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Reasons for decision

TD Canada Trust in the City of Greater Sudbury, Ontario,

applicant,

and

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers),

respondent,

and

Ms. Rita Larsen; Ms. Roberta Israelson et al.,

intervenors.

Board File: 25025-C
CIRB/CCRI Decision no. 363
October 18, 2006

A reconsideration panel of the Board, composed of Mr. Warren R. Edmondson, Chairperson, Ms. Julie M. Durette and Mr. Douglas G. Ruck, Q.C., Vice-Chairpersons, examined the above-cited application filed pursuant to section 18 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*).

Counsel of Record

Mr. James R. Hassell, for TD Canada Trust in the City of Greater Sudbury, Ontario;

Mr. Robert Champagne, for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers);
Ms. Lisa Poratto-Mason, for Ms. Rita Larsen and Mrs. Roberta Israelson et al.

These reasons for decision were written by Ms. Julie M. Durette, Vice-Chairperson.

Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed the parties' extensive submissions, the Board is satisfied that the documents and information before it are sufficient to allow it to consider and decide the matter without holding an oral hearing.

I - Nature of the Application and Background

[1] By application filed April 19, 2005, TD Canada Trust in the City of Greater Sudbury, Ontario (TD or the employer) seeks reconsideration of the Board's decision in *TD Canada Trust in the City of Greater Sudbury, Ontario*, [2005] CIRB no. 316, and the Board's related certification order no. 8804-U, as amended by order no. 8876-U.

[2] In the decision under review, the original panel granted the application for certification filed on December 17, 2004, by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (the Steelworkers or the union). The original panel determined that a single bargaining unit comprising employees in eight branches of TD in the Greater Sudbury area, including the Lively Branch, was an appropriate unit for collective bargaining, despite TD's position that a branch-by-branch bargaining unit was appropriate. The original panel also dismissed TD's allegations of employee coercion and intimidation by the union, during its certification campaign.

[3] In the present reconsideration application, TD wants the Board to exercise its reconsideration powers pursuant to section 18 of the *Code* and sections 44(b) and 44(c) of the Canada Industrial Relations Board Regulations, 2001 (*the Regulations*), on the basis that the original panel has committed errors of law and policy that cast serious doubt on the interpretation of the *Code* and that

it has breached principles of natural justice. TD also sought a stay of the original panel's decision and order pending the determination of the present application by the Board.

[4] Shortly after TD filed its reconsideration application, other applications were filed on behalf of employees of TD's Lively Branch (the Lively Branch employees or the intervenors), contesting their inclusion in the bargaining unit and raising issues similar to those raised by TD in its application. The intervenors' applications were consolidated with TD's application pursuant to section 20 of the *Regulations.*

[5] In *TD Canada Trust in the City of Greater Sudbury, Ontario*, June 27, 2005 (CIRB LD 1282), the Board granted the Lively Branch employees intervenor status and denied TD's request for a stay of the initial panel's decision and order, pending the determination of the present application.

[6] In *TD Canada Trust in the City of Greater Sudbury*, *Ontario*, November 18, 2005 (CIRB LD 1323), as a means of expediting the present process and in order to allow the affected parties to move on, this reconsideration panel communicated its disposition of the present matter by way of a bottom-line decision. The Board dismissed the reconsideration application with reasons to follow. Following are the Board's reasons for its decision.

II - Positions of the Parties

A - The Employer

[7] In its application, TD lists its grounds for reconsideration as follows:

> (a) the CIRB contravened the principles of natural justice and the *Code* when it failed to conduct a full investigation into all of the incidents of intimidation and coercion asserted by employees;
>
> (b) the CIRB erred in law and policy when it decided incorrectly not to consider TDCT's submissions relative to the Union's intimidation and coercion of employees;
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> (c) the CIRB erred in law and policy when it held that the Union's proposed single bargaining unit is an appropriate unit for collective bargaining;

(d) the CIRB contravened the principles of natural justice when it failed to disclose to the parties relevant information regarding the certification application;

(e) in the alternative, the CIRB contravened the rules of natural justice and failed to interpret correctly the *Code* by failing to hold an oral hearing respecting the validity of the membership evidence submitted by the Union and respecting the appropriate bargaining unit; and

(f) in the further alternative, the CIRB contravened the rules of natural justice and failed to interpret correctly the *Code* when it failed to order and to conduct a representation vote to determine the true wishes of the employees.

[8] The Board has summarized TD's position under the following five headings.

1 - Appropriateness of the Bargaining Unit

[9] TD objects to the appropriateness of a single bargaining unit comprising eight branches and sub-branches located in the City of Greater Sudbury. It argues that the original panel incorrectly applied the decisions in *National Bank of Canada* (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRB no. 542); and *Bank of Montreal, Sherbrooke*, *Quebec* (1986), 68 di 67 (CLRB no. 604). Essentially, TD argues that these two decisions, which support "cluster" certification, were given undue weight by the original panel as there are an overwhelming number of decisions which support the concept of branch-by-branch certification.

[10] TD also argues that the original panel failed to draw the necessary distinctions between the facts in *National Bank of Canada*, *supra*, relating to the Rimouski branches of the National Bank, and the facts in the present matter. It submits that in that case, employees in all of the National Bank's branches in Rimouski appeared to support the single bargaining unit, contrary to the present matter where all of the Lively Branch employees oppose their inclusion in the bargaining unit. TD maintains that the Steelworkers have established the required overall majority support by "crushing" the wishes of employees in small branches with its majority support held in larger branches. In TD's view, a cluster of branches should only be considered as an appropriate bargaining unit where employees in all locations demonstrate that they wish to belong to a single bargaining unit.

[11] TD submits that the original panel should have excluded from the bargaining unit any branches where employees did not wish to be represented by a union. It argues that section 18.1 of the *Code*

allows the Board to restructure bargaining units and to subsequently add employees who may not have wished to be unionized initially. Consequently, it was unnecessary and inappropriate to include in the bargaining unit, at this time, those branches where employees had clearly expressed their desire not to be represented by a union.

[12] In addition, TD argues that the failure to exclude branches where employees did not wish to be represented by the union, demonstrates the original panel failed to ensure the employees' right of freedom of non-association as guaranteed by the *Canadian Charter of Rights and Freedom* (the *Charter*).

[13] Finally, TD submits that in determining the appropriateness of a proposed bargaining unit, the Board must balance the employer's interests against the employees' right to freely choose to be associated. It maintains that the original panel failed to apply this principle and consequently erred in law and policy by not properly considering the evidence submitted in regards to its administrative structure.

2 - Failure to Disclose Information

[14] TD argues that the *audi alteram partem* principle, or what is commonly known as the right of a party to be heard, compels the Board to inform parties of all relevant information considered in the process of determining an application so that the parties may have an opportunity to properly consider all issues and to make appropriate submissions prior to any decisions being issued. TD takes the position that the original panel violated this principle of natural justice when it failed to notify and disclose to all parties that interventions had been filed by employees and that all of the employees of at least one of the branches affected, the Lively Branch, objected to the union's application. It is TD's contention that the interventions of the Lively employees were not properly considered by the original panel.

[15] TD also asserts that the original panel denied the parties the right to be heard on all relevant issues when it failed to disclose the level of union support for each branch included in the proposed bargaining unit. It maintains that, in light of the information provided in the decision under review

and of its communications with the Lively Branch employees following the issuing of the decision, it can assert that the right of those employees to freely choose whether to associate with the union, was breached.

[16] TD argues that the employees' right of non-association under section 2(d) of the *Charter* was violated when the original panel did not properly consider employee wishes, and in particular when it ignored the interventions filed by all of the Lively Branch employees. It further submits the original panel failed to establish, as required under section 1 of the *Charter*, that the violation of this right was justified under the circumstances.

3 - Membership Evidence

[17] TD submits that the original panel also breached the rule that guarantees the right to be heard, when it failed to ensure that the membership evidence submitted by the union was obtained on a voluntary basis and in a lawful manner. TD asserts that when employees' rights to freely choose whether to join a union are called into question, the Board must consider all allegations, whether made by the employer or by the affected employees. It submits that principles of natural justice require the Board to notify the parties of any concerns raised in relation to the membership evidence, excluding the employees' identities, so that the parties are afforded an opportunity to respond.

[18] TD particularly objects to the sufficiency of the interviews conducted by the investigating officer. It argues that the Board, through its investigating officer, fettered its discretion to properly assess the validity of membership evidence when it only conducted random sample interviews instead of conducting a full investigation of all the allegations raised. According to TD, because of the requirement to keep membership evidence confidential, the Board has a duty to conduct a full and complete investigation into the validity of membership evidence when concerns exist.

[19] Finally, TD submits that the original panel erred in law and policy when it failed to make essential distinctions between the case law referred to, in particular the *IMS Marine Surveyors Ltd.*, [2001] CIRB no. 135 decision and the facts of the present matter. It criticizes the contention of the original panel that allegations of intimidation and coercion should not be made in the context of an

application for certification but should more properly be the object of an unfair labour practice complaint.

4 - Need for an Oral Hearing

[20] It is TD's contention that the original panel contravened the rules of natural justice and failed to correctly interpret the *Code* by not conducting an oral hearing to allow all parties, including affected employees, an opportunity to be heard on the issue of the validity of the membership evidence submitted by the union and on the issue of the appropriateness of the bargaining unit.

5 - Need for a Representation Vote

[21] TD submits that the original panel contravened the rules of natural justice and incorrectly interpreted the *Code* when it failed to order and to conduct a representation vote to determine the true wishes of the employees on a branch-by-branch basis. This was particularly needed, argues TD, in light of the allegations of intimidation and coercion on the part of the union as submitted by both the employer and the employees, including the entire Lively Branch.

[22] By way of remedy, TD asks the Board to rescind the original panel's decision and certification order and dismiss the union's application. In the alternative, the employer requests that the Board direct an oral hearing be held to determine the validity of the union's membership evidence and to determine the appropriate bargaining unit. To that end, the employer seeks disclosure by the Board of the union's level of support, as well as any other information not disclosed in regards to the union's certification application. In the further alternative, the employer asks the Board to order a representation vote for each branch, and certify only those branches where the union enjoys majority support.

B - The Intervenors

[23] Similar to the position held by TD, the intervenors contend that the Board erred in law and policy when it certified the union for a single bargaining unit comprising all branches of the City of

Greater Sudbury. They submit that a single bargaining unit is not appropriate in light of its geographical scope, the wishes of the employees, the lack of community of interest between all of the employees and the viability of proper collective bargaining.

[24] The intervenors raise concerns about the possible consequences of smaller branches being included with larger branches in a single bargaining unit. They list factors which they contend distinguish the work environment prevailing within the Lively Branch where they work, from the other larger branches included in the bargaining unit. They maintain that the single bargaining unit of branches, including the Lively Branch, is comprised of groups of employees with separate and distinct communities of interest specific to localities that have been amalgamated within the greater City of Sudbury. They particularly emphasize the fact that all of the employees of the Lively Branch reject unionization as they fear that a small branch like theirs cannot properly be represented in such a context.

[25] The intervenors also raise what they consider to be new facts that, if known by the original panel, would have led it to a different conclusion. These facts are summarized as follows: Lively is located in a remote area away from the City of Sudbury; it has no sophisticated road system or public transportation; northern employees do not travel long distances to go to work; the working conditions in the smaller branches located outside the City of Sudbury are different; different hours of operation are in place from those in Sudbury; and the residents of Lively have the opportunity to live, work and play within a self-contained community.

[26] The intervenors argue that the Board erred in its consideration and application of the law relating to physical proximity, employee wishes and viability of the bargaining unit and industrial stability. They maintain that the original panel did not properly consider the possible serious labour relations harm and lack of viability of the bargaining unit by not requiring that the union establish support for each branch.

[27] The intervenors point to previous Board decisions where single branch bargaining units were found appropriate. Like TD, the intervenors suggest the Board's power include the ability, upon

application, to add at a later date any branch to an existing cluster pursuant to section 18.1 of the *Code*.

[28] The intervenors also contend that the Board erred in law when it did not give sufficient weight to the wishes of the employees. They underline that all seven employees of the Lively Branch oppose unionization and do not wish to be included within the union's bargaining unit.

[29] The intervenors further argue that the Board was in violation of the *Charter* when it did not properly balance the *Code*'s objectives against their right to freely choose to associate or not. Requiring employees to associate with other employees and a trade union, without majority support, violates the principle of freedom from forced association under section 2(d) of the *Charter*. Regarding the possible justification under section 1 of the *Charter*, the intervenors submit that the Board should not impose certification for the Lively Branch, when it is clear that 100% of the employees do not want to be included in the bargaining unit or where there is no clear interdependence, integration and interrelationship.

[30] The intervenors echo the employer's contention that the Board breached principles of natural justice and improperly applied the provisions of the *Code* when it failed to conduct a full investigation into all of the alleged intimidation and coercion incidents advanced by the Lively Branch employees. They also question the Board's random sample interviews and the fact that the Board's investigating officer did not meet with all seven Lively Branch employees who raised concerns about the union's conduct. The intervenors seek the same remedy as TD and request the opportunity for those employees whose previous submissions were not considered by the original panel to state their case before the Board.

C - The Union

[31] The union submits that the appropriateness of a bargaining unit is a question of fact and points out that, although the Board may rely on past practices within the same or similar industries, it is not bound by previous certification orders.

[32] The union disputes the assertion that employees at the Lively Branch constitute a separate, distinct and independent employee group. It maintains that both the parties' submissions before the original panel and the decision under review do not support the alleged distinctiveness of the Lively Branch employees.

[33] The union maintains that the original panel considered the right criteria in determining the appropriateness of the bargaining unit and properly exercised its discretion in making its determination. According to the union, TD is simply trying to relitigate factual findings made by the original panel with which it does not agree.

[34] The union submits that there was no breach of a principle of natural justice by not disclosing to TD that certain employees had written to the Board, given that employee wishes are of no concern to the employer. In addition, the union points to the fact that the employees' submissions were filed with the Board following the date of application. The union also underlines the fact that the original panel specifically mentioned in its decision that it had received and considered employees' wishes.

[35] The union opposes TD's contention that the Board should disclose the union's level of support for each branch included in the bargaining unit. It submits that the original panel followed long-established Board policy for assessing employee support, i.e., the application date.

[36] The union opposes TD's request to assess majority support in each of the branches included in the bargaining unit. The suggestion by TD to exclude from the union's bargaining unit any employees who oppose the union would, according to the union, fragment the workplace and cause labour relations problems, and would go against the rule of democratic majority.

[37] The union underlines that pursuant to section 28(c) of the *Code*, a clear process is established for the Board to follow. This section confirms that the Board should consider the wishes of the majority of employees in the bargaining unit that has been determined to be appropriate and that the wishes of the minority are not determinative. To that end, employees cannot be "hived off" into a separate unit, outside of the collective bargaining regime, while they otherwise share a community of interest with the majority of employees in the bargaining unit. With respect to a possible future

section 18.1 application, the union submits that the Board's duty to certify under section 28(c) of the *Code* cannot be ignored despite the Board's broader power to amend existing bargaining units.

[38] The union rejects the employer's assertion that the right to freedom of association encompasses a right of employees to be free from dealing with a union. The union submits that the choice to associate with a union and the representation of employees by a union through collective bargaining do not violate the freedom of association under either the *Charter* or the *Code*. It further submits that neither the right to freedom of association nor the right of employees to be free from having to deal with the union, as invoked by TD, is a recognized right under the *Code*, the Board's jurisprudence or generally under Canadian law.

[39] The union also underlines that TD failed to raise this issue before the original panel and should now be barred from doing so. It submits that in any event, TD has no standing to raise a possible *Charter* right violation on behalf of a group of employees.

[40] In regards to the allegations of intimidation or coercion, the union submits that the Board is not required to conduct a full investigation or interview all employees who may have expressed concerns. It adds the allegations were investigated pursuant to normal Board practices, which process was clearly laid out in the Board's decision. Further, the union argues that TD never raised any objection at the time, nor was any formal complaint filed by either the employees or the employer.

[41] With respect to the concerns raised by the Lively Branch employees, the union submits that the conduct of random sample interviews confirmed that there was no intimidation or coercion on the part of the union. It maintains that the wishes letters filed by certain employees failed to establish a *prima facie* case that the union had engaged in intimidation or coercion.

[42] The union supports the original panel's assessment of the *IMS Marine Surveyors Ltd.*, *supra*, decision. It concludes that both that decision and the decision under review confirm the Board's position in regards to employer's allegations of union misconduct during a certification campaign. The union submits that there is no evidence to confirm the employer's assertions that the original

panel would have failed to consider those allegations or that it did not investigate the incidents described in TD's submissions.

[43] The union disputes the allegations that not holding an oral hearing or not conducting a representation vote in the present matter breached principles of natural justice. The union stresses the Board's discretion under section 16.1 of the *Code* to decide any matter without holding an oral hearing. It points out that the Board also has the discretion to determine its own process with respect to certification applications generally, including its process for determining employees' wishes. According to the union, the fact that some employees in the proposed bargaining unit opposed being unionized has never been a reason to hold an oral hearing, nor should the employer be allowed to speak for employees in representation matters. With respect to a representation vote, the union contends that the original panel's decision not to hold a vote was correct. It maintains that following its investigation, the original panel was satisfied the union demonstrated majority support and there was therefore no reason to order a vote under section 29(1) of the *Code*.

III - Analysis and Decision

[44] Section 18 of the *Code*, provides the Board with the discretion to review, rescind, amend, alter or vary any order or decision made by it, and to rehear any application before making an order in respect of the application.

[45] Section 44 of the *Regulations* sets out the circumstances under which an application pursuant to section 18 is made. Those circumstances include:

> 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:
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> (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;
>
> (b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;
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> (c) a failure of the Board to respect a principle of natural justice.

[46] Given that section 22 of the *Code* provides that every decision of the Board is final, the Board's reconsideration powers are limited and are not intended to be an appeal process of a decision, a rearguing of the same issues before a different panel of the Board or a process to contest the facts and issues determined by the original panel. Consequently, the rescinding of an original panel's decision remains the exception rather than the rule. An applicant bears the burden of establishing that there exist serious reasons, or even exceptional circumstances, that justify the reconsideration of a decision (see *591992BC Ltd.*, [2001] CIRB no. 140).

[47] The Board is also mindful that the Lively Branch employees have been granted intervenor status in the present reconsideration application for reasons which were explained in *TD Canada Trust in the City of Greater Sudbury, Ontario*(*LD 1282*), *supra*, and to which the Board will refer to later in the present decision. For that reason, the Board has carefully reviewed and considered the Lively Branch employees' submissions and the other parties' reply submissions, to determine whether the original panel would have arrived at a different conclusion if it had before it the benefit of the totality of those submissions.

[48] Having reviewed all the issues as framed by the parties to the present application, the Board is satisfied they boil down to two main questions: (1) did the original panel err in its determination of the appropriateness of the bargaining unit and (2) did it err in its assessment of employees' wishes and the required level of union support.

A - Appropriateness of the Bargaining Unit

[49] One of TD's arguments is that there are only a few decisions where the Board accepted as appropriate for collective bargaining the principle of a cluster of branches, in contrast to the great majority of Board decisions certifying unions on the basis of branch-by-branch bargaining units being appropriate.

[50] From a review of the history of Board decisions in the banking industry, it is evident that in earlier certification applications before the Board, the unions mostly sought to be certified - and the Board accepted as appropriate - branch-by-branch bargaining units. However, from early on, the

Board made it clear that each application would be determined on its own facts and that, by accepting as appropriate a bargaining unit on a branch-by-branch basis, it was not closing the door to other possible appropriate bargaining units. In *Bank of Nova Scotia Kitimat* (1959), 59 CLLC 18,152, the union sought to represent tellers, clerks, ledger keepers and stenographers at the single branch of the Bank of Nova Scotia in Kitimat, British Columbia. The bank submitted that a nation-wide bargaining unit was appropriate. Although the Board concluded that the proposed single branch bargaining unit was not appropriate under the circumstances, it stated the following with respect to possible future applications:

> While this application is rejected the Board deems it advisable to state that this decision must not be taken as indicating that the Board agrees with the Respondent's contention that the appropriate bargaining unit must be a nation-wide unit of employees of the Bank. **The present decision rests on and is applicable only to its own particular facts.** The Board points to the facts that this is the first application with which it has to deal, concerning bank employees... The ... *Act* applies to banks and their employees, and the Board will consider all applications concerning bank employees, with the purpose of giving effect to the intent of the Act. It may well be that units of some of the employees of a Bank, grouped together territorially or on some other basis, will prove to be appropriate, rather than a nation-wide unit.
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> (page 1799; emphasis added)

[51] The same approach was reaffirmed in subsequent decisions of the Board. In *Bank of Nova Scotia (Port Dover Branch)* (1977), 21 di 439; [1977] 2 Can LRBR 126; and 77 CLLC 16,090 (CLRB no. 91), the union filed three certification applications for three separate branches of the Bank of Nova Scotia, one branch in Simcoe and two branches in Port Dover. The Board found that the single branch bargaining unit in each application was appropriate. The Board reiterated that it had made it quite clear in previous decisions, that the composition of a bargaining unit was not necessarily determined on the basis of prior Board decisions, but as a question of fact based on the evidence and arguments in each application.

[52] As noted previously, in most of the earlier decisions dealing with the issue of the appropriateness of the bargaining unit in the banking industry, the unions applied to be certified on a branch-by-branch basis while the employers consistently argued for broader-based bargaining units, including a unit comprising several branches, as appropriate.

[53] In *National Bank of Canada*, *supra*, the union applied to be certified as the bargaining agent for a unit consisting of all branches of the National Bank in Rimouski. Similar to the matter under review, the intended scope of the bargaining unit was concentrated on all employees of a bank within the geographical boundaries of a city. Since this was the first opportunity for the Board to deal with the appropriateness of a bargaining unit other than on the basis of individual branches, it took the opportunity to do an exhaustive review of the history of unionization in the banking industry and canvassed both the Canadian and American jurisprudence up to that date. The Board concluded that the unit applied for, comprising all of the employees of the National Bank in the geographical area of Rimouski, was an appropriate unit:

> What can be said about this new unit? It appeared from the cases decided by the NLRB in the United States that the "splinter" (the individual branch) is the rule. But in an industry in which an employer has many branches, the retail drugstore industry, it invented the concept of the "cluster" of establishments.
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> ...
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> Furthermore, as the Board has been careful to note, the chartered banks have quite diverse structures and, in fact, each case will have to be studied on its own merits.
>
> ...
>
> In conclusion, the Board intends by this decision to continue its policy of exercising its discretion under section 125(2) of the *Code* in such a way as to give employees a "realistic possibility of exercising their rights under the *Code*."
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> (pages 142-143; 304-305; and 14,314-14,315)

[54] In a subsequent decision, *Bank of Montreal*, *supra*, the Board certified a cluster of seven establishments of the Bank of Montreal within the city of Sherbrooke. In doing so, the Board reiterated that in previously determining that an individual branch was an appropriate unit, it never said that it was the only unit of bank employees appropriate for collective bargaining (see page 80).

[55] In *National Bank of Canada*, *supra*, the Board reaffirmed that the appropriateness of a proposed bargaining unit is not a static concept but rather that it evolves as new needs develop. The decision established the extreme limits of the Board's discretion regarding the issue of the appropriateness of bargaining units as follows:

> All labour boards in Canada have more or less abundantly written about the criteria to be applied in determining the appropriateness of a bargaining unit; certainly this Board has done so.
>
> This Board established the extreme limits of its discretion in this area in a fairly formal manner:
>
> 1. It is not required to determine the ideal unit.
> 2. There may be more than one appropriate unit, successively over time or at the same time.
> 3. It is not bound by any earlier finding...
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> (pages 138; 299-300; and 14,312)

[56] The Board went on to state that it would not always be possible to determine the most appropriate unit, for different reasons, the most important of which was that to do so could deprive a group of employees of their freedom to join the organization of their choice. Significantly, the Board also rejected the concept of stare decisis in the exercise of a labour board's discretion in determining whether a proposed bargaining unit is an appropriate one. The Board felt that it would not be able to respond rapidly and satisfactorily to the ongoing changes of modern business if it was bound by past decisions. The Board also reaffirmed that when dealing with issues concerning appropriateness it was prepared to take the employer's administrative structure into account, provided it did not "nullify the employees' rights to freely choose an association."

[57] In the decision under review, the original panel correctly summarized the Board's role and practice in determining a certification application pursuant to section 24 of the *Code.*

> [20] As may be seen by the wording of section 24, the union has the freedom of defining the bargaining unit as it considers appropriate. The Board's role is to decide (i) whether the unit constitutes a unit appropriate for collective bargaining; and (ii) whether a majority of employees in the unit wish to have the trade union represent them as their bargaining agent.
>
> [21] As the Board has stated on countless occasions, it is not required to define the most appropriate bargaining unit, but a unit appropriate for collective bargaining. The appropriateness of a bargaining unit is a matter of fact which rests on whether the bargaining agent is able to define a sufficient community of interest among the employees it seeks to represent to justify certifying such a bargaining unit. In essence, this determination involves a consideration of whether the employees share an appropriate structure of working conditions within the organization of the workplace. Where employees are unorganized, the objective is to provide them with a meaningful opportunity to participate in collective bargaining (see *Alberta Wheat Pool* (1991), 86 di 172 (CLRB no. 907), at page 176). **The Board has also previously stated that in determining the appropriate bargaining unit, it may rely on past practice and conditions within the same or similar industries, but its hands are not tied by previous certifications. Each case is treated according to its particular facts. ...**

(*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; pages 6-7; emphasis added)

[58] It is the opinion of this reconsideration panel that the original panel also correctly summarized and reaffirmed the principles enunciated in *National Bank of Canada*; and *Bank of Montreal*, *supra*:

> [22] In *National Bank of Canada* (1985), 58 di 94; 11 CLRBR (NS) 257; and 86 CLLC 16,032 (partial report) (CLRB no. 542), the Canada Labour Relations Board (CLRB), considered the issue of the appropriateness of certifying what it characterized as a "cluster" or geographical unit rather than a "city" unit. The Board noted that chartered banks have quite diverse structures, but rejected the notion that the "splinter" or individual branch rule applied by the National Labour Relations Board in the United States should prevail in Canada or that bargaining units should be configured according to a bank's administrative structures. Thus, the Board found that a unit consisting of all branches in the Rimouski area constituted an appropriate unit. The Board also found that there was no need for the union to demonstrate majority support at each branch in order to be certified for a cluster of branches. As well, in *Bank of Montreal, Sherbrooke, Quebec* (1986), 68 di 67 (CLRB no. 604), the CLRB found that a unit of all employees in the city of Sherbrooke to be an appropriate bargaining unit.
>
> **[23] In both these decisions, the Board recognized that following a history of certification of individual branches, unions began to break new ground by applying for larger units. In *Bank of Montreal, Sherbrooke, Quebec*, *supra,* the Board restated its policy that "in determining that an individual branch was an appropriate unit, it never said that it was the only unit of bank employees appropriate for collective bargaining."**
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> (*TD Canada Trust in the City of Greater Sudbury*, *(316), supra;* pages 7-8; emphasis added)

[59] Following a review of the Board's jurisprudence in the banking industry, one cannot conclude that there exists a Board practice which favours branch-by-branch bargaining unit configuration, over other possible appropriate bargaining units, including a cluster of bank branches within a geographical area. To the contrary, a review of the above jurisprudence establishes that the Board went out of its way to clearly specify that branch-by-branch certification did not preclude other bargaining units. Consequently, the Board's practice in the banking industry is no different from the one it follows in other certification applications before the Board. The facts of each application dictate whether a proposed bargaining unit will be found to be appropriate under the circumstances. The mere fact that in their initial organizing stages, unions mostly applied for bargaining units on a branch-by-branch basis and the Board issued more certification orders on that basis, did not establish a binding policy or practice in this industry. Therefore, this panel finds that no error of law or policy was committed by the original panel for failure to follow previous Board jurisprudence.

[60] The reconsideration panel now turns to the argument that it was an error to have found as appropriate a cluster of branches rather than a branch-by-branch unit, under the specific circumstances of the present matter.

[61] The original panel made the following findings, in determining the appropriateness of the proposed bargaining unit:

> [25] The Board finds that the facts submitted by TD in support of its position that individual branches with their sub-branches are appropriate units are not persuasive. It may be that the business at some branches is higher in deposits than others or that each branch has its own financial targets, performance incentive targets or sales revenue goals; however, this has no impact on the organization of the bargaining unit. How employee satisfaction or customer satisfaction is measured is not relevant to the community of interest of employees within the bargaining unit.
>
> [26] Variances of hours of operation or shift schedules for the purposes of breaks and lunch or the availability of discretionary recreational or reward funds can certainly be addressed within the context of collective bargaining. **The number of managers, the different reporting relationships or management duties within given branches is relevant to the administrative structure of the bank, but as stated earlier, is not decisive in how bargaining units are to be configured.**
>
> **[27] Of greater relevance is the fact that the employees work in a general geographical area where the municipalities are proximate to each other.** The 11 other branches that comprise the Northern Lights District are considerably further than the eight branches proposed for inclusion in the bargaining unit. The city of Greater Sudbury is the financial centre for Northeastern Ontario and it is not disputed that the branches proposed for inclusion serve the same customer base. TD's products and services are available at all these branches. The fact that some branches may have a more rural base than others may affect the bank's clientele, but does not generally affect employees' working conditions. While there may be differences between branches, operating procedures and levels of service are standardized for all of TD's customers.
>
> [28] The volume of business does not fundamentally change the basic job descriptions and classifications since as these are similar, if not identical, regardless of the branch. The volume of business may determine whether a job classification exists at a particular branch and the number of employees filling such job classifications. Variations in job duties (generalists vs. specialists) because of branch size do not impact the general structure of employees' working conditions. The salary ranges that apply to job classifications are consistent between branches. Employee mobility between branches is not an issue since employees apparently enjoy access to the same job opportunities. The same human resource policies, bonus incentive plan, health, welfare, and insurance and vacation benefits apply to all. While hiring and training practices may not be uniform between branches, such issues can be addressed within the collective bargaining context. **Consequently, in spite of some minor differences, the working conditions of employees at the eight branches sought for inclusion in the bargaining unit are sufficiently similar for the Board to decide that there should be a single bargaining unit.**

(*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; pages 9-10; emphasis added)

[62] Based on the foregoing, the reconsideration panel cannot agree, as is alleged, that the original panel did not consider TD's administrative structure. What the above passages confirm is that the original panel rejected the employer's position of certifying on the basis of individual branches and their sub-branches. In doing so, the original panel specifically considered TD's administrative structure but found it was not determinative, in the circumstances, in light of all the other factors considered.

[63] The reconsideration panel has also reviewed the submissions filed on behalf of the Lively Branch employees, as well as TD and the union's response to the intervenors' submissions. In particular, the Board has reviewed the concerns raised about the possible consequences of smaller branches being included with larger branches in a single bargaining unit and what the Lively Branch employees consider to be new facts, as summarized earlier in paragraph 26 above. The reconsideration panel can appreciate that the factors raised by the intervenors with respect to their location and working conditions, in the minds of the Lively Branch employees, distinguishes them from the larger branches. However, the reconsideration panel is not convinced that those distinctions are different than the ones previously considered by the original panel or that they are sufficient to establish that, including the Lively Branch employees in a bargaining unit comprising all of the branches within a geographical area, creates a bargaining unit that is not appropriate for collective bargaining.

[64] TD contends that the union established its requisite support as a result of crushing the smaller branches with the majority attained through the larger branches. The Board, however, finds that this is not accurate and that a review of the membership evidence does not support this contention. The investigating officer's report discloses the number of employees by branch as per the bargaining units submitted by TD, as follows:

Commerce Centre and Sudbury North End (sub-branch): 38

Plaza 69: 21

Falconbridge Plaza and Garson (sub-branch): 34

Copper Cliff: 6

Lively: 7

Levack: 5

Total: 106

[65] A review of the above numbers establishes that the number of employees in each branch (including sub-branches) varies. Lively is not the only small branch, there are others (Copper Cliff and Levack). The largest branch, including its sub-branch (Commerce Centre and Sudbury North End) comprises only 38 employees.

[66] The original panel was satisfied that the union had established majority support for the unit found appropriate, that is a unit comprising all employees of TD Canada Trust in the City of Greater Sudbury, excluding managers and persons above the rank of managers and employees in the Business Banking and Insurance group. The Lively Branch employees, as well as all other TD employees within the City of Greater Sudbury, are included in the bargaining unit found appropriate.

[67] Once the initial panel found that a unit comprising all of TD's employees in the Greater City of Sudbury was appropriate, it was only necessary for the union, in accordance with the *Code*, to establish majority support in the unit as a whole and not at each individual branch. This is similar to a bargaining unit comprising several departments of the same organization. An assessment of union support by individual department could conceivably show that the union has overall majority support without having majority support within each department. Similar to the Lively Branch employees, it could be that employees in a particular department may feel strongly about not being unionized; however, once the Board has found that a bargaining unit is appropriate, the requisite support is then determined for that unit as a whole and not on the basis of each portion of that bargaining unit.

[68] The same reasoning was adopted in *National Bank of Canada*, *supra*, as follows:

> Indeed, if we consider an appropriate industrial bargaining unit, with an employer who operates a single plant, we will find a number of departments in which employees with varying qualifications perform their jobs. Once a labour board determines that there is sufficient community of interest and integration of functions, and similarity of working conditions and system of compensation to conclude that all

> employees - except, say office employees, members of management and employees in confidential labour relations positions - will be in the unit, does it then ask the applicant union to establish that a majority of employees in each department support the application?
>
> **Moreover, with respect to the representativeness in the unit, the Board must say that the applicant has established this. But beyond that, the representativeness of the union is not a result of crushing small branches with an enormous majority in the biggest branch; that is not the evidence.**
>
> (pages 142; 303; and 14,314; emphasis added)

[69] As part of the present reconsideration application, TD has requested that the Board provide membership information. More specifically, it requested that the Board release membership evidence on a branch-by-branch basis. TD maintains that the membership support for each branch can be provided without disclosing individual employee wishes as required under section 35 of the *Regulations.*

[70] The reconsideration panel is satisfied that, in order to address the issues raised in the present application, it is sufficient to state that based upon the information contained in the confidential portion of the investigating officer's report the union established majority support **in all branches** within the City of Greater Sudbury, except the Lively Branch. Thus, contrary to TD's position, this was not a situation in which the larger branches crushed the smaller branches. In the reconsideration panel's view, the original panel correctly applied the Board's process, as established by its jurisprudence, when it considered the union's overall support for the bargaining unit found appropriate.

[71] Both TD and the Lively Branch employees have argued that the Board's power under section 18.1 of the *Code* to review, at a later date, the bargaining unit structure to add branches to the bargaining unit militates in favour of not including any branches where majority support within the branch has not been established. In response to this argument, the reconsideration panel agrees with the position of the union that the Board's role and obligations under the certification provisions of the *Code*, and in particular under section 28, are independent of its broader power to review bargaining unit structures under section 18.1 of the *Code.* In addition, the applicable test under each provision is different. To that end, under section 18.1, the Board will not exercise its discretion to

review the structure of bargaining units, unless it is satisfied the existing bargaining units are no longer appropriate for collective bargaining. This is not the situation in the matter at hand.

B - Failure to Disclose Information

[72] One of the bases for the reconsideration application is the failure by the original panel to provide copies of the employees' interventions to the other parties. Pursuant to section 35 of the *Regulations*, the Board is required to keep employee wishes confidential. That section provides as follows:

> 35. The Board shall not disclose to anyone evidence that could reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the disclosure would be in furtherance of the objectives of the *Code.*

[73] Because the interventions filed addressed the wishes of the employees, in keeping with section 35 of the *Regulations,* the Board did not disclose the employees' letters to the union or the employer. The confidentiality extended to the wishes of employees or their membership in a trade union is primarily intended to prevent harassment or reprisals. There are also other well-established labour relations reasons for not revealing such information. For example, the knowledge of only borderline majority support for a trade union could have detrimental effects on collective bargaining, particularly in the context of a first collective agreement. Consequently, the Board has consistently denied requests to provide evidence of union membership (see *Maritime-Ontario Freight Lines Limited* v. *Teamsters Local Union 938*, no. A-574-00, November 2, 2001 (F.C.A.); *Réseau de Télévision Quatre Saisons Inc.* (1990), 79 di 195; and 90 CLLC 16,047 (CLRB no. 779); and *K.D. Marine Transport Ltd.* (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)).

[74] The reconsideration panel is satisfied that the initial panel did consider the interventions filed by certain employees in its deliberations. This is confirmed by the following passage of the decision under review:

> [30]... **Upon review of the employee letters** and the confidential report, the Board has concluded there was no coercion or intimidation of employees associated with the union's membership campaign. ...
>
> (*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; pages 10-11; emphasis added)

[75] It is to be noted that in certification application, individual employees are normally not given standing to intervene in regards to the bargaining unit definition. The Board has found in *Nav Canada et al.*, [2000] CIRB no. 88, that whenever bargaining unit scope is at issue, employees do not have standing, whether dealing with section 18, 18.1 or 27. Employees have no "party" status in relation to bargaining unit definition, unless granted such status at the Board's discretion.

[76] In *TD Canada Trust in the City of Greater Sudbury, Ontario* (LD 1282), *supra*, the Board recognized the issue presently being raised and granted the Lively Branch employees status in the reconsideration application filed by the employer. It gave the intervenors the opportunity to make further submissions and the union and employer the chance to respond:

> As regards the application for intervenor status, the reconsideration panel finds that the Lively employees, despite their contention to the contrary, had not been granted intervenor status in Board file no. 24751-C. The reconsideration panel, however, also finds that although the original submissions of the Lively employees were, in part, expressions of their wishes about wanting or not wanting to be represented by the union, there was also a significant component which went to the issues in dispute. Whereas, employee wishes are deemed to be confidential and not shared with the parties, representations addressing the substantive issues under consideration are to be transmitted to the parties and an opportunity given to respond to the points raised. However, as this opportunity was not granted to the parties in file 24751-C, the Board finds it appropriate to grant intervenor status to the Lively employees in the reconsideration application filed by the employer. Accordingly, if the Lively employees wish to make further submissions to the Board with respect to the reconsideration application, they must do so on or before July 5, 2005. The employer and union shall have until July 12, 2005 to file their responses.
>
> (pages 2-3)

[77] The Lively Branch employees have been granted intervenor status in the present application and all parties have had the opportunity to make further submissions within the present reconsideration applications. In the reconsideration panel's view, this alleviates any concerns about the initial panel not disclosing relevant information. All parties have now had an opportunity to make submissions which have been considered by the reconsideration panel within the process of the present application.

C - Section 2(d) of the *Charter*

[78] Both TD and the intervenors essentially raise the same point under the present heading. The original panels' decision to include certain employees, in particular the Lively Branch employees,

without giving sufficient weight to their interventions or their wishes, including not holding a representational vote, violated their right of non-association or freedom from forced association under section 2(d) of the *Charter*.

[79] This Board has had numerous occasions upon which to address this argument and, consistent with its prior rulings, finds that there has been no breach of the employees' *Charter* rights in the present circumstances.

[80] In this regard, the Board's decision in *TELUS Communications Inc. et al.*, [2004] CIRB no. 278; and 111 CLRBR (2d) 27, is instructive. In that case, the Board, in the context of a bargaining unit structure review, found that former Clearnet and Québec Telephone (Mobility) (QTM) employees - two businesses acquired by TELUS - which had become TELE-MOBILE employees, fell within the existing Telecommunications Workers Union (TWU) bargaining unit. The Board found it was not necessary to order a representation vote to ascertain the wishes of the employees to be swept in, despite that they were previously unrepresented or represented by a different bargaining agent, since the TWU represented the vast majority of the employees in the single combined unit.

[81] In response to the employer's constitutional objection in that case, the Board thoroughly reviewed the *Charter* principles at issue and the past jurisprudence of the Board and the courts, and concluded that it would not contravene section 2(d) of the *Charter* if it were to exercise its discretion to order that the former Clearnet and QTM employees be swept into the existing single bargaining unit without holding a vote. It adopted the principle enunciated by the Supreme Court of Canada in *R.* v. *Advanced Cutting & Coring Ltd. et al.* (2001), 276 N.R. 1, and found that the mere requirement to join a union must be viewed as insufficiently burdensome to breach the negative freedom of association embedded in section 2(d) of the *Charter*.

[82] This decision of the Board was upheld by the Federal Court of Appeal in *Télé-Mobile Co. et al.* v. *Telecommunications Workers Union et al.*, [2005] 2 F.C.R. 727; (2004), 248 D.L.R. (4th) 25; 328 N.R. 336; and [2005] CLLC 220-043 (F.C.A., no. A-327-04). The Federal Court of Appeal dealt with the issue in short order, recognizing that the facts of the *TELUS Communications Inc. et al.*, *supra* decision were distinguishable from those in *R.* v. *Advanced Cutting & Coring Ltd. et al., supra* in

that, unlike the situation in *R.* v. *Advanced Cutting & Coring Ltd. et al., supra*, the Rand formula applied in *TELUS Communications Inc. et al.*, *supra*, such that the obligation in question was even less onerous. In *R.* v. *Advanced Cutting & Coring Ltd. et al., supra*, the employees were statutorily required to join one of the designated unions, whereas under the *Code*, the requirement is only to be included within a bargaining unit and to pay union dues. The Federal Court of Appeal stated that mere inclusion in a bargaining unit and the compulsory payment of dues do not engage section 2(d), even though members of the bargaining unit who decide not to belong to the union thereby exclude themselves from having any say in the manner in which it represents them. It cited with approval the Supreme Court of Canada decision in *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, and the more recent OLRB decision in *Metroland Printing, Publishing and Distributing Ltd.*, [2003] OLRB Rep. January/February 104.

[83] Leave to appeal to the Supreme Court of Canada on this very *Charter* issue was denied by the Supreme Court in *Rosella T. Liberati, Tele-Mobile, TM Mobile Inc. and Telus Communications Inc.* v. *Telecommunications Workers Union*, no. 30782, June 30, 2005 (S.C.C.).

[84] In *Metroland Printing, Publishing and Distributing Ltd.*, *supra*, a union applied to represent an all-employee bargaining unit at a small community newspaper in Midland, Ontario. One of two employees who comprised the employer's distribution department intervened and submitted that the employees in this department did not want to be represented by the union. He contended that any Board decision that ordered both himself and the other distribution department employee into the proposed bargaining unit would contravene their guaranteed freedom of association under section 2(d) of the *Charter*. In rejecting this argument, the OLRB found that inclusion in the bargaining unit is an acceptable form of compelled association:

> 30. Since the Board's decision in *Corporation of the City of Thunder Bay* the Supreme Court of Canada has considered the Freedom of Association, and the right not to associate, in connection with labour relations matters. In *Lavigne* v. *OPSEU*, [1991] 2 S.C.R. 211, the Supreme Court of Canada considered, but failed to conclusively decide whether s.2(d) encompasses the right not to associate. The Court revisited the issue recently in *P.* v. *Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209. There, eight of nine justices acknowledged the existence of the negative right not to associate under s.2(d). In *Advance Cutting & Coring*, the Court considered a legislative provision requiring workers to join one of a list of unions. The Court found that the bare obligation to join a union was not sufficiently onerous to violate the right not to associate. At page 329 of the decision Justice LeBel addressed the limits on the right not to associate:

> "The acknowledgment of a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arises. Otherwise, it would mean that the mere fact of association might amount to a breach of the Charter. An inquiry must take place into the nature of the commitment to an association."
>
> 31. In the present case, Mr. Walker objects not to becoming a member of the union but to his inclusion in a bargaining unit with other departments (the mere fact that Mr. Walker is included in a bargaining unit does not compel him to become a member of the union). Clearly, the obligation to be included in a bargaining unit is less onerous than the requirement to join a trade union, and cannot be found to violate Mr. Walker's right not to associate under s.2(d). **Inclusion in a bargaining unit is an acceptable form of compelled association and does not violate the guarantees of s.2(d) even though the freedom of association includes the right not to associate**.
>
> (page 113; emphasis added)

[85] The above principles apply equally in the present matter. The present situation is, in certain respects, analogous to *Metroland Printing, Publishing and Distributing Ltd.*, *supra*, since the intervenors object to being included in the bargaining unit without a representation vote and without any concern given for their express wishes not to be included. The original panel exercised its discretion and found that the appropriate bargaining unit was one that included all of TD's branches in the geographical area of Greater Sudbury, which includes the Lively Branch. On the basis of its finding of majority support for the bargaining agent in the unit found to be appropriate, the original panel issued its certification order, in accordance with Board policy and practice. The fact that the individual employees of the Lively Branch are thereby obligated to belong to the bargaining unit and to pay union dues, even if it is against their wishes, does not, on the basis of the *Charter* principles and authorities cited, constitute a violation of the employees' rights under section 2(d) of the *Charter*.

D - Membership Evidence

[86] In assessing the present reconsideration applications, it is helpful to remember that certification applications are largely administrative in nature, involving for the most part findings of fact, and that the issues to be decided go to the heart of the Board's specific expertise (see *Coastal Shipping Limited*, [2005] CIRB no. 309).

1 - Inadequate Investigation and Failure to Consider TD's Submissions

[87] In the decision under review, the original panel commented as follows in regards to the investigating officer's investigation of employees' concerns:

> [30] A number of employees filed letters of concern with the Board with respect to this application. In its submissions, the employer also raised the issue that there had been coercion and intimidation during the union's certification campaign, but did not provide the union with its allegations. **The Board's investigating officer conducted interviews of a random sample of employees and filed a confidential report of these interviews for the Board's consideration. Upon review of the employee letters and the confidential report, the Board has concluded there was no coercion or intimidation of employees associated with the union's membership campaign.** While some employees stated they were uncomfortable at being asked to join a union, or that it was untimely, generally, their concerns stemmed from a lack of knowledge of the unionization process and the fact that some were approached while at home. No employee stated being coerced into signing a membership card. Employees who did not agree with the certification process did not sign a membership card. The Board, therefore, dismisses these allegations as unsupported by the facts.
>
> (*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; pages 10-11; emphasis added)

[88] Both TD and the intervenors question the adequacy of the Board's investigation in relation to the union's membership evidence given their allegations of intimidation and coercion. Relying on the above passage of the decision under review, TD submits that a proper and fair investigation into the determination of the validity of the union's membership evidence in a certification application requires that, at a minimum, the Board through its investigating officer: (I) investigate fully all claims, written and verbal, made to the Board directly by employees or indirectly through TD; (ii) conduct an appropriate level of inquiry of other employees in each of the branches who did not specifically communicate with the Board; and (iii) investigate the method by which the union obtained membership evidence, including how the union obtained personal information about employees, to ensure employees' rights, including their right to privacy under applicable privacy legislation, were not violated.

[89] The Board's general practice in circumstances where questions arise as to the validity of the membership evidence or the manner in which it is obtained, is for the Board's investigating officer to conduct an investigation of the specific allegations. The officer may also contact a random sample of other employees to test the voluntary nature of the remainder of the membership evidence. This

investigation is done on a confidential basis, usually by way of interviews with individual employees, and the results are reported to the Board by way of a confidential report, in accordance with the Board's *Regulations* (see *IMS Marine Surveyors Ltd.*, *supra*).

[90] The level or extent of the investigating officer's investigation is discretionary and may vary depending upon the circumstances. It will depend on a variety of factors, such as the nature and extent of the allegations, the size of the proposed bargaining unit and the availability and willingness of employees to be interviewed. Ultimately, it rests with the panel seized with the matter to determine whether further investigation is required and, if it is satisfied that the membership evidence is reliable, such evidence may be used to determine the true wishes of the employees.

[91] The manner in which the Board will respond to the allegations and its determination of what action it will take are discretionary and will depend upon the seriousness of the allegations and on the strength of the evidence presented. It may be that, in a given case, the investigation by the Board's officer will reveal that the allegations of intimidation or coercion were not made out, or that they were not so significant as to taint the membership evidence casting doubt on the true wishes of the employees. Only where the Board is satisfied that there have been improprieties or undue pressure that affect the validity or reliability of the membership evidence submitted, will the Board consider an alternative method of verifying employee wishes and the level of support for the applicant union.

[92] A review of the initial certification application file, including the investigating officer's confidential report to the Board reveals that the original panel's statement that the investigating officer conducted interviews of a "random sample of employees," does not reflect the true nature of the investigation actually conducted. This, in turn, may have contributed to the uncertainty and sense of unfairness apparently felt by the intervenors and the employer. However, the investigating officer in fact conducted a more thorough investigation than the phrase "random sample" implies. The investigating officer directed his attention towards the specific allegations raised by the employer. The confidential report is very clear as to which employees were interviewed and which employees the officer had attempted to contact, and establishes, to the satisfaction of the reconsideration panel, that the specific allegations raised by the employer have been investigated.

[93] The fact that the officer did not interview each and every individual employee who wrote to the Board to express wishes or who included a statement as to union tactics does not in itself render the investigation inadequate or insufficient, or amount to a denial of the right to be heard. As stated above, the extent of the investigation conducted by the officer, and ultimately by the Board, is discretionary and will be dictated by the nature and seriousness of each allegation and the particular circumstances of each case.

[94] It is evident from the decision under review that the original panel considered both the concerns expressed in the employee letters and the results of the confidential interviews of the employees connected with the employer's allegations, and that it was satisfied that the evidence before it was sufficient for it to conclude that the facts as alleged did not amount to intimidation or coercion. The original panel could have ordered further investigation if it had deemed that the facts and circumstances warranted it, but it was also within its discretion to proceed on the basis of the information before it.

[95] The original panel's finding of no intimidation or coercion in the present case was an assessment of the facts as presented and investigated. The determination of what constitutes intimidation, harassment or coercion by union officials during a union organizing drive must ultimately be made on an objective basis, bearing in mind the intended objectives and purposes of the *Code*. The original panel assessed the evidence as it saw fit, and it would be inappropriate for this reconsideration panel to substitute its opinion to that of the original panel. This reconsideration panel is satisfied that a proper and sufficient investigation was conducted by the Board into the allegations of intimidation and coercion raised, and that the Board did not fetter its discretion or otherwise commit an error of law or policy or breach of natural justice with respect to its investigation into or the assessment of the membership evidence upon which it relied in making its original decision to certify the union.

2 - Not Making Required Distinctions with *IMS Marine Surveyors Ltd., supra* Decision

[96] TD takes exception to the following passage of the decision under review, and submits that the original panel failed to make the necessary distinctions between the *IMS Marine Surveyors Ltd.*, *supra*, decision and the present matter:

> [31] There is one further point that should be addressed. In certification proceedings, the wishes of employees, including their motives for joining a union are not the employer's concern. Any disquiet about undue influence or coercion into signing membership concerns should be brought to the Board's attention by the employees themselves. Under section 96 of the *Code*, such allegations are within the Board's mandate to adjudicate and no useful purpose is served by the employer raising such an issue in an attempt to oppose an application for certification (on this point, see *IMS Marine Surveyors Ltd.*, [2001] CIRB no. 135).
>
> (*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; page 11)

[97] The employer points out that in *IMS Marine Surveyors Ltd.*, *supra*, the employer had filed a separate complaint and no employees had complained on their own. These factors, argues TD, distinguish the present case from that case. It submits that these distinctions are significant and should have caused the original panel to give greater consideration to the concerns and allegations raised by the employer. In the employer's view, the Board's reliance on the *IMS Marine Surveyors Ltd.*, *supra* decision, without making the necessary distinctions, amounted to an error of law or policy.

[98] The essence of the original panel's comments to which the employer objects is that complaints of intimidation and coercion by the union in its organizing campaign should be raised by employees themselves and not by an employer. The *IMS Marine Surveyors Ltd*., *supra* decision was cited by the original panel as an authority for that proposition. The reconsideration panel would agree that, as a general rule, it is certainly preferable to have complaints of intimidation and coercion raised by those who have suffered directly from such alleged tactics. This would allow for the employer to remain neutral and outside of the main area of contention over employee wishes in cases where such evidence is in issue. We would also agree that such allegations should not be raised by an employer simply as a tactic to defeat or to stall the certification process. However, the reconsideration panel is of the view that such a proposition should not be interpreted so strictly as to suggest that employers are never entitled to raise such concerns in the context of an application for certification. The employer argues that the original panel's statement shows that it failed to properly distinguish the case in *IMS Marine Surveyors Ltd.*, *supra*, from the matter it had to consider. The reconsideration panel does not agree with this assessment. The opinion expressed by the original panel was made in *obiter* and did not affect the overall determination of the certification application by the Board. As described above, a review of the confidential report in the original file shows that, although the

original panel expressed its view as to the appropriate manner for bringing such allegations forward, it nevertheless did not prevent the Board from conducting an investigation into the very allegations raised by the employer. In the present case, as discussed above, the Board considered and investigated the allegations raised by the employer, through its practice of confidential interviews with affected employees, and satisfied itself that there was insufficient evidence to support a finding of intimidation or coercion that would call into question the reliability of the membership evidence submitted. The Board then, having already considered and disposed of the allegations, expressed its view as to what it considered a more appropriate manner for raising such allegations.

[99] On the basis of the above, the reconsideration panel cannot agree that the original panel applied a previous decision without making essential factual distinctions such that it committed an error of law or policy, in the circumstances. Nor can it be said that the original panel's comments led it to refuse or decline to investigate the employer's allegations, such that it thereby committed a breach of natural justice or an error of law or policy by potentially relying on unreliable or unlawfully obtained membership evidence.

[100] Overall, and after a careful review of all of the parties' submissions, the reconsideration panel is satisfied that the union did not obtain membership evidence by means contrary to the *Code.* Consequently, the initial panel did not commit any error of law or policy in regards to the validity of the union's membership evidence.

E - Oral Hearing

[101] TD takes issue with the fact that the original panel did not hold an oral hearing in this matter to allow the parties to be heard in order to test the validity of the membership evidence and the will of the employees as to their true wishes. In its view, failure to hold an oral hearing in the particular circumstances, where a group of employees and the employer have both called into question the reliability of the union's membership evidence, constitutes a breach of the rules of natural justice and an error of law or policy concerning the proper interpretation of the *Code*.

[102] This reconsideration panel finds no breach of natural justice or error of law or policy on such grounds, in the circumstances. While the Board clearly has a duty to act fairly and in accordance with the rules of natural justice, the principles of which include the right to be heard, the parties' right to be heard does not oblige the Board to conduct oral hearings in all cases (see *Komo Construction Inc. et al.* v. *Commission des Relations du Travail du Québec et al*., [1968] S.C.R. 172).

[103] Section 16.1 of the *Code*, which came into effect on January 1, 1999, gives the Board express authority to determine any matter before it without an oral hearing. This authority has been upheld on judicial review by the Federal Court of Appeal (see *NAV Canada* v. *International Brotherhood of Electrical Workers, Local 2228* (2001) 267 N.R. 125 (F.C.A., no. A-320-00)).

[104] In addition to its express authority, the Board has had a long-standing practice of not holding an oral hearing into certification applications, except in exceptional circumstances (see *Maritime-Ontario, Parcel Division*, [2000] CIRB no. 100). This practice has also been upheld by the Federal Court of Appeal on numerous occasions (see *Durham Transport Inc.* v. *International Brotherhood of Teamsters and the Canada Labour Relations Board* (1977), 21 N.R. 20 (F.C.A., no. A-553-77); *Greyhound Lines of Canada* v. *Canada (Labour Relations Board)*, (1978) 24 N.R. 382 (F.C.A., no. A-324-78); *Canadian Arsenal Limited* v. *Canada (Labour Relations Board)*, [1979] 2 F.C. 393; and *Woodward's Limited* v. *International Association of Machinists and Aerospace Workers* (1990), 116 N.R. 181 (F.C.A., no. A-138-90)). The Board has recently confirmed this practice and its rationale in *Coastal Shipping Limited, supra*. This practice includes dealing with issues of employee wishes and membership evidence, which are generally investigated by the Board's officer and reported only to the Board in order to ensure confidentiality of evidence of employee wishes, in accordance with the Board's *Regulations* (see *Sedpex Inc. et al.* (1985), 63 di 102 (CLRB no. 543)). Accordingly, the panel seized of the matter has the full power to decide whether to hold a hearing, based upon the submissions and material on file.

[105] In this particular case, as discussed in more detail above, the Board's investigating officer did, in fact, investigate the allegations of intimidation and coercion and reported his findings to the Board in a confidential manner. The original panel was satisfied, on the basis of that report and all of the evidence and submissions on file, that the membership evidence was reliable and was able to reflect

the true wishes of the employees as at the application date. On this basis, there cannot be said to be exceptional circumstances that would warrant or compel the Board to hold an oral hearing. Consequently, this panel finds no breach of natural justice or error of law or policy on the part of the original panel in exercising its discretion not to hold an oral hearing in the case before it.

F - Representation Vote

[106] In its response to the union's certification application, TD requested that a representation vote be conducted. The initial panel addressed that request as follows:

> [34] The Board must now address the employer's request that the Board order a representation vote in order to ascertain employee wishes. The Board's practice in certification applications is to ascertain the wishes of employees by means of membership cards. Where the union has majority status, the Board will certify without holding a vote. A simple majority in the bargaining unit is sufficient for certification under section 28(c) of the *Code*.
>
> [35] Where questions arise as to the validity of membership evidence filed by the applicant union, the Board's practice is to investigate the allegations by means of confidential interviews conducted, as was the case here, by the Board's investigating officer. Where the Board is satisfied that the allegations are not founded, there will be no reason to conduct a vote, as the Board will verify and rely on membership evidence provided by the union at the time of its application. This verification is conducted by the investigating officer.
>
> (*TD Canada Trust in the City of Greater Sudbury, Ontario (316), supra*; page 12)

[107] This reconsideration panel agrees with the general principles and statements made by the original panel on this issue. The Board's long-standing practice, which has been reaffirmed on numerous occasions, is to ascertain the wishes of the employees by way of membership cards as at the date of the application for certification (see *Atomic Transportation System Inc.* (1995), 99 di 56 (CLRB no. 1137); and *Sedpex Inc. et al.*, *supra*). Where the union has majority support on the basis of the membership evidence at the date of application for the unit found appropriate, there must be serious reasons for the Board to exercise its discretion to order a vote pursuant to section 29(1) of the *Code*:

> ... in exercising its discretion under section 29(1), the Board has maintained that it would order representation votes only in special circumstances such as particular raid applications, alleged unfair labour practices, where it suspects that union membership evidence is tainted or irregular, and, very

> exceptionally, where a considerable amount of time has passed between the date of application and the date of the Board's decision ...
>
> Only very rarely has the Board departed from such policy and determined that employee wishes ought to be ascertained at another date and through another means than membership evidence. In these cases, the Board, depending on the nature of the irregularities alleged or affecting the membership evidence, has either ordered a representation vote in accordance with section 29(1) of the *Code* or dismissed the certification application outright.
>
> (*Atomic Transportation System Inc*. (1994), 94 di 48 (CLRB no. 1064); page 55)

[108] In the present case, it is evident from the decision under review that the original panel considered the membership evidence on file at the date of the application, and had the benefit of the employee wishes letters and the results of the confidential interviews and investigation report prepared by the Board's investigating officer. On the basis of that information, the original panel made its assessment and did not consider that there were serious concerns respecting the accuracy and reliability of the membership evidence, and was satisfied that the evidence was not obtained through any unlawful means or by way of intimidation or coercion.

[109] The Board's policy is that a representation vote is the exception rather than the rule, and the decision to order a vote pursuant to section 29 of the *Code* is clearly a discretionary one left for exceptional circumstances. The role of the reconsideration panel is not to sit in appeal of the original panel's decision or to justify it; hence, the reconsideration panel would be very reluctant to rescind the decision of the initial panel to certify without a vote. The reconsideration panel is satisfied that the original panel considered all of the parties' submissions, the employee letters, the employee interviews and the Board officer's report and did not deviate from the Board's established policy, as outlined in *Atomic Transportation System Inc. (1064), supra*, in arriving at its decision not to order a vote in the circumstances.

[110] TD further asserts that a representation vote should have been held at each branch and that only those branches with majority support should have been certified. This issue has been addressed above, where the reconsideration panel sets out the Board's policy concerning the appropriate bargaining unit and the level of support required. As indicated, the reconsideration panel is of the view that the original panel was not required, either by the *Code* or Board policy, to assess the level of support for the union at each individual branch included within the proposed unit. Majority

support within the overall unit deemed to be appropriate is all that is required. Therefore, its decision not to order a representation vote at each branch, and then include only those branches with majority support within the certification, was fully justified and in accordance with the Board's policy and practice in certification matters.

IV - Conclusion

[111] For the above reasons, the Board finds there was no failure by the original panel to respect a principle of natural justice, and there was no error of law or policy that cast a doubt on the interpretation of the *Code*. Finally, the submissions of the Lively Branch employees do not convince the Board that the panel under review erred in its decision to include them in the bargaining unit found appropriate for collective bargaining. Consequently, the present application is dismissed.

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

Warren R. Edmondson
Chairperson

Julie M. Durette
Vice-Chairperson

Douglas G. Ruck, Q.C.
Vice-Chairperson