du Code donnée par le Conseil;

(*c*) a failure of the Board to respect a principle of natural justice; and	*c*) le non-respect par le Conseil d'un principe de justice naturelle;
(*d*) a decision made by a Registrar under section 3.	*d*) toute décision rendue par un greffier aux termes de l'article 3.

[11] According to the Board, section 44 of the *Regulations* was enacted in 2001 as a codification of the Board's jurisprudence relating to applications for reconsideration. It is now well established that the list in section 44 of the permissible grounds for reconsideration is not exhaustive. That is indicated by the use of "includes" in the opening words of section 44. More importantly, it necessarily follows from the general principle that the Board cannot use its power to make regulations to limit the scope of its statutory discretion. This point is well made in *ADM Agri-Industries Ltée v. Syndicate national des employees de Les Moulins Maple Leaf (de l'Est)*, 2004 FCA 69, at paragraph 40 (translation):

> … We do not feel that the Board could by regulation set aside a discretion conferred by the Code. Additionally, the fact that the Board saw fit to identify by regulation certain circumstances giving rise to an application for reconsideration by one party does not mean that in so doing it limited the circumstances in which it could of its own motion reconsider its decisions itself.

(See also *Société des arrimeurs de Québec v. Canadian Union of Public Employees, Local 3810*, 2008 FCA 237 and *Canadian Union of Public Employees, local 2614 (Syndicat des débardeurs du port de Québec) v. Société des arrimeurs de Québec inc.*, 2011 FCA 17.)

[12] The Board says that consideration is being given to repealing section 44 of the *Regulations* because of its limited utility in the face of section 18 of the Code. The Standing Joint Committee for the Scrutiny of Regulations (a Parliamentary committee established pursuant to section 19 of the

Statutory Instruments Act, R.S.C. 1985, c. S-22) has said that section 44 of the *Regulations* serves no legislative purpose.

(e) The Board's standing in this Court

[13] The Board's participation in an application for judicial review of one of its decisions is permitted by subsection 22(1.1) of the Code, which reads as follows:

22. (1.1) The Board has standing to appear in proceedings referred to in subsection (1) for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures.	**22.** (1.1) Le Conseil a qualité pour comparaître dans les procédures visées au paragraphe (1) pour présenter ses observations à l'égard de la norme de contrôle judiciaire applicable à ses décisions ou à l'égard de sa compétence, de ses procédures et de ses politiques.

(2) Facts

[14] According to a collective agreement in force between the TWU and Telus from November 20, 2005 to November 19, 2010, a wage step plan was provided for apprentice technicians (including the complainants) so that they would receive wage increases upon completion of certain stages of the apprenticeship program. In or about February of 2008, the TWU filed individual grievances concerning retropay allegedly owed by Telus to apprentice technicians in connection with the wage step plan. The TWU subsequently filed a policy grievance regarding the same issue.

[15] On June 5, 2009, the TWU and Telus entered into an agreement settling the policy grievances. The agreement provided for future wage increases for all apprentice technicians, but retropay was stipulated for only 49 named apprentice technicians. Approximately 250 apprentice technicians, including the complainants, were not named and therefore were not entitled to retropay under the settlement agreement. All individual grievances, including those initiated by or on behalf

of the complainants, were dismissed or discontinued. As a result, the complainants were left with no recourse against Telus in respect of their claims for retropay.

[16] On June 17, 2009, a Telus official told all apprentice technicians that they would receive retropay under the settlement agreement. That information was incorrect. On July 9, 2009, an official of the TWU correctly told some complainants that they would not receive retropay. The receipt of that information marked the beginning of the 90 day period stipulated in subsection 97(2) for the making of any complaint to the Board about the settlement agreement.

[17] In July of 2009, three of the complainants formed a steering committee to consider what action might be open to apprentice technicians who were not entitled to retropay under the settlement agreement. Between July of 2009 and April of 2010, the steering committee took steps to try to determine the nature of their claims for retropay, compile documents, and identify and locate other apprentice technicians who were not entitled to retropay. In April of 2010 they retained counsel, who quickly took steps to initiate a section 37 complaint and to seek an extension of time.

[18] The Board did not require the TWU to file submissions in response to the complaint, and did not convene an oral hearing. In a decision dated June 29, 2010, the Board refused the request for an extension of time, and gave written reasons for its decision (2010 CIRB 526). The Board's analysis reads as follows:

> **16** Section 97(2) of the *Code* contains a 90-day time limit for the filing of unfair labour practice complaints:
>
>> **97.(2)** Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the

> Board ought to have known, of the action or circumstances giving rise to the complaint.

17 Prior to 1999, the Board had no ability to extend this time limit, though the Board always had the discretion to determine when complainants "knew, or ... ought to have known" that they could file a complaint.

18 With the amendments to the *Code* effective January 1, 1999, the Legislator added section 16(m.1) in order to give the Board the discretion to extend time limits such as those applying to section 37 complaints:

> 16. The Board has, in relation to any proceeding before it, power
>
> …
>
> (m.1) to extend the time limits set out in this Part for instituting a proceeding.

19 The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.

20 While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.

21 The Board will not exercise its discretion under section 16(m.1) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.

22 Nonetheless, the Board will consider extending the time limits in compelling situations, such as if a complainant's health prevented the filing of a timely complaint: *Louise Galarneau*, 2003 CIRB 239. Generally, the Board will consider the length of the delay and the justification for it.

23 In this case, Mr. Torres knew, or ought to have known, following correspondence from the TWU and the telephone conversation on July 9, 2009, that a final decision on his entitlement to retropay had been made. The 90-day time limit would have expired on October 10, 2009.

24 The complaint was filed more than six months after the expiration of that time limit.

> **25** While Mr. Torres and the complainants may in good faith have thought it preferable to file a single complaint in order to include as many complainants as possible, that is not the type of justification that will convince the Board to exercise its discretion under section 16(m.1) to excuse the nine months which passed between the start of the limitation period and the filing of the complaint.
>
> **26** Had the Board received multiple complaints within the applicable time limit, the Board could have easily consolidated them given the similarity of the facts. Similarly, it could have suggested taking a representative case forward, given the similarity in the facts, in order to determine the outcome of all the cases.
>
> **27** As a result, the Board declines to extend the *Code*'s 90-day time limit set out in section 97(2) of the *Code*. The complaint is dismissed.

[19] The complainants did not ask the Board to exercise its reconsideration power. They commenced an application for judicial review in this Court, seeking an order setting aside the Board's decision and remitting their complaint to the Board for consideration on the merits, or alternatively requiring the Board to reconsider the request for an extension of time.

(3) Discussion

<u>(a) Grounds for the application for judicial review, and the standard of review</u>

[20] The broad grounds stated in the notice of application for judicial review were narrowed in the complainants' memorandum of fact and law, and further narrowed at the hearing. At the outset the parties did not agree on the applicable standard of review, but by the time of the hearing all parties agreed that the standard of review is reasonableness. I agree that reasonableness is the appropriate standard of review because the decision sought to be reviewed is the exercise of a discretionary power (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 53).

[21] The complainants' challenge to the Board's decision is based entirely on their submission that the Board's decision not to extend the time for initiating the complaint is unreasonable. The TWU and Telus take the contrary position. However, before discussing that debate, it is necessary to consider the preliminary issue raised by the TWU, which is whether this Court should exercise its discretion to refuse to entertain this application, or to deny the complainants a remedy, because they failed to pursue an adequate alternative remedy.

(b) Whether the complainants had an adequate alternative remedy

[22] The TWU submits that the right of the complainants to ask the Board to exercise the reconsideration power granted to it under section 18 of the Code is an adequate alternative remedy. The Board disagrees because its reconsideration process is not a statutory appeal process or a functional equivalent. The applicants adopt the Board's position.

[23] The Board's written submissions were filed only four days before the date of the hearing. The TWU addressed the Board's submissions orally, but was also given the opportunity to submit further written submissions on this issue, which it has done. The complainants were also given the right to file submissions in response, which they have done.

[24] The TWU's position is based in part on the unquestionable proposition that a court has the discretion to refuse to grant an administrative law remedy to an applicant for judicial review who fails to pursue an adequate alternative remedy. The TWU also relies on a line of cases that provide guidance as to the factors that may be considered by a court in determining whether a particular statutory appeal process is an adequate alternative remedy: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, and *Nancy Green's*

Cahilty Lodge Ltd. v. Thompson Nicola (Regional District), [1996] B.C.J. No. 547 (B.C.S.C.). However, none of these cases address a situation that is remotely like this case. In my view, it would take a considerable stretch to read them as authority for the proposition that the reconsideration power in section 18 of the Code is an adequate alternative remedy.

[25] In *Harelkin*, a faculty committee required a student to discontinue his studies. The legislation (the *University of Regina Act, 1974*, 1973-74 (Sask.), c. 119) provided for an appeal to a committee of the university council. The student appealed to that committee without success. The legislation provided for a further appeal to a committee of the senate of the university. The student did not appeal to the senate committee. Instead, he filed an application for judicial review. The Supreme Court of Canada (a 4 to 3 majority) held that the student should be denied a remedy on judicial review because he had not availed himself of his right to appeal to the senate committee, which was an adequate alternative remedy for a number of reasons. First, the appeal procedure was fair in the sense that the student would have a sufficient right to present evidence (including new evidence) and be heard. Second, the senate committee had the authority to set aside the decision of the university council, consider the matter *de novo*, and render a decision on the merits. Third, the appeal process was more convenient, less costly and more expeditious than judicial review, both for the student and the university.

[26] *Canadian Pacific v. Matsqui Indian Band* involved applications for judicial review of property tax assessments issued by two First Nations bands. The issue in each case was whether the property sought to be taxed, a rail line that crossed a reserve and a right of way over the railway line on which fibre optic cables had been laid, was “land in the reserve”, which was the statutory basis

for the tax. The First Nations' property tax by-laws provided for appeals to boards they had established, and an appeal to the Federal Court on questions of law. The applications for judicial review were struck by the Federal Court on the basis that the statutory appeal process was an adequate alternative remedy. That decision was reversed by the Federal Court of Appeal. The Supreme Court of Canada upheld the decision of the Federal Court of Appeal (by a 5 to 4 majority).

[27] Although the five judges in the majority reached the same conclusion, they did so for three different reasons. Two of the five concluded that although some factors pointed to the conclusion that the statutory appeal process was an adequate alternative remedy, the appeal tribunal lacked institutional independence which was a factor that was sufficient by itself to determine that the appeal process was not an adequate alternative remedy. Two of the five judges thought that the appeal tribunal did not have the jurisdiction to determine the key legal question, which was whether certain property was in the reserve. One judge thought that the Federal Court should have determined that key legal question by way of judicial review because the Federal Court was the final point of the statutory appeal scheme and would have been required to determine that key legal question in any event.

[28] In the *Cahilty Lodge* case, a builder applied to the British Columbia Supreme Court for judicial review of the refusal of a municipal building inspector to issue a building permit for a hotel because the planned mezzanines violated a height restriction in the provincial building code, and also for a second refusal when the builder reapplied for a permit, invoking an "equivalents" provision in the building code. The governing statute established a Building Code Appeal Board with the jurisdiction to determine any question of interpretation or application of the building code.

The Court held that a reference to the Board was an adequate alternative remedy with respect to the equivalents question, and dismissed that part of the builder's application for judicial review. However, the Court held that a reference to the Board was not an adequate alternative remedy with respect to the height question because a previous decision of the Board on the same question had rejected the builder's argument, so that a reference to the Board on that point would have been inconvenient and futile. The Court determined the height question against the builder because the decision of the building inspector was held not to be patently unreasonable.

[29] In all of these cases, the issue was whether a statutory appeal process was an adequate alternative remedy. In all of them, the applicant had a statutory right to appeal a decision to an appellate body that was not the same as the initial decision maker. As indicated above, none of them can be taken as authority for the proposition that an adequate alternative remedy can be found in the right of a party to ask an initial decision maker to reconsider its decision pursuant to section 18 of the Code or an analogous provision.

[30] In determining whether a statutory process is an adequate alternative remedy, one important factor is the manner in which the power exercisable under the statutory process is likely to be exercised given the burden of the initial decision. For example, a statutory right of appeal may be a robust remedy if the appeal must be heard by a body that is separate from the initial decision maker and the mandate of the appeal body is to consider the matter *de novo*. In such a case it could be said that the burden of the initial decision is small. On the other hand, an experienced decision maker with a power to reconsider its own decisions will often be inclined to exercise that power relatively

sparingly, so that the burden of the initial decision likely will be substantial. In my view, that would tend to defeat any argument that a reconsideration power is an adequate alternative remedy.

[31] The reconsideration power of the Board falls well into the last mentioned category. The Board itself asserts that its jurisprudence shows a consistent adherence to the general principle that Board decisions are final and that the Board's reconsideration power is to be exercised with restraint, so that reconsideration is the exception rather than the norm: *Canadian National Railways*, [1975] 1 Can LRBR 327; *Canadian Broadcasting Corporation*, 92 CLLC 16,006; *591992 B.C. Ltd.*, 2001 CIRB 140; *Wholesale Delivery Service (1972) Ltd.*; 2002 CIRB 204; *Brink's Canada Limited*, 2002 CIRB 204; *Ted Kies*, 2008 CIRB 413; B*ritish Columbia Maritime Employers Association and DP World (Canada) Inc.*, 2008 CIRB 424; *D'Anglo (Cynthia Jay)*, 2009 CIRB 460; *3329003 Canada Inc. and Trentway-Wagar Inc.*, 2010 CIRB 521.

[32] That there is a difference in this context between a statutory appeal process and a statutory power of reconsideration is also evident from the comments of Justice LeBel and Justice Binnie, writing for the majority and minority, respectively, of the Supreme Court of Canada in *Ellis-Don Ltd. v. Ontario ((Labour Relations Board)*, [2001] 1 S.C.R. 221. Justice LeBel wrote this at paragraph 57 (my emphasis):

> 57. There was also some discussion in this Court about the failure of the appellant to ask for reconsideration. However, even the Board conceded that in the circumstances, reconsideration did not constitute an absolute prerequisite to judicial review. In the present case, it might have been a good tactical move that would perhaps have elicited some information from the Board about its consultation process, but the principles of judicial review did not require the use or exhaustion of this particular remedy. Of course, in some cases, failure to seek reconsideration might be a factor to be weighed by superior courts when determining whether to grant a remedy in an application for judicial review.

And Justice Binnie wrote this at paragraph 94:

> 94. The Divisional Court also faulted the appellant for its failure to seek a reconsideration by the Board under s. 114(1) of the Act. Apparently the court was not pleased with appellant counsel's somewhat triumphal rejoinder that the Board had been "caught ... with [its] hand in the cookie jar" and he was not disposed to give it an opportunity to extricate itself. While a motion for reconsideration was an option, it was not equivalent to an internal appeal for purposes of an "exhaustion of administrative remedies" argument. The Board's position advanced with ingenuity and vigour in these proceedings no doubt reflects what the panel would have said on a reconsideration, namely the assertion that [*IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282] sanctioned the procedure adopted in this case.

[33] I take from the comments of Justice LeBel that when a court is considering whether to exercise its discretion to grant an administrative law remedy, a failure to seek reconsideration is not a bar to an application for judicial review, although it may be a factor that is relevant in determining whether to grant an administrative law remedy. Justice Binnie does not disagree, adding that reconsideration is not equivalent to an internal appeal.

[34] The TWU did not cite any case in which a failure to seek reconsideration under section 18 of the Code would preclude an administrative law remedy. The Board itself brought to the Court's attention the only such case of which it was aware: *Murphy v. Canadian Telecommunications Employees' Association*, 2010 FCA 113. The Board submitted that *Murphy* is wrongly decided and should not be followed. The TWU argued that this Court is bound by *Murphy*.

[35] Like the present case, *Murphy* involved a complaint to the Board under section 37 of the Code. The complaint was based on the fact that a certain letter agreement between the union and the employer had been excluded from the collective agreement. The letter agreement established a joint employer/union committee with a mandate to review and reclassify various positions based on their

characteristics and job descriptions. Because the letter agreement was excluded from the collective agreement, any grievance resulting from the reclassification of positions reviewed by the committee was not subject to arbitration.

[36] The work of the joint committee caused a pay reduction for Mr. Murphy, who complained to the Board under section 37 of the Code. First, Mr. Murphy complained that his union had unlawfully deprived its members of the grievance procedure. The Board rejected this aspect of the complaint on the basis of its reasoning in two other prior similar complaints. On judicial review, this Court found that the decision of the Board in respect of this ground of complaint was reasonable.

[37] Second, Mr. Murphy complained that his union had not adequately disclosed information to its members prior to the ratification of the collective agreement. The union conceded that the Board had not explicitly dealt with this aspect of the complaint, although it argued that the Board had dealt with it implicitly. On judicial review, this Court was inclined to agree that the Board had implicitly dealt with this aspect of the complaint. However, the Court also noted (at paragraph 7 of *Murphy*) that "where the applicant's concern is that the Board failed to address an aspect of the complaint that was put to it, the applicant should have availed himself of the administrative remedy of reconsideration that was available under section 18 of the Code."

[38] The TWU argues that the principle underlying the second point in *Murphy* is that the statutory power of reconsideration in section 18 of the Code is such a part of the Board's administration process that the failure to invoke it is necessarily fatal to any application for judicial review of a Board's decision. I do not read *Murphy* as establishing any such proposition. The Board

itself asserts that its statutory reconsideration power is not intended to be a statutory appeal procedure and that failure to seek reconsideration is not an impediment to judicial review.

[39] The rationale for the Court's decision on the second point in *Murphy* is not stated, but I infer that it is based on two assumptions. First, where a Board decision is challenged by way of an application for judicial review, the best remedy the applicant can hope for is an order requiring the Board to reconsider. Second, if the Board has in fact overlooked one aspect of a complaint, the Board may well correct the oversight on request, even without being ordered to do so. Seen in that light, *Murphy* is an example of the kind of situation to which Justice LeBel adverted in *Ellis-Don;* the failure of Mr. Murphy to seek reconsideration was given significant weight in determining that no administrative law remedy was warranted in the particular circumstances of that case.

[40] The facts of this case are quite unlike the facts in *Murphy*. Here, the Board's own jurisprudence, as summarized in its submissions, suggests that in the present case the Board is unlikely to reconsider a decision to refuse an extension of time.

[41] For these reasons, I conclude that the Court would not be justified in dismissing this application for judicial review, or refusing to grant an administrative law remedy, merely because the complainants failed to ask the Board to exercise its reconsideration power.

(c) Whether the decision of the Board to refuse the extension of time was reasonable

[42] I turn now to the second main point in this application, which is a review of the merits of the Board's decision. The question is whether it was reasonable for the Board to refuse to extend the time limit for the complaints. I conclude for the following reasons that the answer is yes.

[43] As I read the Board’s reasons, its refusal to extend the time was based on its consideration of four general factors in light of the undisputed facts. I summarize the factors as follows: (1) The statutory time limit is a matter of law and is justified by policy considerations, namely, to encourage parties to act expeditiously in order to promote certainty and avoid prejudice to the other parties. (2) The Board should not exercise its discretion to extend time limits automatically because that would undermine the policy justification for the existence of the time limit. (3) On the other hand, the Board should exercise its discretion in compelling situations, after taking into account the reasons for the delay and its duration. (4) Generally, laypersons (which I take to include individuals unrepresented by counsel) should be held to the same standard as unions and employers.

[44] The Board also considered specifically the length of the delay (9 months), and its cause. The Board concluded that the main cause was the honest but mistaken belief of the complainants that the Board would prefer a single, multi-party complaint filed late to a multitude of individual complaints filed earlier. However, the Board noted that it has ample procedural means for dealing with large numbers of related complaints.

[45] The complainants do not suggest that the Board misunderstood the reason for the delay. However, they argue that it was unreasonable for the Board not to give special consideration to the fact that the complainants were not represented for most of those 9 months. They point out that their relative inexperience represented difficult hurdles, both in assembling the information they believed would be necessary to support their complaint, and in appreciating the Board’s procedures and the ways in which a multiplicity of complaints could best be managed.

[46] A decision is reasonable if it is sufficiently explained and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47. In my view, the record discloses nothing unreasonable about the Board's decision not to extend the time limit in this case.

[47] It is true that the Board took an unsympathetic stance toward the difficulties faced by the complainants as they attempted to navigate unfamiliar territory and to ensure that their complaint, once made, could be handled efficiently. However, these difficult circumstances gave the complainants no legal right to have the Board exercise its discretion in their favour. In my view, the Board's decision to refuse the extension was a decision that fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, and thus was reasonable. In my view, the application for judicial review should be dismissed.

(5) Conclusion

[48] I would dismiss the application for judicial review. As between the complainants and the TWU, I would award no costs given the divided success. Telus sought costs in its memorandum of fact and law, but its submissions added nothing substantive to the submissions of the TWU and its request was withdrawn at the hearing. The Board did not seek costs.

"K. Sharlow"

J.A.

"I agree
M. Nadon J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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