Canada Industrial Relations Board **Conseil canadian des relations industrielles**
C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240 rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8
Fax/Télécopieur: 613-995-9493

Our files: 31335-C, 31336-C

Document n°: 542648

April 12, 2016

BY COURIER

Me Claude Tardif
Rivest, Schmidt et Associés
Montreal, QC
H2R 2N8 claudetardif@rivestschmidt.qc.ca

Me Maryse Tremblay
Borden Ladner Gervais L.L.P.
Suite 900
1,000 De la Gauchetière Street West
Montreal, Quebec
H3B 5H4 mtremblay@blg.com

Me Yan Boissonneault
Bell Canada
Legal Department
Building A7
1 Carrefour Alexander-Graham-Bell
Verdun, Quebec
H3E 3B3 yan.boissonneault@bell.ca

In the matter of the *Canada Labour Code (Part I – Industrial Relations)* and an application for an interim order filed pursuant to section 19.1 of said *Code* by Unifor, applicant; Bell Canada, respondent; Communications, Energy and Paperworkers Union of Canada, certified bargaining agent. (31335-C)

In the matter of the *Canada Labour Code (Part I – Industrial Relations)* and a complaint of unfair labour practice filed pursuant to section 97 (1) of said *Code* by Unifor, the complainant, alleging violation of Article 94(1)a of the *Code* by Bell Canada, respondent; Communications, Energy and Paperworkers Union of Canada, certified bargaining agent. (31336-C)

Maîtres,

Further to the hearing held in the matter of file n° 31336-C, the parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board composed of Me Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I – Industrial Relations)*.

The Board notes that, since the unfair labour practice complaint (file n° 31336-C) was heard expeditiously, there is no longer any need to process the application for an interim order. Accordingly, file n° 31335-C is now closed.

As agreed with the parties, the Board will forward a copy of the English version of the Reasons to them as soon as possible.

To comply with Section 20 of the *Official Languages Act*, the reasons will also be published on the Board's website at www.ccri-cirb.gc.ca.

Sincerely,

[signed... signature illegible]
For Sylvie M.D. Guilbert
Executive Director and Senior Registrar

Enc.

C.C.: Ms. Elaine Désorcy (CIRB – Montreal)

Canada Industrial Relations Board **Conseil canadian des relations industrielles**
C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240 rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8
Fax/Télécopieur: 613-995-9493

Reasons for decision

Unifor,

applicant,

and

Bell Canada,

respondent.

Board file: 31335-C

Unifor,

complainant,

and

Bell Canada,

respondent.

Board file: 31336-C
Neutral citation: 2016 CIRB **823**
April 12, 2016

The Canada Industrial Relations Board (the Board) was composed of Me Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*). A hearing was held in Montreal, Quebec, on December 21 and 22, 2015, as well as on January 8 and February 1, 2, 4, 15 and 17, 2016.

Appearances
Me Claude Tardif, for Unifor (Me Alexandre Grenier initially appeared for Unifor but was replaced by Me Claude Tardif during the hearings);
Me Maryse Tremblay and Me Yan Boissonneault, for Bell Canada.

I. Nature of the complaint

[1] The Board received an application for an interim order and a complaint for unfair labour practice filed on October 27, 2015 under sections 19.1 and 94(1)a) of the *Code* by Unifor (the union) against Bell Canada (Bell or the employer) (file n^{os} 31335-C and 31336-C).

[2] In essence, the union is seeking a declaration by the Board that Bell is engaging in unfair labour practice under section 94(1) of the *Code* and refuses to respect the union's monopoly over the representation of employees by offering a voluntary separation package (VSP) directly to its employees covered by the bargaining certificate.

[3] The union is also requesting that the Board issue an order that Bell cease implementation of the VSP and that it refrain from offering VSPs directly to employees without first obtaining its consent.

[4] Bell is requesting that the Board exercise its discretionary power under section 98(3) of the *Code* and that it dismiss the complaint in favour of its deferral to grievance arbitration.

[5] The Board first summoned all the parties to a hearing on November 5, 2015, concerning the application for an interim order (file no 31335-C). At the beginning of this hearing and with the consent of the parties, the Board cancelled the hearing since an agreement was reached to hear the complaint for unfair labour practice expeditiously. The hearing on the merits of the case thus began on December 21, 2015. Consequently, it was not necessary to rule on the application for an interim order and the Board has closed the file on this matter.

II. Background and facts

[6] Bell operates in the telecommunications sector, providing telephone and broadcasting products and services to residential and business customers. On March 4, 2008, the Communications, Energy and Paperworkers Union of Canada (CEP) was certified, pursuant to the *Code*, as the bargaining agent representing "*all office employees excluding employees performing supervisory functions and those above the rank of supervisor"* (Order n^{o} 9413-U). However, although the order has not yet been officially updated, it is worth noting that Unifor became the successor union to the CEP following a merger that took effect on September 1st, 2013. The collective agreement binding the parties was renewed in 2013, came into force on June 1st, 2013 and is valid until November 30, 2017.

[7] The parties also reached a memorandum of agreement entitled the "Workforce Adjustment Plan" (hereinafter referred to as the "memorandum of agreement"), which was renewed and amended on September 23, 2013. This memorandum of agreement has existed since 1995 and is an integral part of the collective agreement. The following excerpt is taken from this document:

> **WORKFORCE ADJUSTMENT PLAN**
> **MEMORANDUM OF AGREEMENT BETWEEN:**
> **BELL CANADA**
> **AND**
> **COMMUNICATIONS, ENERGY AND PAPERWORKERS**
> **UNION OF CANADA**
>
> This is to confirm our agreement, and reflects the discussions which were held concerning the force adjustment and lay-off provisions found in the Collective Agreement, with respect to the process to be implemented for dealing with workforce issues during the term of the Collective Agreement.
>
> This Workforce Adjustment Plan is a tool to be used when there is a need for a reduction of staff levels to meet the challenges of an increasingly competitive marketplace. In order to respond to the impact of workforce

adjustment, a process that involves the participation of the union and provides for the fair and equitable treatment of surplus employees has been agreed to by the parties.

Key features of the Workforce Adjustment Plan include:

Involvement of the Union

The involvement of the union in the Workforce Adjustment Plan is accomplished through the following forums: Department Joint Committees and District Joint Committees. These forums are designed to ensure that the union is kept informed of developments in the management of the workforce within the context of this Plan and is able to review the application of the Workforce Adjustment Plan guidelines.

Department and District Responsibilities

The Workforce Adjustment Plan guidelines are to be implemented on a department and district basis as and where appropriate, in an attempt to resolve a staff surplus problem. These guidelines have been developed jointly and include the following: controls on hiring, reclassification to Regular status, the employment of Temporary employees, the process for filling any vacant position in this bargaining unit and the utilization of voluntary measures where possible.

Management of Surplus

If, after following the application of the Workforce Adjustment Plan guidelines, there remains a surplus of Regular employees, the Company will offer the displacement procedure where applicable as set out in Attachment A of this Agreement.

[8] In 2013, the parties also agreed on a document entitled "Workforce Adjustment Plan: Clerical and Associated Employees (CEP)" (hereinafter referred to as the "Red Book") for the administration of the memorandum of agreement. This document contains guidelines that are complementary to and supportive of the memorandum of agreement with respect to the management of human resources in the context of a workforce adjustment plan.

[9] In 2005, the parties also signed the Memorandum of Agreement on Outsourcing / Contracting Out, which is an integral part of the collective agreement. This document notably provides for the following:

1. It is agreed that for the duration of this Memorandum of Agreement, Bell Canada will not, as a direct result of the outsourcing or contracting out of any of the work normally performed by employees included in the Clerical and Associated Employees bargaining unit, declare a surplus that would result in the termination or lay off of any Regular Bell Canada employee included in the Clerical and Associated - 80 - Employees bargaining unit and who is employed by Bell Canada on the date of the signing of this Memorandum of Agreement.

2. The parties acknowledge that Bell Canada may resort to the outsourcing or contracting out of bargaining unit work to deal with incremental work volume, work volume generated through attrition and/or for other operational reasons, including situations involving the movement of members of the Clerical and Associated Employees bargaining unit to entities outside of Bell Canada.

3. The parties agree that in situations where any differences concerning the interpretation or application of this Memorandum of Agreement arise, a grievance shall be filed and shall be processed through expedited arbitration. The matter shall be heard by an arbitrator on a date mutually agreed to by the parties.

4. The job security protection described in paragraph 1 of this Memorandum of Agreement, which is provided in the specific context of the modifications made to the Collective Agreement as part of its renewal, shall be in force for the duration of the collective agreement.

[10] In May 2015, Bell notified Unifor of its plan to offer VSPs to a certain number of its Bell Business Markets customer service employees, adding that, as a result, the company would need to resort to outsourcing to absorb the work surplus generated by these departures. In July 2015, Bell estimated the number of voluntary departures at 147, out of a total of 323 employees eligible for a VSP.

[11] During the summer of 2015, verbal discussions and email exchanges took place between the parties and a meeting of the Joint Labour Relations Committee was held on October 2, 2015. Bell gave a detailed presentation of the disputed VSP as well as a timetable for the deployment of its plan. The meeting came to an abrupt end due to disagreement between the parties on the implementation of the VSP, as the union considered that its parameters are subject to negotiation.

[12] On October 15, 2015, the union sent a communication to its Clerical and Associated members denouncing the Employer's attitude and actions. This communication reads as follows:

> Bell Canada has notified the union of its plan to outsource the equivalent of 75 BBM jobs under Domenica Maccioccia (formerly Donald Mackinnon) to vendors. As part of the plan, Bell will not declare surplus: but the company intends to offer up to 110 VSPs in specific areas of BBM to staff who will be pension eligible between now and December 31, 2016. Bell will be advising employees shortly. Bell Canada told us that the purpose of this initiative was to outsource the jobs left vacant by departures. Bell Canada's strategy is to do an end-run around the legal ban in your collective agreement against lay-offs caused by outsourcing.
>
> Your union strongly opposes this VSP initiative. Let's be clear, as a rule the union does not oppose a VSP program aimed at avoiding layoffs where there is a decline in load. But we already have legal protection against layoffs that are intended to facilitate outsourcing. We bargained hard for that protection: we aim to keep it. In the current situation Bell Canada offers a poison-pill: illegally reducing the workforce by creating an artificial shortfall of 75 EQE, then plugging that productivity gap by outsourcing to vendors to fill. Instead, they should be posting good paying jobs in your bargaining unit.
>
> In 2003, the Canadian Industrial Relations Board (CIRB) ruled that Bell Canada broke the law by offering a VSP to Craft employees without first having negotiated parameters with the union. Of course we reminded Bell of this obligation to negotiate the parameters of a possible VSP. The Company simply says that what applies to Craft does not apply to Clerical.
>
> Bell Canada so badly wants to outsource our jobs and our futures ---to realign costs and revenue, to use their words---- that it dangles $6.4M in front of 110 members who are eligible to retire. Considering that the Clerical & Associated bargaining unit had more than 12,000 members in 2002 and now we are less than 6,000 members, you will understand that we cannot support such an assault against our jobs and our futures.
>
> Unifor intends to use all legal remedies to prevent Bell Canada from proceeding with this VSP.
>
> We will notify you of further developments.

[13] On October 22, 2015, Bell sent a letter to the union's representatives in which it voiced its disagreement with the union's letter. In this letter, Bell mentions:

> Mr. Carrière,
>
> This is in response to your communication issued to Clerical and Associated employees located in Québec on October 15, 2015 and in Ontario on October 16, 2015 regarding Bell's Voluntary Separation Packages offer (VSP) and is issued to correct some inaccuracies and/or misunderstandings contained in those communications.
>
> Your communication to Bell's Clerical and Associated employees, more particularly the one sent to employees located in Quebec on October 15, 2015, indicates that Unifor has informed the Company that it has the obligation to negotiate the parameters of an eventual VSP but that Bell flatly refused to do so. That is simply not accurate.
>
> What we indicated to the Committee, on a few occasions, is that the Company does not need to negotiate with Unifor to obtain its consent to proceed with VSP offers to its Clerical and Associated employees as the parties

have already negotiated very detailed provisions in the Collective Agreement, as well as the Red Book which include flow charts, on dealing with workforce adjustments, including VSPs.

What happened is, while the Company has been indicating as far back as July 13, 2015 that it is willing to discuss the union's concerns and VSP modalities, the union's bargaining committee refused to substantially discuss the VSP Bell is prepared to offer despite several requests to do so. The union's spokespersons have instead taken the position that a CIRB decision from 2003 involving a different bargaining unit and a very different agreement prohibited Bell from implementing VSPs without the union's consent and that the union was categorically opposed to any VSP that would result in any work being outsourced.

So that there is no misunderstanding, I am reiterating that Bell is willing to discuss the union's concerns or issues with the current VSP, as well as review VSP modalities, if required. We would appreciate that you inform your members accordingly.

As a matter of fact, such discussions are already taking place following meetings through the forums identified in the Workforce Adjustment Plan Memorandum of Agreement. Indeed, during some of those meetings, the union's committees members have asked questions and raised concerns that Company representatives are currently working to provide answers to so that any adjustments to be made to the VSP may be put in place before its formal presentation to Clerical and Associated employees.

I hope that, instead of making declarations to your clerical membership that the Company is acting illegally, you will recognize that this is what the parties have bargained and that Bell has followed the process outlined in the Collective Agreement and Red Book, and that you will participate through the proper forums in productive discussions aimed at answering the concerns your members may have with the Voluntary Separation Packages offer.

Sincerely,

[signed Steve Desgagné]
Chief Negotiator, BCE & Bell

[14] On October 23, 2015, the union's local unions filed five grievances related to the disputed VSP. Considering the unique circumstances, one of the requests was to declare the use of outsourcing unlawful and in violation of the collective agreement and the Red Book on the grounds that the Employer had not declared an employee surplus. The grievances accused Bell of breaking with past practice and violating the purpose and intent of the agreements in question, notably the Memorandum of Agreement on Outsourcing / Contracting Out, the memorandum of agreement and the Red Book.

[15] On October 27, 2015, the union filed the application for an interim order and the complaint for unfair labour practice with the Board.

[16] On October 29, 2015, Bell held a teleconference to announce its plans to offer a VSP to the employees concerned. One hundred and ten (110) voluntary departures were ultimately announced. The details of the offer were contained in a document entitled "Questions and answers" that was distributed to employees on October 29, 2015, following the teleconference.

[17] Since this announcement, and in accordance with an agreement reached between the parties with the assistance of the Board's industrial relations officer, the VSP had been suspended pending a decision by the Board.

III. Position of the parties

A. The union

[18] In its application, Unifor claims that Bell is engaging in unfair labour practice and interfering with the union's monopoly over the representation of employees by offering a voluntary separation

package (VSP) directly to the employees covered by the bargaining certificate it holds. Moreover, the union claims that Bell is refusing to negotiate the modalities and parameters of the VSP in a context where there is no employee surplus.

[19] According to the union, Bell's proposed reading of the agreements contained in the collective agreement and the Red Book disregards both the historical context in which these agreements were negotiated and the key objective of these agreements, which is the management of employee surpluses. The union claims that Bell at no time declared a surplus and that it failed to apply the procedures agreed to by the parties to this effect.

[20] The union argues that there has to be a need for the reduction of staff levels in order for the memorandum of agreement and the collective agreement to apply. It adds that the Red Book is not integrated in the collective agreement.

[21] The union contends that the parties are in a unique situation that is not covered by the collective agreement and that this should lead the Board to conclude that Bell is obligated to negotiate the terms of the VSP with it.

B. The employer, Bell

[22] According to Bell, it is clear from the provisions of the memorandum of agreement and the Red Book that is has a right to offer VSPs to employees in the absence of a surplus declaration. As such, it does not believe that it is under any obligation to renegotiate the content of the disputed VSP with the union, since an agreement already exists to this effect, as established in the Red Book.

[23] According to Bell, it is also clear from the provisions of the Red Book that the intention of the parties is to give priority to voluntary measures, such as VSPs, as opposed to surplus declarations. In other words, a declaration of surplus employees would be a last resort.

[24] On the question of outsourcing, Bell explains that the parties reached an agreement outlining its rights in this area and that this agreement forms an integral part of the collective agreement. In its view, the outsourcing of work generated by a VSP is not covered by the Memorandum of Agreement on Outsourcing / Contracting Out. Indeed, the services of an outside contractor would be used to deal with the work load generated by voluntary departures and normal attrition, since Bell would not replace departing employees who avail themselves of a VSP. Bell adds that the outsourcing would not be the result of a surplus declaration or employee lay-offs.

[25] Bell requests that the Board defer the complaint for unfair labour practice to arbitration, in accordance with section 98(3) of the *Code.*

IV. Oral evidence

[26] The union called four witnesses: Mr. Olivier Carrière, National Representative, Mr. Howard Law, National Representative, Ms. Myriam Germain, Unifor Local Area Director, and Mr. Steve Couillard, member of the Bargaining Committee and President of Local 6002 in the Quebec City region. The union also filed two affidavits, one from Ms. Myriam Germain and the other from Mr. Olivier Carrière.

[27] The employer called six witnesses: Ms. Ghada Sharkawy, Senior Human Resources Consultant, Bell, Mr. Alberto Da Anunciaco [sic], Manager, Professional Services, Mr. Matthew Smart, Senior Human Resources Consultant, Ms. Sylvie Malo, Senior Human Resources Consultant (Network

Provisioning), Ms. Diane Sabourin, Senior Human Resources Consultant, and Ms. Geneviève Britt, Director, Human Resources.

[28] For the purposes of determining the issues in dispute, only a summary of the testimonials and relevant facts is presented in the following. Several segments of the testimonials deal with email exchanges, telephone conversations and meetings between the parties regarding the VSP in dispute and with the refusal of the union to accept this VSP without negotiation of its parameters. The Board is of the view that these facts are contextual elements that shed light on the events that gave rise to the union's complaint, but that they are not relevant to the issues on which the Board must rule with respect to the merits of the case.

A. The union

1. Mr. Olivier Carrière

[29] Mr. Carrière has served as a National Representative for Unifor since its founding in 2013. Since 2001, he has held several union positions, in addition to participating in the negotiation of several collective agreements, including that signed by the parties in 2013. Mr. Carrière was in fact the union's main spokesperson during these negotiations.

[30] Mr. Carrière explains that the collective agreement between the parties covers local unions 6000 to 6008, four of which are located in Quebec (6000 to 6003) and five in Ontario (6004 to 6008). Approximately 6,000 members are currently covered by the bargaining certificate, down from 12,600 members previously. He attributes this decline in the number of members to the employer's substantial use of outsourcing, technological improvements, loss of clients and an initiative launched by the employer in 2004 following massive departures.

[31] Mr. Carrière explains that the present case concerns employees who are members of Locals 6000, 6003, 6006 and 6008.

[32] Mr. Carrière refers the Board to the Memorandum of Agreement on Outsourcing / Contracting Out and explains that this agreement was incorporated in the collective agreement in 2005. According to the witness, it constituted a key issue for the union given the significant reduction in its membership number.

[33] Mr. Carrière also refers the Board to the memorandum of agreement included in the collective agreement, which has existed for over 20 years. According to Mr. Carrière, this memorandum of agreement applies when the need arises for the Employer to make workforce reductions. Mr. Carrière considers that the factor triggering application of this memorandum of agreement is an employee surplus caused by a shortage of work, and he adds that the surplus declarations made by the Employer often involve VSPs.

[34] Mr. Carrière explains that the memorandum of agreement also provides for a displacement procedure in the event that an employee's position is declared surplus, but specifies that this procedure does not apply if an employee accepts a VSP in a context of a surplus declaration. In other words, a VSP is not necessarily or systematically offered if the employer declares a staff surplus.

[35] Mr. Carrière also refers the Board to the Red Book, which was negotiated upon the renewal of the collective agreement in 2013. He considers that the Red Book is a complement to the memorandum of agreement setting out the procedures to be applied in situations where the Employer wishes to offer voluntary departure packages in the context of a surplus declaration.

According to the witness, a disagreement or difference in the interpretation of the Red Book cannot be referred to arbitration because this document is not part of the collective agreement.

[36] Mr. Carrière argues that the union accepted VSPs in the past as a means to prevent surplus declarations in the context of a reduction in work load or as a result of budgetary imperatives. Mr. Carrière indicates that, if the union always agreed with Bell on every VSP offered, the collective agreement would no longer have any value. He adds that the union disagrees with the VSP in dispute here because the employer is generating attrition in order to outsource work even though it has not declared a surplus.

[37] Mr. Carrière maintains that, despite the fact that the union filed grievances challenging Bell's VSP, and despite the present unfair labour practice complaint submitted to the Board on October 27, 2015, the employer nonetheless proceeded to present the VSP directly to employees. In Mr. Carrière's view, this action discredits the union in the eyes of its members and creates a rift between the members of the bargaining unit.

[38] Under cross-examination, Mr. Carrière admits that this was the first time the union had opposed a VSP for the members of the bargaining unit concerned. When asked about the different VSPs offered to employees between 2010 and 2015, Mr. Carrière acknowledges that several of them were not accompanied by a surplus declaration and that the union nonetheless did not oppose them.

[39] Mr. Carrière is also asked about several other VSPs offered in the absence of a surplus declaration and with an outsourcing project. Mr. Carrière admits that the union did not object to them. He indicates that the union does not oppose VSPs when they are advantageous for employees.

[40] When asked about the Red Book, Mr. Carrière once again declares that it authorizes VSPs, but only in cases where the Employer declares a surplus.

2. Mr. Howard Law

[41] Like Mr. Carrière, Mr. Law has many years of experience with the union. He has served as a National Representative for Unifor since April 2011.

[42] Mr. Law describes the circumstances under which he became aware of the VSP in dispute. Like Mr. Carrière, Mr. Law considers that the different agreements apply to VSPs in situations where there is a staff surplus. Mr. Law maintains that he pointed out to Mr. Serge Thibault, Senior Labour Relations Consultant for the employer, that the VSP in dispute was unlawful and drew his attention to the decision rendered by the Board in 2003 in *Bell Canada*, 2003 CIRB 212.

[43] Mr. Law also states that he is not aware of a past practice where VSPs were implemented in the absence of a surplus declaration. Mr. Law concurs with Mr. Carrière in asserting that Bell's announcement of a VSP to the employees concerned on October 29, 2015 created a rift among members and placed the union in a no-win situation. He indicates that he was contacted by employees who questioned him about their job security. He adds that the circumstances created a demoralizing situation for some employees and placed the union in an awkward situation.

[44] Under cross-examination, Mr. Law is questioned regarding a VSP dated April 2012, that was not accompanied by a surplus declaration and that involved outsourcing. He declares that he does not have any memory of this VSP and considers it an exception.

3. Mr. Steve Couillard

[45] Mr. Couillard joined Bell in March 2005. He has held union positions since 2008 and has been a member of the Bargaining Committee since 2013. He is president of Local 6003 for the Quebec City region. He participated in the negotiations leading to the renewal of the current collective agreement.

[46] Mr. Couillard also describes the circumstances surrounding Bell's presentation of the VSP in dispute. According to Mr. Couillard, the members of his Local first heard of the VSP Bell planned to offer around July 13, 2015, as the employer had sent an invitation by email to the employees concerned; Bell apparently then cancelled the invitation at the last minute. According to Mr. Couillard, a wave of panic swept through the employees and no explanation was given for the cancellation of the meeting. According to him, the employees were nervous and worried.

[47] When cross-examined regarding the invitation of July 13, 2015 received by employees, Mr. Couillard states that the invitation did not mention that it involved a VSP, but rather that it was an "update / Business Market". He indicates that the employees apparently went directly to the source for more information on the reasons for the invitation and its cancellation.

[48] Mr. Couillard was also cross-examined regarding different VSPs that did not contain a surplus declaration and that were implemented by Bell between 2009 and 2012. He claims that he was not made aware of these VSPs, among other things because they did not apply to employees in the Quebec City region. Mr. Couillard claims that he was only involved with a VSP once, in July 2015. This VSP resulted from the need to group work together at a single site, since the three employees at the Quebec City office could no longer carry out their work remotely. Mr. Couillard says that he examined the document presented by the employer at the time, but admits that he did not sign anything in relation to this VSP.

4. Ms. Myriam Germain

[49] Ms. Germain is a Local Area Director for Unifor. She joined Bell in January 2000 and has held union positions since 2001. She served as a National Representative from 2013 to January 2015, and has been Local Area Director since that time.

[50] Ms. Germain was the first union representative approached by Mr. Serge Thibault regarding the VSP in dispute, at the beginning of May 2015. The first presentation of the VSP apparently took place on May 14, 2015. She maintains that Bell's VSP was not accompanied by a surplus declaration and that the surplus of work generated by the voluntary departures would be offset through outsourcing. Mr. Thibault hoped to announce this initiative at the end of May.

[51] Ms. Germain states that she prefers to support VSPs in situations where there is a surplus declaration. According to her, in the past, the union has always been able to negotiate this type of program with the employer. She explains that Bell would take into consideration the modifications proposed by the union. By way of example, she mentions the case of Quebec City employees whose work was transferred to Trois-Rivières based on a suggestion by the union, despite the fact that Bell initially wanted to transfer their work to Montreal.

[52] Under cross-examination, Ms. Germain indicates that she had several discussions with the employer regarding the disputed VSP in the summer of 2015. She confirms that several VSPs had

been implemented in the past, but that the aim was always to reduce the work load and the union agreed to them in order to avoid surplus jobs.

B. The employer

1. Ms. Diane Sabourin

[53] Ms. Sabourin is a Senior Human Resources Consultant. She has worked for Bell for 35 years. As part of her job, she supports a client group reporting to a vice-president, providing all necessary services and consulting on matters related to human resources.

[54] Ms. Sabourin testifies in relation to an initiative launched in April 2015 that involved a VSP for Bell Business Markets affecting six different teams. She notes that these voluntary departure offers were made to 22 employees due to fierce competition and a need to improve the cost structure, to reduce the work load and to optimize processes.

[55] Ms. Sabourin declares that this VSP was presented to two union representatives, including Ms. Myriam Germain. She states that at no time did the union representatives indicate that this VSP had to be negotiated with the union and that they never voiced either agreement or disagreement with the VSP.

[56] Ms. Sabourin concludes her testimony by confirming that Bell went ahead with three of the voluntary departure offers described in the document presented to the union. Under cross-examination, Ms. Sabourin confirms that the three other voluntary departure offers were later merged with the VSP at issue here.

2. Ms. Geneviève Britt

[57] Ms. Britt has held the position of Director of Human Resources, Bell Business Markets division, since 2008. In this capacity, she is responsible for human resources and labour relations across Canada. She supervises teams in three provinces.

[58] Ms. Britt gave testimony regarding a VSP submitted to seven division heads in the Business Markets division in July 2014 with the aim of dealing with a reduced work load and budgetary constraints. She explains that the VSP in question was sent to the Bell Business Markets union representatives concerned on the occasion of two teleconferences, one for Ontario and the other for Quebec. She explains that no surplus declaration was made for any of the groups concerned except one, even though there had not been sufficient voluntary departures. She explains that there were plans to declare a surplus for Mr. Coutu's group if an insufficient number of VSPs was reached, in which case Bell would then negotiate these staff surpluses with the union.

[59] Ms. Britt claims that she participated by telephone in the presentation of these VSPs to the union representatives. She indicates that the union representatives made no comments during this call and that Bell implemented this VSP according to the initial plan. With regard to Mr. Coutu's group, despite the fact that only one person accepted the offer of a VSP, no surplus declaration was made.

[60] Ms. Britt also testified regarding another initiative dating back to February 2015 that involved a reorganization following a reduction in the work volume and an offer of 10 VSPs. Ms. Britt also participated in the presentation of this VSP to the union representatives. The union asked what would happen if there were an insufficient number of volunteers for the VSP, and Ms. Britt at the

time indicated that Bell would meet its objectives by drawing on its pool of part-time and occasional employees. She also indicates that Bell went ahead with this VSP.

[61] Ms. Britt also testified regarding the VSP at issue here. She is the one who summoned the union representatives to explain this initiative, whose aim was to offer a hybrid model that would allow work to be transferred to an outside contractor. Ms. Britt explains that Bell Business Markets is in a difficult situation; she needs to manage costs and make cuts to certain services. According to Ms. Britt, close to 300 employees will become eligible for retirement between now and December 31, 2016. This VSP came on top of the fact that Bell employees who retire before December 31, 2016 will be able to keep their employee benefits.

[62] Ms. Britt confirms that the union representatives voiced their disagreement during the teleconference held on July 7, 2015, and maintains that this was the first time that the union voiced its opposition to a VSP. Ms. Britt also indicates that she participated in the presentation of this VSP by teleconference in October 2015; on this occasion, the VSP was once again presented to union representatives, who again voiced their disagreement with it.

[63] Under cross-examination, Ms. Britt admits that no work was contracted out following the VSP of July 2014. Asked to specify whether the union sought information on the volume of work to be outsourcing during the presentations of the VSP initiatives, Ms. Britt responds that she does not remember; she also does not remember if the union asked about the possibility of outsourcing.

[64] With regard to the VSP at issue here, Ms. Britt claims that the components comprising it are provided for in the Red Book. However, she is not completely sure of this.

[65] Ms. Britt indicates that it was after conducting a demographic survey that Bell realized that several Bell Business Markets employees would be eligible for retirement by the end of December 2016. She adds that Bell was concerned about the impending retirement of these employees, as well as the fact that the program related to employee benefits would expire on that date. She indicates that Bell knew that this employee benefits program was an important issue for employees.

[66] Ms. Britt also states that, due to the large number of employees likely to take advantage of a VSP, Bell would not have the time to train employees to offset the planned departures, and that this is the reason why Bell wanted to resort to outsourcing. Ms. Britt adds that the hiring and training of new employees would entail additional efforts and costs and that, ultimately, the people in some of these positions would not be replaced.

3. Mr. Alberto Da Anunciaco [sic]

[67] Mr. Da Anunciaco [sic] has worked for Bell since May 2002. Since October 2010, he has held a management position with Bell Business Markets. In this capacity, he is responsible for a series of business lines and he has teams of engineers and project managers reporting to him. His group offers large-scale business solutions to Bell clients.

[68] Mr. Da Anunciaco [sic] testifies that he participated in an initiative involving a VSP in July 2015. This initiative was in response to a reduction in the work volume and excess capacity. The initiative aimed to offer VSPs to four pension-eligible employees within a work group of five employees. This initiative was presented to the union representatives in a teleconference.

[69] Mr. Da Anunciaco [sic] indicated that the union representatives voiced their frustration and challenged Bell's right to unilaterally implement this VSP. According to him, the union

representatives were not necessarily expecting a response to their comments; their challenge was more rhetorical in nature.

[70] Mr. Da Anunciaco [sic] confirms that Bell implemented the VSP and that only one employee accepted the offer.

4. Mr. Matthew Smart

[71] Mr. Smart has held the position of Senior Human Resources Consultant at the Centre Creek Bank in Mississauga, Ontario for roughly the past six years. He is responsible for offering human resources services to Bell's internal clients that are assigned to him. He also deals with matters related to human resources, talent management, organizational development and labour relations.

[72] Mr. Smart testified regarding a VSP implemented by Bell Business Markets in January 2010. This VSP was motivated by budgetary pressures combined with a merger of the large business market and small and medium business market.

[73] Mr. Smart points out that this program targeted all employees reporting to Mr. McCall's team and that, because of the group's demographics, several employees were eligible for retirement. According to him, if there had not been a sufficient number of volunteers, Bell would have considered the options provided for in the Red Book.

[74] Mr. Smart indicates that he participated in the announcement of this VSP and in the teleconferences held with the union representatives. He maintains that the union representatives did not oppose the VSP offered because its aim was to maximize the number of employees eligible for retirement. Mr. Smart does not recall the union representatives making any comments, raising any questions, or filing any grievances challenging this initiative.

[75] Mr. Smart comments on another voluntary separation initiative dating to May 2011. The document relating to this VSP mentioned financial difficulties and the need for a workforce reduction. Forty-three employees were targeted by this initiative. The document also indicated that, if an insufficient number of employees volunteered, Bell would explore other options for reducing the workforce.

[76] Mr. Smart indicates that he participated in the announcement of this VSP to the union representatives. He maintains that the union raised questions but did not oppose the VSP. Bell subsequently implemented the program. The union did not file a grievance or complaint following this initiative.

[77] Under cross-examination, Mr. Smart admits that, during the presentation of the VSP in January 2010, Bell did not inform the union that a portion of the work volume would be outsourced; he does not believe that this question was addressed at the time. The same is true for the initiative presented to the union representatives in May 2011.

5. Ms. Ghada Sharkawy

[78] Ms. Sharkawy has held the position of Senior Human Resources Consultant with Bell since 2005. Since 2014, she holds this position in the Bell Business Markets division. In this capacity, she provides advice to managers on all matters related to human resources and labour relations.

[79] Ms. Sharkawy testified regarding a VSP initiative dating back to February 2015. This initiative was justified by the fact that Bell Business Markets was dealing with, notably, a context of heightened competition and a reduction in the volume of work. This VSP targeted 15 employees.

[80] Ms. Sharkawy was present when the announcement was made to the union. She indicates that, during this presentation, no union representative opposed the VSP, but she points out that questions were raised regarding market forces. She claims that the VSP was put forward and that no grievance or complaint was filed by the union.

[81] Ms. Sharkawy also testified concerning two other VSP initiatives, one dating to April 2015 and the other to July 2015. The first initiative was aimed at 29 employees and the second concerned four employees. The presentations were made to union representatives and, with the exception of some remarks on the nature of the work done by the employees and the impact on the manager affected by this initiative, the union did not raise any objections.

[82] Ms. Sharkawy confirmed that the VSPs of February, April and July 2015 were all implemented by Bell. She also reports that she participated in the telephone call of October 14, 2015, concerning the VSP in dispute. She indicates that the aim of this teleconference was to ensure consultation with the union, to provide information, to foster dialogue and to answer questions.

[83] Ms. Sharkawy also confirms that she sent an email on October 23, 2015, to the union's national representatives, to the local union presidents and to the Bell Business Markets managers affected by the initiative to inform them that the communication of the VSP would be postponed to October 29, 2015.

[84] When cross-examined regarding the VSP of February 2015, Ms. Sharkawy indicates that Bell absolutely did not inform the union that work would be outsourced, adding that the question of outsourcing was not part of the initiative communicated to the union representatives. The same response was given concerning the VSP dated April 2015.

[85] With regard to the VSP of July 2015 intended for four employees, Ms. Sharkawy indicates that Bell had mentioned to the union that it was possible that work would be outsourced to outside contractors if the volume of work was to increase in the future. She specifies, however, that this information was not mentioned in the document. Further with respect to this initiative of July 2015, she recalls that Mr. Law asked questions about the volume of work; she responded that Bell could resort to using the services of contractors. She specified that this was only a possibility, not a fait accompli.

6. Mr. Steve Desgagné

[86] Mr. Desgagné has held the position of chief negotiator with Bell and BCE since 2012. He explains that Bell Canada is a wholly owned subsidiary of BCE. As chief negotiator, Mr. Desgagnés is responsible for overseeing the negotiation of all collective agreements and labour relations at BCE, with the exception of Bell Media.

[87] Mr. Desgagné confirms that the most recent collective agreement covering clerical and associated employees was negotiated in May 2013 and came into force on June 1st, 2013. Mr. Desgagné testified about the exchanges he had with the union representatives, including Mr. Law, in the summer of 2015 regarding the VSP in dispute.

[88] Mr. Desgagné also comments on the list of union demands tabled during the negotiation of the collective agreement. He notes that the union explicitly requested the negotiation of a retirement incentive plan, including a succession plan, but that the discussions were very brief because Bell considered that it was allowed to offer VSPs without the union's consent.

7. Ms. Sylvie Malo

[89] Ms. Malo has worked at Bell for 37 years. She has held the position of Senior Human Resources Consultant for the past 23 years. In this capacity, she is responsible for providing human resources support to her client group, including daily management of human resources, labour relations, performance management, grievance handing and all aspects related to employee management.

[90] Ms. Malo indicates that she was involved in an initiative aimed at the reorganization of clerical employees in October 2012. She states that a presentation was made to union representatives to explain this reorganization and that the presentation also included a VSP.

[91] Ms. Malo explains that this reorganization was justified by a budget cut and a reduction in work volume. Bell was not planning to declare a surplus regardless of the number of employees who volunteered. She maintains that, out of 335 employees affected by this VSP, 58 were eligible for retirement and that Bell anticipated that 31 employees would accept the VSP offer.

[92] A presentation was made to the union representatives via teleconference and Ms. Malo states that the union did not raise any objections. However, the union asked what would happen if Bell's expectations were not met. Ms. Malo indicates that Bell informed the union that there would be no consequences because no surplus declaration would be made. Ms. Malo indicates that Bell implemented the VSP.

[93] Ms. Malo also testified regarding two other VSP initiatives, one in January 2013 and the other in October 2013. The first was offered to 155 employees, and Bell did not plan to declare a surplus. The other was aimed at 285 employees, and Bell anticipated that 15 of them would take advantage of this VSP. Ms. Malo specifies that Bell was not planning on declaring a surplus for either of these two initiatives. The VSPs were implemented.

[94] Under cross-examination, Ms. Malo confirms that, in the presentation of the October 2012 initiative, no mention was made that a portion of the work would be outsourced. She adds that this was also the case for the VSPs of January 2013 and October 2013.

[95] Lastly, Ms. Malo indicates that, in two of the three initiatives described above, more volunteers came forward than expected and that Bell nonetheless accepted more requests than initially anticipated. Ms. Malo confirms that Bell did not use outsourcing in the wake of these three initiatives, since there were enough part-time and occasional employees to perform the surplus work generated by these VSPs.

8. Mr. Serge Thibault

[96] Mr. Thibault joined Bell in October 1990. He worked as a union representative from 1993 to 1996. He went back to Bell at the end of 1996 to work on major projects with the billing team. In 2001, he was promoted to Associate Director of Labour Relations in the corporate group, then to labour relations. In 2009, he was appointed to the position of Director, Labour Relations, the title of which is now Senior Consultant, Labour Relations.

[97] Mr. Thibault explains that he is responsible for labour relations for the residential teams, clerical employees and salespeople in the Quebec and Ontario regions. He explains that, since 2011, there has been a change of direction in human resources. Mr. Thibault acts as a labour relations consultant for all the human resources consultants in matters concerning labour relations initiatives.

[98] Mr. Thibault has participated in the negotiation of several collective agreements, including those for both craft and clerical employees at Bell ICT and Bell Aliant Communications. In the case of clerical and associated employees, Mr. Thibault was in charge of the integration of employees covered by the collective agreements (BINS) and was responsible for revising the job profiles in the organization. He is currently responsible for the day-to-day management of these employees.

[99] Mr. Thibault explains that he played an important role in the VSP at issue here as well as in several other VSPs offered by Bell over the past few years. Mr. Thibault points out that every initiative that has an impact on clerical or office employees must be examined by his office to ensure that it does not violate the collective agreement.

[100] Mr. Thibault describes the agreements negotiated between the parties, including the collective agreement and the memorandum of agreement. Mr. Thibault maintains that the union's involvement with regard to the memorandum of agreement takes place through joint committees involving different levels of union representatives. Mr. Thibault explains that discussions are held with the joint committees in cases where Bell presents a VSP to the union.

[101] Mr. Thibault indicates that Bell explains the impacts of the VSP to the representatives on the joint committees and invites the union to ask questions and make comments in order to take into account certain of its concerns.

[102] Mr. Thibault voices his disagreement with Mr. Carrière's view that the memorandum of understanding only applies in a context of a workforce reduction or a surplus declaration. According to Mr. Thibault, this document also applies in situations where cost-cutting is required. Mr. Thibault maintains that a need to cut costs without reducing the workforce can arise. He refers the Board to Article 18 of the collective agreement, on force adjustment, which describes what should be done if there is a reduction in the work load. According to Mr. Thibault, the memorandum of agreement must be consulted whenever there is a workforce adjustment.

[103] Mr. Thibault therefore considers that the memorandum of agreement also applies when it is necessary to proceed with a workforce reduction due to financial pressures that do not necessarily generate a reduction in the work volume. Mr. Thibault adds that the memorandum of agreement provides guidelines for solving staff surplus problems with the union, including the use of controls on hiring, temporary employees and voluntary measures. He affirms that the utilization of voluntary measures can also lead to a reduction in the number of hours for full-time employees as well as the possibility for certain employees to leave the company.

[104] With regard to Attachment A of the memorandum of agreement, on the displacement procedure, Mr. Thibault indicates that this procedure applies only in cases where an employee with more than eight years of service is declared surplus. This procedure does not apply in a situation where there is a VSP initiative.

[105] Mr. Thibault affirms that the Memorandum of Agreement on Outsourcing / Contracting Out was introduced in 2005 and allows Bell to outsource work if there is a decline in work volume caused by attrition. The term "attrition" would include an employee who retires, who leaves the company after accepting a VSP, who is dismissed with cause or who passes away.

[106] With regard to the Red Book, Mr. Thibault states that it was negotiated with the union at the bargaining table and has existed since 1999. The Red Book sets out the parameters governing the employer's obligations and the potential options for employees affected by a workforce adjustment plan. Mr. Thibault also refers the Board to the section entitled "Department/District Business Plan," which defines what should be included in the business plan of a project that may affect staffing requirements, whether it involves a surplus or a shortage.

[107] Referring the Board to the steps in the business plan mentioned in the Red Book, Mr. Thibault points out that the District must consider voluntary options before taking any other measures in the development of its business plan in the case of a workforce adjustment. According to him, these are the steps that must be taken prior to a workforce reduction. These measures are a complement to the memorandum of agreement. He adds that Bell has the right to adjust its workforce to deal with external constraints and for reasons other than declines in work load. It is Bell's prerogative to examine projects that will have an impact on its workforce and to then present the initiatives, the business plan and, finally, the program.

[108] Mr. Thibault also disagrees with Mr. Carrière's view that the Red Book only applies in situations where there is a surplus declaration. Mr. Thibault points out that, up to now, the union has never opposed the terms and conditions offered in the VSPs. The compensation offered is always the same: 0.5 month of salary per year of service – with a minimum of three months and a maximum of 12 months – in addition to benefits if the employee is eligible for retirement.

[109] Mr. Thibault points out that VSPs can sometimes be accompanied by a surplus declaration, and they can just as well contain a provision concerning the use of outsourcing.

[110] Mr. Thibault maintains that Bell has offered VSPs directly to employees since 1992. Mr. Thibault comments on several VSPs filed in evidence (tabs J and N in the employer's booklet) and indicates that they were all presented to the union and implemented. None of them were negotiated with the union, since the collective agreement, the memorandum of understanding and the Red Book already provide for measures covering VSPs.

[111] Mr. Thibault states that, contrary to Mr. Carrière's claims, the union does not give its agreement or disagreement in the case of a VSP.

[112] Mr. Thibault testified regarding a VSP in April 2012 affecting several departments, including 58 employees in the repair department and 138 back-office employees, all of whom were pension-eligible. He specifies that this VSP anticipated the use of outsourcing and adds that the union did not oppose it.

[113] Mr. Thibault also testified regarding several other VSPs that did not involve surplus declarations and that, in some cases, called for the use of outsourcing. Mr. Thibault maintains that none of these VSPs were negotiated and that all were presented to the union. He also specifies that all of these VSPs offered employees the same financial terms. Mr. Thibault states that these VSPs were implemented and no grievances were filed.

[114] Mr. Thibault adds that the discussions with the union concerning VSPs are held in the context of consultative meetings held four times yearly between the union's representatives and members of the district committees. According to Mr. Thibault, the aim of these meetings is to inform the union of Bell's initiatives, to review technological changes and training offered to employees and to discuss the reorganization of work in the business units.

[115] Mr. Thibault describes his contribution to the VSP at issue here and indicates that he discussed this VSP for the first time with Ms. Germain and Ms. Noreen Risby on May 14, 2015. Mr. Thibault also describes the joint committee meeting of June 19, 2015, during which he informed the union representatives, Mr. Howard and Mr. Carrière, that a VSP was planned for Mr. Donald McInnon's team. Mr. Howard reportedly said that such a VSP was subject to negotiation, to which he responded that Bell had the right to offer VSPs directly to clerical employees without negotiating, just as Bell had always done in the past.

[116] Mr. Thibault also describes the meeting of the joint committee held on October 2, 2015, which was cut short due to the union's disagreement with the VSP in dispute. Mr. Thibault maintains that the version of the VSP of October 2, 2015 did not involve a surplus declaration, offered the same compensation as the other VSPs to pension-eligible employees and provided for outsourcing as a result of attrition.

[117] Mr. Thibault also comments on the letter sent by Bell to the union following the communication sent by the union to clerical employees targeted by the disputed VSP. In its letter, Bell invited the union to discuss its concerns and the modalities of said VSP. According to Mr. Thibault, the union did not inform its members of this invitation.

[118] Mr. Thibault also states that the union wanted to discuss the question of retirement incentives during the last collective agreement negotiations; Mr. Desgagné is said to have declared that VSPs were common and that there was no need to negotiate.

[119] Under cross-examination, Mr. Thibault maintains that no VSPs were presented to employees without first being presented to the union, and that this was the first time the union had contested a VSP.

[120] With regard to deployment of the workforce, Mr. Thibault explains that the number of jobs to be cut was only established once Bell knew how many employees had accepted the VSP offer. Mr. Thibault indicates that Bell had estimated that 147 out of 323 pension-eligible employees would take advantage of the VSP at issue here.

[121] Mr. Thibault admits that Bell sent the information regarding the VSP at issue to employees despite the union's opposition. According to Mr. Thibault, Bell had the right to inform employees.

[122] Mr. Thibault also admits that the term "VSP" is not mentioned in the memorandum of agreement, but he points out that the memorandum of agreement mentions "voluntary measures." According to Mr. Thibault, "voluntary measures" include VSPs.

V. Arguments

A. The union

[123] Counsel for the union submitted a detailed document that he called "a summary of arguments of the applicant Unifor," containing nearly 200 paragraphs. The following is a summary of the union's arguments. In support of its arguments, counsel also submitted a thick booklet containing decisions of the Board and other common law courts, including certain decisions of the Supreme Court of Canada (SCC).

[124] From the outset, the union maintains that the principle according to which employment conditions and questions related to the employment conditions of employees must be negotiated with the bargaining agent is enshrined in the *Code*. It argues that this case raises the delicate question of the relationship existing between the jurisdiction of the Board and that of the grievance arbitrator over the dispute, in a context where the union filed five grievances whose outcome is likely to overlap that expected in the complaint under study.

[125] The union argues that the Board has jurisdiction to determine whether Bell has provided clear and convincing evidence that the collective agreement authorizes it to negotiate VSPs directly with individual employees. In this regard, it relies on *Atomic Energy of Canada Limited*, 2005 CIRB 334.

[126] To explain the context of the present case, counsel argues that Bell has never presented a VSP directly to employees without the union's agreement. He adds that during the negotiation of the collective agreement between the parties, the union raised the issue of VSPs and requested that the parties work together to implement a plan to fill the positions left vacant by voluntary departures. Counsel maintains that Bell refused the union's offer to negotiate a rehiring ratio.

[127] The union claims that is was informed of the plan for the disputed VSP of May 6, 2015 via a memo sent to Ms. Germain by Mr. Thériault. This memo specified that the organization would need to resort to outsourcing in order to meet the service requirements generated by the voluntary departures. The evidence shows that the union was opposed to the fact that Bell was offering this VSP directly to employees without negotiating it; the union relies on the Board's decision in *Bell Canada*, *supra*, as evidence.

[128] The union argues that, despite the fact that it filed its unfair labour practice complaint and its application for an interim order on October 27, 2015, the Employer announced the VSP directly to employees on the following October 29. The union maintains that this announcement had a significant impact on relations within the union, adding that it discredited the union in the eyes of its members who wanted to access the VSP, in addition to causing a rift within the union.

[129] The union argues that the obligation to bargain in good faith is not limited to the negotiation of the collective agreement and that the role of bargaining agent gives rise to various legal implications, the most important of which is the union's monopoly over representation. Upon being granted certification, the union is recognized as the exclusive bargaining agent for employees in the bargaining unit; this is a fundamental principle of labour relations in Canada. This recognition prohibits the employer from negotiating directly with its employees.

[130] The union refers the Board to sections 36 and 94 of the *Code* and to several SCC decisions, including the judgment in *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc*., [2006] 1 S.C.R. 27, 2006 SCC 2, and the judgment in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245.

[131] The union argues that the legal impediment to Bell negotiating directly with employees can only be countered by an argument based on express or implied consent and clear supporting practices.

[132] With regard to the issue of jurisdiction raised by the employer – which invited the Board to decline to render a decision on the complaint and to defer the case to arbitration pursuant to section 98(3) of the *Code* – the union maintains that it is the policy of the Board to hear only complaints that raise issues of public interest within the meaning of the *Code* and that address

situations that exceed the scope of the collective agreement concerned. The union relied on several Board decisions in this regard.

[133] The union considers that its complaint meets these criteria, since there exists, in the case at hand, a statutory right that the Board has a duty to reaffirm and matters of public interest on which it has a duty to rule. The union adds that the circumstances in the case at hand exceed the strict scope of the collective agreement. In its view, the key issue consists in determining whether a unionized employee of Bell still has the power to directly negotiate the employment conditions to which he or she is subject and to accept the VSPs offered by the employer, or, on the contrary, whether the individual rights of unionized employees are subordinate to collective rights, with a view to fulfilling the general objectives underlying the *Code*.

[134] The union points out that, in *Aliant Telecom Inc.,* 2005 CIRB 310, the Board referred to the fact that, if a bargaining agent makes a clear request to discuss voluntary separation issues, an employer who acts unilaterally by reaching individual agreements directly with employees interferes with the rights of the bargaining agent and violates section 94(1) a) of the *Code*.

[135] According to the union, the grievances that it presented in parallel have absolutely no bearing on the jurisdiction of the Board and the refusal to recognize the monopoly of the union over representation raises issues of public interest within the meaning of the *Code*, to the extent that it calls into question the most important principle enshrined in the *Code*: the fundamental freedom of association.

[136] Accordingly, argues the union, the dispute in this case does not arise out of the collective agreement, but rather concerns the effect of certification and the status of exclusive bargaining agent it confers. This status entails an obligation on the part of the employer to negotiate with the bargaining agent; in this matter, the Board must have exclusive jurisdiction to apply the *Code*.

[137] The union also argues that, in order to render a decision, the Board can analyze the terms of the collective agreement, as it did in *Bell Canada*, *supra*. The union maintains that the Board does not need to undertake an exhaustive study of the terms of the collective agreement, but rather must determine whether Bell has provided clear and convincing evidence that the collective agreement and prior practices authorize it to negotiate directly with individual employees. The union considers that Bell's jurisdictional objection should be refused.

[138] The union argues that there is nothing in either the collective agreement or the Red Book that authorizes Bell to negotiate VSPs directly with employees in order to accelerate their retirement so that it can then outsource the work left vacant.

[139] The union maintains that the aim of the Workforce Adjustment Memorandum of Agreement is to set out guidelines on how to deal with force adjustments and lay-offs in relation to the provisions of Article 18 of the collective agreement.

[140] The union also maintains that the only place in the memorandum of agreement where potential VSPs could be considered is on page 71 [translator's note: reference to French version], under the formula "the utilization of voluntary measures where possible." The union argues that this is very different from the wording of the memorandum of agreement dealing directly with voluntary departures that the Board analyzed in *TELUS Communications Inc.,* 2009 CIRB 475 (*TELUS 2009)*.

[141] The union asserts that the only place in the Red Book that mentions voluntary measures is on page B-2, where it is indicated that voluntary measures can be considered in the place of declaring employees surplus.

[142] The union also argues that Bell's position is illegitimate when it claims that its only obligation is to discuss VSPs with the union and that, failing an agreement, it can impose its decision. The position of the union is that that there is no provision in either the memorandum of agreement or the Red Book that justifies Bell's position and that, in any event, the provisions of the Red Book are only applicable in the context of a workforce adjustment following a reduction in work volume.

[143] In fact, the allegations made by Bell do not appear to be based on a clear text in the collective agreement.

[144] On the subject of the existence of past practices relied on by Bell, the union argues that the evidence shows that Bell has never negotiated a VSP directly with employees without the consent of the union, nor has Bell ever implemented a VSP in a situation where the union voiced its formal opposition.

[145] The union considers that the majority of VSPs filed in evidence by Bell involved situations where there was a lower of volume of work and where the aim of the VSPs was to avoid a surplus declaration.

[146] It adds that, while it may have accepted VSPs in the past that gave rise to outsourcing of the work made available, this should not have the effect of creating an irrefutable practice that the union would no longer be able to contest in the future. Each case is unique and cannot be seen as establishing an irrefutable practice that cannot be opposed by the union in the future.

[147] The union adds that it did not oppose the VSPs introduced since 1999 because it considered that opposition was not justified by collective considerations. On the other hand, it considers that the situation presented by Bell in May 2015 justified opposition on its part on behalf of its employees as a collective group. In this regard, the union relies on the decisions in *Bell Canada*, *supra*, and *Atomic Energy of Canada Ltd*., *supra*, to support its argument that the union's past acceptance of VSPs does not raise a barrier to the present complaint.

[148] With regard to the Memorandum of Agreement on Outsourcing / Contracting Out, the union argues that the parties stipulated in this Memorandum that the company's preference is to maintain employment internally and that outsourcing must therefore be restricted to the exceptional situations provided for in the Memorandum. According to the union, Bell can resort to outsourcing in the following situations:

- To deal with incremental work volume;
- To deal with work volume generated through attrition;
- To deal with work volume generated for other operational reasons.

[149] The union insists on the fact that, without the disputed VSP, Bell would not be able to apply this Memorandum in Agreement in accordance with any of the three situations under which it is allowed to outsource or contract out the volume of work performed by employees currently employed by Bell. It added that the employees concerned have job security.

[150] The union argues that Bell is using the VSP in dispute to generate attrition in order to be seen as respecting the conditions allowing for outsourcing. It adds that it did not negotiate the

Memorandum of Agreement on Outsourcing / Contracting Out so that Bell could negotiate individually with employees. That is why it is necessary to obtain the consent of the union before implementing VSPs.

[151] In essence, the union's argument is that the Memorandum of Agreement on Outsourcing / Contracting Out does not empower Bell to negotiate VSPs directly with employees if the union has notified it of its refusal.

[152] The union asserts that, under the *Code,* it is mandatory to negotiate VSPs with the union because they have the effect of modifying existing employment conditions, notably in relation to the job security mentioned in the Memorandum of Agreement on Outsourcing / Contracting Out, even if Bell made a commitment to fill the vacated positions internally where possible.

[153] The union argues that, in its capacity as the exclusive bargaining agent, it has the right to determine its strategies and choose its means as well as any compromises it believes are necessary in the context of collective bargaining, adding that the employer cannot come between the union and employees.

[154] The union reiterates that there is no clear provision in the Memorandum of Agreement on Outsourcing / Contracting Out granting Bell the right to negotiate VSPs directly with employees to create vacant positions in order to be able to outsource the work generated by the departures.

[155] In fact, in the view of the union, there is no provision in the collective agreement in which the union clearly waives its status of exclusive bargaining agent and that would allow the employer to negotiate departures directly with employees in a case such as this and to then outsource the jobs, which are protected.

[156] Consequently, the union argues that the employer is interfering here in the union's representation of employees by negotiating directly with them in order to do indirectly something that it is prohibited from doing directly. The union believes that, in doing so, Bell is undermining the balance negotiated in the collective agreement and job security by clearly contravening the spirit of the agreement between the parties. It relies on several Board decisions in support of this argument.

[157] Finally, the union argues that the employer also engaged in unfair labour practice in its communications with employees, despite the fact that an unfair labour practice complaint had been filed with the Board on October 27, 2015. Bell nonetheless announced the disputed VSP directly to the employees on October 29, 2015.

[158] The union argues that the employer sought to undermine the union's efforts to represent its members and to unduly influence the employees by communicating directly with them.

[159] The union requests that the Board allow the unfair labour practice complaint pursuant to section 94(1) of the *Code.*

B. The employer

[160] Counsel for Bell also submitted a detailed "plan of argument" containing nearly 300 paragraphs. They also produced a voluminous book of authorities in support of their arguments, which are summarized below.

[161] From the outset, counsel for Bell asserts that the union's arguments are based on false premises. The first premise concerns the union's allegation that Bell negotiated directly with the employees concerned by the VSP. Counsel maintains that Bell did not negotiate this VSP with the employees, but rather communicated the VSP to them on October 29, 2015. She argues that this VSP is not subject to discussion or negotiation.

[162] The second false premise concerns the union's argument that past practices prove that the union negotiated VSPs on a case-by-case basis. Counsel maintains that none of the VSPs adduced in evidence show that they were negotiated with the union. She adds that no written agreement was adduced in evidence by the union in this regard and that all the VSPs were implemented.

[163] With regard to the union's argument that Bell is compromising the job security of the employees targeted by the disputed VSP, counsel argues that the Memorandum of Agreement on Outsourcing / Contracting Out shows that, on the contrary, Bell's preference is to maintain employment internally and that it is indicated that, in that context, the aim of this memorandum of agreement is to "provide a measure of job security." Counsel argues that this Memorandum of Agreement grants Bell the right to resort to outsourcing.

[164] Finally, Counsel argues that, contrary to the union's contention that there is no difference of opinion between the parties regarding the collective agreement, the evidence reveals a blatant difference of opinion in relation to the memorandum of agreement and the Memorandum of Argument on Outsourcing / Contracting Out.

[165] Moreover, Bell argues that the VSP in dispute was implemented in accordance with the provisions of the memorandum of agreement as well as the related guidelines set out in the Red Book, which were duly negotiated by the parties.

[166] Bell therefore considers that this is a clear case requiring that the Board exercise its discretionary power to decline the complaint filed by the union in order that it may be deferred to arbitration for interpretation of the agreements negotiated between the parties.

[167] Bell further argues that, through these negotiated agreements, the union itself defined its representation rights and the scope of its participation in the context of workforce adjustment plans and VSP offers. Bell adds that, in seeking the Board's intervention, the union's aim is to bypass the agreements duly negotiated by it for the simple reason that it no longer accepts their terms and conditions.

[168] Bell points out that a grievance arbitrator has already heard five grievances filed by the union dealing with the same issues as those contemplated in the union's complaint.

[169] Bell indicates that the evidence presented to the Board shows that, since the negotiation of the memorandum of agreement in 1998 and of the Red Book in 1999, it has offered at least 19 VSPs without any objection on the part of the union. It adds that several of these VSPs included outsourcing initiatives and that none of them were negotiated with the union.

[170] Bell refers the Board to the memorandum of agreement and the Red Book, which were negotiated, and argues that the parties negotiated clear agreements that expressly provide for its right to offer VSPs to its employees. Bell adds that the dispute between the parties arose from the fact that Bell offered a VSP in the absence of a declaration of employee surplus and in a context where Bell had announced its intention to resort to outsourcing.

[171] Referring to the discussions concerning the VSP, Bell points out that it attempted to hold discussions with the union on several occasions during the summer of 2015, but that the union merely insisted, several times, that the employer could not offer a VSP to employees unless it was first negotiated in its entirety with the union.

[172] According to Bell, the context of the invitation extended to the union to discuss the VSP was entirely consistent with past practices. Bell argues that past practices show that the VSPs were always presented to the union and that discussions took place as part of these presentations, with the union asking questions, but without the VSPs being the subject of negotiations beyond what was already provided for in the negotiated agreements.

[173] With regard to past practices, Bell argues that the union never raised any objection to the implementation of the VSPs nor did it file any grievance or other complaints with the Board with respect to these VSPs. Moreover, and contrary to the union's claims, all of the VSPs offered by Bell were offered either in the absence of or prior to the declaration of an employee surplus.

[174] Bell maintains that its evidence relating to the VSPs offered in the past was not contradicted by the union's witnesses and that this evidence clearly demonstrates that each time a VSP was presented to the union, the latter expressed neither agreement nor disagreement. Rather, the union simply asked questions or made suggestions.

[175] According to Bell, the witness Thibault clearly explained that it is clear that the outsourcing of work generated by a VSP is not covered by the Memorandum of Agreement on Outsourcing / Contracting Out. When Bell uses the services of an outside contractor due to a volume of work generated by the voluntary departure of pension-eligible employees, not by a surplus declaration, it is complying with the terms and conditions of the Memorandum of Agreement on Outsourcing / Contracting Out. Bell maintains that the volume of work generated by the VSP in such cases is the result of attrition, since it does not fill vacancies resulting from the voluntary departure of employees who accept a VSP.

[176] According to Bell, any consideration by the Board of the legality of the VSP in dispute requires a detailed and exhaustive consideration of the provisions of the memorandum of agreement and the Red Book. Bell indicates that the union itself admitted in its submissions that it is necessary to interpret the collective agreement and the memoranda of agreement.

[177] Accordingly, in Bell's view, the Board must decline to rule on the complaint since the union could "refer" the case to an arbitrator pursuant to a collective agreement, in accordance with section 98(3) of the *Code*. Bell relies on several decisions by the Board, including *Canadian National Railway Company*, 2015 CIRB 766, and *Canada Post Corporation* (1989) 76 di 212 (CLRB no. 729), in support of its argument that all disputes in which the essential character of the dispute arises under the collective agreement come under the exclusive jurisdiction of a grievance arbitrator and that the Board is generally reluctant to intervene in a dispute that is essentially a difference of opinion over the interpretation and application of the collective agreement.

[178] Bell argues that, contrary to the union's claims, the Board cannot be the interpreter of the collective agreement and the memoranda of agreement. It also holds that the case *Atomic Energy of Canada Ltd.*, *supra*, relied on by the union in support of its arguments, cannot serve as the basis for a decision since the substance of this dispute concerned a very different context and was related to a complaint filed pursuant to sections 50a) and b) of the *Code*.

[179] Bell adds that the union's claim that the Red Book is not part of the collective agreement and is therefore not subject to arbitration between the parties is curious, to say the least, considering that the union itself, in its grievances, explicitly petitioned the arbitrator to declare that Bell is violating the Red Book, notably, by granting VSPs in the absence of a surplus declaration.

[180] According to Bell, the Red Book is a complement to the memorandum of agreement and it is clear that the question raised by the union arises under the collective agreement.

[181] Bell relies on the Board's decision in *TELUS 2009*, *supra*, and asserts that, as in the present case, the matter concerned an agreement negotiated between the parties relating to a voluntary separation program. The Board ruled that the dispute related to the negotiated agreement involved the interpretation and application of the collective agreement and could therefore be dealt with by a grievance arbitrator. According to Bell, the decision reached in *TELUS 2009* also applies in this case and Bell requests that the Board decline to rule on the complaint, pursuant to section 98(3) of the *Code.*

[182] Alternatively, Bell submits that it did not violate section 94(1) of the *Code* by offering a VSP to the employees concerned, nor did it in any way interfere with the union's monopoly over the representation of employees since it applied the terms and conditions of the agreements negotiated between the parties.

[183] Bell adds that the preamble to the *Code* recognizes and encourages free collective bargaining; it therefore follows that the agreements duly negotiated between the parties must be respected. In this case, these agreements define and delineate the role of the union in the case of workforce adjustments and grant Bell the right to offer VSPs.

[184] When considering the question of the scope of the union's rights of representation in this case, the Board must consider and defer to what the parties have agreed upon for themselves and take into account their conduct in relation to what they have agreed upon. Bell relies on the decision in *TELUS Communications Inc.*, 2003 CIRB 222, to argue that section 94(1)a) of the *Code* provides general protection for the union's rights of representation, which must be interpreted and applied taking into account the context as well as the conduct adopted by the parties in the past. Accordingly, there is nothing in section 94(1)a) that prevents the parties from reaching compromises; if one party wants to limit its rights of representation with respect to certain matters, it can certainly do so. This is precisely what the union and Bell did by negotiating the memorandum of agreement and the Red Book.

[185] Bell points out that Unifor is a very knowledgeable union that has negotiated many collective and other agreements with it. Bell adds that the union was fully aware of the Board's decision in *Bell Canada, supra*, when it renewed and had its members ratify the memorandum of agreement and the Red Book on several occasions since 2003.

[186] Bell maintains that, in filing its complaint, the union is attempting to extricate itself from an agreement that it duly signed with Bell. Bell also asserts that this case bears no resemblance with *Bell Canada, supra*, relied on by the union in support of its complaint. The situation is very different in that, in that case, the Board based its findings on the fact that the VSP was offered as a means of bypassing the force adjustment procedures provided in the collective agreement which stipulated a requirement for Bell to consult with the union, but that no consultation was held. Bell also relies on an arbitration decision by the Ontario Labour Relations Board in *Consolidated Bathurst Packaging Ltd.,* [1983] OLRB Rep. September 1411, to argue that once the parties have agreed to the rules to

be observed with respect to workforce adjustment plans – including the role of the union when such plans are introduced – there can be no violation of section 94(1) of the *Code.*

[187] Bell also argues that it did not violate section 94(1)a) of the *Code* in its communications with the employees. It maintains that this is a new complaint by the union, since these allegations were not included in its initial complaint and that it cannot be considered by the Board. In any event, however, Bell claims that it in no way violated section 94(1)a) of the *Code*.

[188] Bell maintains that section 94(1)a) of the *Code* allows the employer to communicate directly with its employees and to express its point of view, provided that it does not use promises, coercion, intimidation or threats. In this regard, Bell relies on several Board decisions, including *Sedpex Inc.* (1988), 72 di 148 (CIRB no. 667) and *Air Canada,* 2001 CIRB 131. Bell argues that, ultimately, it is up to the union to prove that the communications in dispute violate section 94(1)a) of the *Code*. It further contends that there is no evidence that its communications harmed the union's capacity to represent its members, as is evidenced, among other things, by the union's decision to notify its members that Bell was planning to offer a VSP and that it opposed this initiative – which the union did on October 15, even before Bell announced the VSP to its employees two weeks later, on October 29, 2015.

[189] Bell requests that this new complaint by the union be dismissed, along with the related application for an interim order, and that the unfair labour practice complaint be deferred to arbitration, pursuant to section 98(3) of the *Code*.

C. Union rebuttal

[190] Counsel for the union presents a brief rebuttal to point out that there is no mention in any of the arguments or statements presented by Bell that the union explicitly waived the requirement that its consent be obtained in relation to any VSP. Similarly, no mention is made in the memorandum of agreement or the Red Book that the union waived the requirement that its consent be obtained in the case of a VSP.

[191] Counsel for the union calls for caution on the part of the Board, asserting that it is incumbent on the Board to determine whether the union clearly waived its right to negotiate any VSPs presented by Bell. It asks that the Board scrutinize Bell's argument asserting that the collective agreement explicitly authorizes it to offer a VSP to its employees in addition to expressly delineating the union's role in this regard.

[192] The union adds that, at the bargaining table in 2013, the parties were aware that several employees would become eligible for retirement in the near future and that it was for this reason that the union wished to negotiate an "retirement incentive plan" that would include a succession plan. It adds that Bell refused, but that it submitted the VSP in dispute a short time after that, in May 2015.

[193] According to the union, a retirement incentive plan presupposes negotiation on a case-by-case basis, as was done in September 2014. In this regard, the union relies on the VSP filed in evidence.

[194] With regard to past practices, the union points out that Bell cannot prove any refusal on its part because the parties had always agreed.

[195] Where the employer decides not to obtain the union's approval in the case of a VSP, it violates section 94(1)a of the *Code*. The issue in dispute is fundamental to the extent that it concerns the

union's exclusive rights of representation as provided in the *Code.* The union therefore requests that the Board determine the matter and not defer it to arbitration.

VI. Analysis and decision

[196] In light of the evidence and the relevant case law, the Board allows the union's complaint pursuant to section 94(1)a) of the *Code.* It is the view of the Board that the content of the collective agreement and the evidence relating to past practices do not clearly and convincingly establish Bell's right to implement the disputed VSP. For the reasons explained below, Bell interfered with the representation of members by offering the VSP without the consent and despite the clear opposition of the union, in violation of section 94(1)a) of the *Code*.

[197] The basic facts of the present case are not in dispute. The evidence shows that, over the summer and fall in 2015, the union clearly voiced its opposition to the VSP in dispute here. The evidence also reveals the willingness of the union to negotiate an agreement on VSPs during the most recent collective agreement negotiations. On the other hand, the parties differ on the exact nature of the dispute and on the appropriate means of settling it.

[198] The union claims that Bell interfered with its exclusive right to represent employees by offering a VSP to which the union was opposed directly to its members. In this regard, it claims that VSPs, which have a bearing on the terms and conditions of employment, are subject to negotiation when the collective agreement is silent on this subject. It maintains that the workforce reduction provisions contained in the collective agreement are not applicable since they apply only in a context of a surplus declaration, which does not appear to be the case in this instance. On the contrary, Bell anticipated a shortage. The union therefore considers that Bell engaged in unfair labour practice under section 94(1)a) of the *Code*. To support its argument, it relies on certain decisions of the Board, including *Bell Canada* and *Atomic Energy of Canada, supra*. In light of these Board decisions, it argues that the Board must determine whether the collective agreement and the past practices exempt Bell from negotiating the VSP in dispute with the union, based on clear and convincing evidence.

[199] For its part, Bell claims that the dispute centres on a difference of opinion regarding the interpretation and application of the collective agreement. It considers that the Board cannot determine this dispute without first conducting an exhaustive analysis of the collective agreement. It sees this as a clear case requiring that the Board exercise its discretionary power as provided for in section 98(3) of the *Code* and that it refuse to determine the complaint in order to defer the case to arbitration.

[200] Alternatively, Bell claims that the collective agreement and the Red Book are clear on the employer's right to offer the VSP in dispute directly to employees without the obligation to negotiate the parameters with the union.

[201] It is in this context, therefore, that the Board must render a decision on the present complaint.

1. Exclusive bargaining rights

[202] Section 36(1) of the *Code* establishes that the certification of a union as bargaining agent confers on it the exclusive authority to bargain collectively on behalf of the employees in the bargaining unit it represents. This principle is not simply a corollary of the obligation to bargain; it extends beyond the negotiation of a collective agreement, as provided in section 94(1)a) of the *Code*:

> **94 (1)** No employer or person acting on behalf of an employer shall:
>
> **(a)** participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union;

[203] In the judgment *Noël v. James Bay Energy Corporation*, 2001 SCC 39; [2001] 2 SCR 207, the SCS lays out the principles governing the employer's right to negotiate conditions of employment and other conditions of work directly with employees. The SCC makes the following observation:

> [41] One of the fundamental principles we find in Quebec labour law, and one which it has in common with federal law and the law of the other provinces, is the monopoly that the union is granted over representation. This principle applies in respect of a defined group of employees or bargaining unit, in relation to a specific employer or company, at the end of a procedure of certification by an administrative tribunal or agency. Once certification is granted, it imposes significant obligations on the employer, imposing on it a duty to recognize the certified union and bargain with it in good faith with the aim of concluding a collective agreement (s. 53 *L.C.*). Once the collective agreement is concluded, it is binding on both the employees and the employer (ss. 67 and 68 *L.C.*). For the purposes of administering the collective agreement, the certified association exercises all the recourses of the employees whom it represents without being required to prove that the interested party has assigned his or her claim (s. 69 *L.C.*). (With respect to these mechanisms, see, for example: F. Morin and J.-Y. Brière, *Le droit de l'emploi au Québec* (1998), at pp. 867-70; R. P. Gagnon, *Le droit du travail du Québec: pratiques et théories* (4th ed. 1999), at p. 362.)
>
> [42] The collective agreement is implemented, first and foremost, between the union and the employer. Certification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees. Because of its exclusive representation function, the presence of the union erects a screen between the employer and the employees. The employer loses the option of negotiating different conditions of employment with individual employees. In *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at p. 519, Chouinard J., who wrote the reasons of this Court, quoted the following passage from the decision of the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217*, [1975] 2 Can. L.R.B.R. 196, at pp. 200-201, regarding the situation created by certification:
>
> > Once a majority of the employees in an appropriate bargaining unit have decided they want to engage in collective bargaining and have selected a union as their representative, this union becomes the exclusive bargaining agent for all the employees in that unit, irrespective of their individual views. The union is granted the legal authority to negotiate and administer a collective agreement, setting terms and conditions of employment for the unit [. . .] This legal position expresses the rationale of the Labour Code as a whole that the bargaining power of each individual employee must be combined with that of all the others to provide a sufficient countervailing force to the employer so as to secure the best overall bargain for the group.

[204] In the judgment *Isidore Garon ltée v. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc*., the SCC describes the fundamental principle of exclusive union representation in relation to collective labour relations:

> [38] Under a collective scheme, on the other hand, conditions of employment are not negotiated individually by the employer and the employee. **Three of this Court's decisions, *McGavin, Hémond* and *Noël*, state the rule that "[c]ertification, followed by the collective agreement, takes away the employer's right to negotiate directly with its employees" and to "negotiat[e] different conditions of employment with individual employees" (*Noël*, at para. 42)**. **The objective of this prohibition and of its corollary, exclusive union representation, is to improve the employee's position in the balance of power with the employer.** Collective conditions of employment are even negotiated for future employees. Relativity of contract, one of the linchpins of the civil law contract, is excluded by the role assigned to the union. In the collective scheme, the employee agrees to work under the conditions negotiated by the union, which is not the employee's mandatary but is designated by law to negotiate conditions of employment.
>
> [Emphasis added]

[205] The preamble of Part I of the *Code* also establishes recognition of freedom of association and free collective bargaining; it also identifies them as the bases of effective industrial relations.

[206] The union's exclusive bargaining rights and the corresponding right to freedom of association are thus recognized in labour relations, both by the *Code* and case law. However, in the case at hand, the union is alleging that Bell interfered with its duty of representation. The Board's role is to ensure that the objectives of Part I are achieved.

2. Bell's request under section 98(3) of the *Code*

[207] Section 98(3) of the *Code* grants the Board discretionary power to refuse to determine a complaint if it considers that it could be referred to an arbitrator pursuant to a collective agreement.

[208] In exercising this discretionary power, the Board must determine the essential character of the dispute.

[209] In *Expertech Network Installation Inc*., 2005 CIRB 337, the Board outlines the approach to adopt in this regard:

> [33] The Board, in *Canadian Museum of Civilization Corporation*, *supra*, stated that one must look to the essential character of the dispute when determining whether the matter can be referred to arbitration:
>
> > ... when examining whether statutory rights have to be reaffirmed under the *Code*, the Board is then scrutinizing the possible legal aspects of the dispute and the rights flowing from the statute, rather than asking itself whether the dispute could be resolved at arbitration, and whether the arbitrator has the power to grant the remedies requested.
> >
> > Conversely, if considering only whether the matter goes beyond the scope of the collective agreement, the Board will then concentrate on the facts of the dispute, regardless of its legal characterization, as directed by the Supreme Court in the context of court actions. The Board will then determine the "essential character" of the dispute and will be guided, inter alia, by the identity of the parties, the place of conduct, the time of the claim and whether the remedies sought may be granted by an arbitrator. In general sense, the essential character of the dispute will be found to arise under the collective agreement if it concerns its application, interpretation, administration or alleged violation**.**

[210] The Board notes that both parties recognize the Board's competence to render a decision on this dispute, as evidenced by Bell's argument and by an excerpt of the decision *Expertech Network Installation Inc., supra,* quoted by it:

> [34] The Board in *Dale Corfield et al.*, [2004] CIRB no. 281, quoted an earlier decision, *Denis Wilson*, *supra*, wherein the Board explained that it can exercise its discretion to defer to arbitration even in cases where it is competent to hear the matter:
>
> > [23] **The fact that an issue can be sent to arbitration does not mean that the Board is not competent to decide a matter of unfair labour practice regarding the same issue.** However, the Board also has the authority, depending on the circumstances, to remove itself from hearing the complaint in favour of the grievance process, the intent being not to interfere with the procedure already provided for the collective agreement, which is in keeping with the spirit of the *Canada Labour Code*...

[211] The Board considers that the essential character of this dispute places it within the limits of the exercise of its role as provided for in the *Code*. The dispute does not arise strictly from a difference of opinion concerning the interpretation and application of the collective agreement, as claimed by Bell. The nature of the dispute is similar to the cases *Bell Canada* and *Atomic Energy of Canada Ltd., supra*. In the present matter, the Board must determine whether Bell has provided clear and convincing proof that the collective agreement and past practices authorize it to negotiate the VSP in dispute directly with the employees. The Board considers that this determination is a matter of public interest in that, in the dispute at hand, it directly concerns the union's exclusive rights of representation, which is a fundamental principle of labour relations protected by the *Code.* In this respect, the Board considers that it has the authority and jurisdiction to examine whether the

collective agreement provides for clear rules on the VSP in dispute, which would allow Bell to bypass the union's exclusive rights of representation.

[212] In this regard, it is useful to take a closer look at certain key decisions rendered by the Board.

3. The VSP in *TELUS 2009*

[213] In this case relied on by Bell, the employer TELUS had offered VSPs directly to employees after the coming into force of the collective agreement. The employer had established the content of the VSPs on its own and reviewed them with the union before informing the employees concerned. The union argued that, because the terms of the memorandum of agreement on the VSPs limited its role to merely reviewing the details of any VSP established by the employer, it effectively made it impossible for the union to exercise its statutory rights as the exclusive bargaining agent. It is interesting to note that the parties had also agreed on provisions regarding workforce reduction in the collective agreement.

[214] Although this matter sought to determine whether the agreement on the VSPs negotiated and signed between the parties was unlawful, the Board had this to say with respect to the VSPs:

> **[46] There is no question that a VSP relates to fundamental terms and conditions of employment. Absent an agreement to the contrary, a VSP is a subject matter on which a union would ordinarily be entitled to exercise its exclusive bargaining agency.**
>
> [*TELUS 2009;* emphasis added]

[215] The Board thus stated unequivocally that a VSP could be legitimately negotiated with the union if the collective agreement did not already impose limits on the exercise of the union's monopoly.

[216] On the merits, the Board ruled that arbitration was the appropriate forum to determine the issues at stake, since a large portion of the union's allegations related to alleged breaches of the collective agreement.

[217] Bell considers that the Board should follow suit in the present matter and defer the dispute to a grievance arbitrator. Bell argues that the essential character of this dispute concerns issues related to the interpretation and application of negotiated agreements.

[218] The union, on the other hand, is of the view that the two situations are not similar. In *TELUS 2009*, the parties had already agreed on a memorandum of agreement on VSPs, which is not the case here.

[219] The memorandum of agreement negotiated and signed by the parties in *TELUS 2009* reads as follows:

> [3] ...
>
> **MEMORANDUM OF AGREEMENT**
> **Voluntary Severance Programs**
>
> The parties acknowledge that our industry continues to experience significant changes. The parties agree that voluntary separation and/or early retirement incentive programs are useful in assisting the Company as it makes staffing decisions.
>
> **Where the Company introduces a voluntary separation and/or early retirement incentive program the Company will review the details of the voluntary program with the union prior to its introduction.**

[emphasis added]

[220] In *TELUS 2009*, the Board dismissed the complaints submitted by the union and noted the following:

> [47] Although it may be a violation of the *Code* for an employer to insist, to the point of impasse, that a union give up its right to bargain a particular subject, it is not contrary to the *Code* for a union to decide to limit its involvement in the on-going determination of a particular term or condition of employment. In the Board's view, the TWU had the right to make the bargain it did, and thereby limit its ability to negotiate each VSP individually. While the union may now regret the bargain that it made in 2005, it is not the Board's role to save one party or the other from a freely negotiated bargain that it later regrets.
>
> [48] The Board also took note of the evidence that, in implementing the VSPs, the employer was not "negotiating" the terms of the VSP with individual employees. All employees were being offered the same VSP, which was the one the employer had disclosed to the union prior to offering it to the employees. Had there been evidence that the employer was negotiating different VSPs with individual members of the union's bargaining unit, this might well have led to a different decision from the Board.
>
> [49] It should be noted that the union retains its right and ability to provide advice to any of its members who are offered a VSP, and to intercede with the employer on behalf of any employee who seeks accommodation or special consideration. The evidence demonstrates that the union has played this representation role with respect to past VSP offerings, and had the opportunity to do so with respect to the BTTO and BSCC VSPs.
>
> [50] **After considering all of the evidence, the Board concluded that the parties had not "contracted out" of the union's statutory right to represent the employees in the bargaining unit. Instead, they have merely agreed to a limit on how the union will exercise its representational rights with respect to VSPs.** Accordingly, the Board is unable to conclude that the bargain on the subject of VSPs that the parties made in 2005 was unlawful or that the VSP MOA contravenes the *Code*.
>
> [51] **The existence of the VSP MOA distinguishes this case from the circumstances that existed in *Bell Canada, supra*.** In this case, as the Board has found that the VSP MOA does not constitute an impermissible contracting out of the *Code*, it operates as a complete defence to the union's complaint of violation of sections 36(1)(a) and 94(1)(a) of the *Code*.
>
> [Emphasis added]

[221] The Board considered that the parties in *TELUS 2009* had clearly agreed to a limit on how the union would exercise its representational rights with respect to VSPs and that it was not the Board's role to save either party from a freely negotiated agreement.

4. The VSP in *Bell Canada, supra*

[222] In this case, the Board received a complaint for unfair labour practice filed by the union against Bell concerning a "voluntary separation program" (hereinafter "VSP"). The complaint in question concerned the technicians' bargaining unit. The collective agreement did not contain any provisions on VSPs, but it did contain force adjustment provisions.

[223] The union alleged that by offering a VSP directly to the union's members and by refusing to negotiate the terms of the VSP with it, Bell interfered with the union's exclusive bargaining rights in violation of sections 94(1) and 94(3)a) of the *Code*.

[224] Bell, the employer, sought to have the Board exercise its discretionary power granted under section 98(3) of the *Code*. Bell also argued that it did not interfere with the union's rights of representation, since the VSP in question was an extension of a long-standing practice and there was no agreement on VSPs in the collective agreement.

[225] The Board refused to exercise its discretionary power under section 98(3) of the *Code*. On the merits of the complaint, the Board first confirmed that section 36 of the *Code* clearly establishes that the union became the exclusive bargaining agent for all employees in its bargaining unit following certification. Bell also reaffirmed that the principle of exclusivity of bargaining rights is recognized and protected in all federal, provincial and territorial labour legislation and is viewed as a fundamental element of labour relations. The Board also established that a VSP constitutes a term or condition of employment.

[226] To determine whether the conduct of the employer Bell amounted to interference with the union's representation rights, the Board framed the question in the following terms in *Bell Canada, supra*:

> [118] ... the key question to be answered is whether the VSP constitutes terms and conditions of employment which affects those negotiated and spelled out in the relevant collective agreement...

[227] In other words, the Board examined the provisions of the relevant collective agreement in order to ascertain whether any of these provisions authorized the employer Bell to offer a VSP directly to employees without negotiating it in advance with the union.

[228] In its analysis, the Board first determined that the offer of a VSP had the effect of altering the terms and conditions of employment:

> [119] The Board's determination of this question in the instant case leads to the conclusion that, by offering the proposed VSP, Bell is negotiating terms and conditions of employment directly with employees. **The payment of severance allowance to an employee in exchange for a resignation in itself alters the existing terms and conditions of employment of that employee.** In looking at the purpose and the nature of the VSP, one is driven to the conclusion that it amounts to a material alteration in the terms and conditions of employment of the affected employees. But for the introduction of the VSP, there would be no enhanced pension benefits or severance allowance accorded to an employee who severs his or her employment. **But for the VSP, there would be no targeted reduction of the workforce achievable except through the provisions of article 11 (Force Adjustment) in the collective agreement.**
>
> [*Bell Canada, supra*; emphasis added]

[229] The Board then examined the provisions in the collective agreement dealing with the subject of VSPs. It reached the following conclusion:

> [121] **We would also point out that although the collective agreement does not contain a separate provision dealing with the subject of VSPs, the collective agreement is quite clear on the issue of the reduction of the workforce.** Respectfully, this Board would take a broader view of whether the collective agreement speaks to an issue than that taken by the OLRB in *Primo Foods Limited*, *supra*. In taking such a view, it is necessary not only to examine the VSP offered, but to go to the heart of the change that would result in the employment relationship in light of the provisions of the collective agreement as a whole. In the instant case, Bell is proposing to reduce its workforce by 100 to 120 employees at specific locations by inducing employee terminations through the payment of enhanced pension benefits and severance pay (VSP).The collective agreement includes provisions for the reduction of the workforce.
>
> ...
>
> [124] **In the situation where Bell offers a VSP to induce employee terminations, it bypasses all of these collective agreement procedures and entitlements, which reflect a sophisticated and delicate balancing of the rights of employees both vis-à-vis the employer and other employees.** Bell does so, by declining to effect a layoff to meet its decreased workload even though it may not have done so to undermine employees' seniority rights, but rather for more humanitarian reasons because it did not want any of its employees to lose their employment involuntarily. **However, in the face of the detailed and sophisticated staff reduction procedures negotiated by the parties, can it be concluded that the collective agreement anticipates that the employer may sidestep those procedures and the delicate balancing of interests contained therein by unilaterally**

implementing a VSP? The exhaustive manner in which the parties have dealt with the issue of workforce reduction leads the Board to conclude otherwise.

[*Bell Canada, supra*; emphasis added]

[230] Finally, the Board analyzed the evidence regarding the employer's and the union's past practices:

> [125] Throughout its argument, Bell put much emphasis on the history of its VSPs and the fact that the union should be estopped from suddenly changing its position on the implementation of such a plan given that it did not oppose it in the past. Bell argued that CEP should be deemed to have acquiesced to the situation, effectively creating a right by the employer to unilaterally implement the VSP, or at least removing the right of the union to complain about employer interference. **The Board is not persuaded that the union's acceptance of past VSPs is a bar to the present complaint.** The Board is of the view that CEP is not estopped from filing the instant complaint because it did not oppose the employer offering VSPs in the past.
>
> [126] **In the past, CEP did not object to such a plan either because there was an express agreement between the parties at the time permitting such plans to be offered, or because CEP agreed the plan was an appropriate way to reduce the workforce in the circumstances prevailing at the time. By contrast, CEP clearly indicated its objection to the present VSP prior to its implementation. In fact, CEP was not convinced that there existed a surplus of employees. Consequently, CEP is not barred from objecting to Bell's unilateral implementation of the current VSP.** The fact that the proposed VSP may be very attractive to some employees or that such plans have generally been very well received by employees in the past is, in the Board's opinion, not relevant.
>
> [127] As the certified bargaining agent, CEP possesses the "exclusive authority to bargain collectively on behalf of the employees in the bargaining unit." This statutorily recognized principle of exclusivity carries with it a corresponding obligation on Bell to recognize CEP as the bargaining agent for all employees in the bargaining unit. As a corollary to the union's exclusive bargaining authority, CEP has a duty to fairly represent all employees in the bargaining unit (section 37 of the *Code*). Thus, **it would be an overly restrictive interpretation of the union's exclusive right to bargain on behalf of employees for the Board to determine that CEP, by failing to negotiate the specific terms of a VSP into the collective agreement, indirectly bargained away its right of exclusive representation, especially in light of the extensive provisions in the collective agreement on workforce adjustment.** Furthermore, CEP's failure to object to Bell's successfully reducing its workforce through a VSP in the past does not render the employer's conduct under review consistent with the *Code*.
>
> [128] Bell may well need to reduce its workforce in order to respond to a variety of circumstances including a surplus associated with the transformation of the company, changes in the regulatory environment, market share loss or a turndown in the economy, etc., which may impact its financial situation. To do so, Bell should resort to the provisions of the collective agreement or obtain CEP's consent to accomplish such reduction in the workforce through other ways.
>
> [*Bell Canada, supra*; emphasis added]

[231] From this decision, the Board considers that terms and conditions of employment are altered in cases where a severance payment is made in exchange for a voluntary departure whose terms and conditions are not provided for in the collective agreement. It also considers that an interpretation of the union's exclusive rights of representation must not be so restrictive as to allow the silence of a collective agreement on a VSP to amount to a surrendering of this right by the union, especially where several other detailed and complex provisions on workforce adjustment have already been negotiated. Finally, it observes that failure to object to previous VSPs does not amount to a waiver by the union of its exclusive bargaining rights.

5. The VSP in *Atomic Energy of Canada Ltd., supra*

[232] In this matter, the Board rendered a decision on an unfair labour practice complaint filed by the union in accordance with sections 50a) and b) and 94(1)a) of the *Code*. The union alleged that the employer had offered a VSP directly to its employees during negotiations for the renewal of the collective agreement, without obtaining the consent of the union or negotiating the terms of the VSP with the union. The employer argued that the VSPs were within the exercise of its management

rights and were consistent with the framework of the legislation and the provisions of the collective agreement. The relevant provisions of the collective agreement dealt comprehensively with lay-offs, including redeployment of employees, bumping, lay-off procedures, steps to reduce the extent of lay-off, notice, termination compensation and the general commitment by the employer to offer a voluntary separation program in the event of a group termination as defined in the *Code*.

[233] The Board described the matter in dispute in *Atomic Energy of Canada Ltd., supra* as follows:

> [50] The essence of the employer's case and its application appears to be that its right to decide upon the VTIP content had been determined by the provisions of the applicable collective agreement and its application in the light of previous practices. It is therefore useful to first consider whether the agreement provisions in place and questions relating to their application to the circumstances in question had been resolved by the agreement provisions or whether the practices which had developed had made clear how the relevant collective agreement provisions should be applied.

[234] The Board concluded that the employer had not provided clear and convincing evidence that it was authorized under the collective agreement to set the terms and conditions of the VSP without negotiating with the union:

> [51] With respect, such a contention does not appear sustainable upon the present facts. First of all, as previously noted, the wording of the collective agreement does not conclude the matter and the practices actually followed, considered in the applicable circumstances, do not demonstrate conclusively that the parties intended that they be applied in the manner suggested by the employer.

[235] The Board first considered that the content and terms and conditions of the proposed VSP go far beyond the scope of the relevant article in the collective agreement:

> [52] It is apparent that article 22 cannot realistically be viewed as specifying and determining the content, timing and terms of the Voluntary Separation Program to be conducted, particularly given that the present circumstances were the first time that the relevant article as such was required by its terms to be applied to a group termination situation. The terms of the proposed VTIP itself as set out above if they are examined, may be seen to be far more detailed and to contain provisions which go far beyond those set in the relevant collective agreement article. Without the additional detail supplied by the employer unilaterally, which was initially provided only on February 19, 2002, it could not reasonably be argued that the relevant provisions of article 22 of the collective agreement could be given effect.

[236] The Board then turned its attention to the question of past practices, concluding that a lack of controversy concerning past VSPs could not be construed as a waiver by the union of its right to a monopoly over bargaining:

> [53] ... upon a consideration of the evidence, there were interchanges which amounted in substances to negotiations and the lack of controversy concerning the VSPs which did occur was more due to the fact that the parties easily agreed upon the program content, than upon an understanding that it could be unilaterally determined by AECL. It is not appropriate that a bargaining agent should see its rights to represent its members compromised because it adopts a flexible and cooperative bargaining style.

[237] In concluding, the Board reiterated that the employer had to provide clear and convincing evidence of such a waiver, supported by provisions in the collective agreement or by past practices clearly indicating how these provisions should be applied, as such a waiver is directly related to a fundamental principle within a statutory scheme:

> [56] **While the obligation to negotiate following certification directly with the union and not with the individual employees might by abridged by clear agreement, or implied agreement and clear supporting practices, such abridgement, under the *Code*, occurs within a statutory scheme having as a fundamental principle the monopoly of the union over the representation of employees. The principle requiring that the terms and conditions of employment and issues respecting the working conditions of employees be negotiated with the bargaining agent, being so grounded in statute requires that an employer asserting that the collective**

> **agreement or supporting practices has removed its obligation to bargain with the union and empowered it to negotiate directly with individual employees, be able to support its position. In the case of the *Code*, section 94(1)(a) considered in its context and in view of authority, requires clear and compelling evidence that the collective agreement and supporting practices contemplate direct negotiations between the employer and individual employees. The evidence in the present case falls well short of such standard**. Indeed, a consideration of the collective agreement provisions and of all of the evidence respecting the previous situations where voluntary separation programs were introduced, demonstrates that typically, matters of detail were the subject of discussion and interchange and that both the availability of such programs and their content were viewed as important terms and conditions of employment. Where, as here, to make the program effective, details had to be worked out and decided upon and negotiations with the union were required, where the collective agreement rights of employees had to be modified, and where there was a collective agreement obligation to introduce such a program, negotiations with the union where required.
>
> [Emphasis added]

[238] Based on this decision, the Board holds that the content and program of the VSP in this instance are also considered to be terms and conditions of employment. It also notes that the wording of the collective agreement must be clear with regard to a waiver by the union of its right to negotiate these terms and conditions of employment, and that the lack of controversy concerning past VSPs could not be seen as compromising its exclusive right of representation.

6. The VSP in dispute

[239] In light of the relevant case law cited above, the Board finds, on the one hand, that a VSP concerns fundamental terms and conditions of employment and, on the other hand, that these fundamental terms and conditions of employment must be negotiated with the bargaining agent. However, in the case at hand, Bell argues that the collective agreement and the existing practices remove its obligation to negotiate with the union and allow it to negotiate a VSP directly with employees. However, in light of the case law, the Board must render a decision in this matter based on clear and convincing evidence.

[240] There is no doubt that the parties have a diametrically opposed view of what is provided for in the collective agreement and of the conclusions to be drawn from past practices.

[241] The union argues that the dispute in this case concerns the effect of certification and the status of exclusive bargaining agent it confers. As such, the dispute does not arise out of the collective agreement. It holds that Bell's right to negotiate VSPs directly with employees in order to create vacant positions so that it can subsequently outsource the work generated by these voluntary departures is not clearly spelled out in the collective agreement.

[242] The union considers that the collective agreement does not contain any provisions according to which it clearly waives its status as exclusive bargaining agent, thereby empowering the employer to directly negotiate the departure of employees and to resort to the outsourcing of protected jobs to make up for an artificially created labour shortage. The memorandum of agreement applies solely in the context of a surplus declaration.

[243] Bell, on the contrary, argues that the memorandum of agreement and the Red Book allow it to offer VSPs regardless of whether or not there is a surplus declaration. It therefore argues that the parties have already negotiated a clear agreement that authorizes it to offer the disputed VSP without the obligation to negotiate with the union. It considers that past practices also support this argument.

[244] What is the situation here? Do the provisions of the memorandum of agreement and the Red Book as well as past practices related to the application of these provisions establish clearly and

convincingly that the employer is allowed to offer the disputed VSP directly to the employees concerned?

[245] It is useful to begin by examining the memorandum of agreement here, which is an integral part of the collective agreement. The title and first two paragraphs of this document are provided below:

> **WORKFORCE ADJUSTMENT PLAN**
> **MEMORANDUM OF AGREEMENT BETWEEN**
> **BELL CANADA**
> **AND**
> **COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA**
>
> This is to confirm our agreement, and reflects the discussions which were held concerning the **force adjustment** and lay-off provisions found in the Collective Agreement, with respect to the process to be implemented for dealing with workforce issues during the term of the Collective Agreement.
>
> **This Workforce Adjustment Plan is a tool to be used when there is a need for a reduction of staff levels** to meet the challenges of an increasingly competitive marketplace. **In order to respond to the impact of workforce adjustment**, a process that involves the participation of the union and provides for the fair and equitable treatment of **surplus employees** has been agreed to by the parties.
>
> [Emphasis added]

[246] Mr. Thibault, the main witness for the employer, explained why he considered that the memorandum of agreement allowed Bell to offer the disputed VSP. He explained that sometimes a VSP would be accompanied by a surplus declaration and at other times by a provision concerning the use of outsourcing. However, he admitted under cross-examination that there was no textual reference to a "VSP" in the memorandum of agreement, but that it was included under "voluntary measures."

> **WORKFORCE ADJUSTMENT PLAN**
> **MEMORANDUM OF AGREEMENT BETWEEN**
> **BELL CANADA**
> **AND**
> **COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA**
>
> **…**
>
> **Department and District Responsibilities**
>
> The Workforce Adjustment Plan guidelines are to be implemented on a department and district basis as and where appropriate, in **an attempt to resolve a staff surplus problem**. These guidelines have been developed jointly and include the following: controls on hiring, reclassification to Regular status, the employment of Temporary employees, the process for filling any vacant position in this bargaining unit and **the utilization of voluntary measures where possible**.
>
> [Emphasis added]

[247] In short, according to Mr. Thibault, because of the reference to these "voluntary measures," every conceivable VSP would be covered under the memorandum of agreement, with or without a declaration of an employee surplus.

[248] In the view of the Board, Bell's claim regarding its right to develop and offer the disputed VSP without negotiating with the union is not clearly demonstrated in light of the collective agreement, including the memorandum of agreement. Bell seems to want to interpret the words contained in the memorandum of agreement very broadly. The wording of the memorandum of agreement is clear and unequivocal: it concerns a "workforce adjustment plan ... to be used when there is a need

for a reduction of staff levels to meet the challenges of an increasingly competitive marketplace." This sentence, found in the introduction to the memorandum of agreement, establishes the context according to which each of the sections of the memorandum of agreement must be interpreted. The introduction also states that the agreement "reflects the discussions which were held concerning the force adjustment and lay-off provisions found in the Collective Agreement, with respect to the process to be implemented for dealing with workforce issues." Article 18 of the collective agreement deals specifically with force adjustment:

> **ARTICLE 18**
> FORCE ADJUSTMENT
>
> **18.01 Where any condition arises which reduces the work load** to the extent that a general program of lay-offs or spreading the work is contemplated, the Company shall endeavour to reach an agreement with the union as to whether a plan of part-timing, lay-offs or a combination of the two shall be put into effect.
>
> [Emphasis added]

[249] The evidence presented by Bell did not clearly and convincingly establish that the memorandum of agreement applies in the context of this dispute, that is, in a situation where the VSP is not accompanied by a reduction in the work load and in the absence of a surplus declaration. This necessarily also applies to the content of the Red Book, since it arises out of the memorandum of agreement. In fact, from the outset, it establishes "guidelines to define entities, determine surplus...." The Board considers that the collective agreement between the parties is clear on the question of workforce reduction. The rules established apply in situations where there is or will be a surplus declaration. In this case, the Red Book provides for different voluntary measures to limit surpluses. As such, the situation differs from that in *TELUS 2009*.

[250] A review of the disputed VSP and of the evidence submitted in this case shows that Bell is anticipating a workforce shortage rather than a surplus. It is evident from both the VSP and the witness testimony that no surplus declaration or even situation involving a surplus, whether real or anticipated, was planned.

[251] Let us recall the cases *Bell Canada* and *Atomic Energy of Canada Ltd., supra*, in which the Board found that it was within its jurisdiction to determine whether the employer had provided clear and convincing proof that the collective agreement authorized it to negotiate VSPs directly with employees. The Board asserted that, in such matters, the employer must be able to prove its case when it claims that the collective agreement or existing practices exempt it from negotiating with the union and empower it to negotiate directly with employees.

[252] In *Bell Canada, supra*, there was no provision in the collective agreement indicating that the union had clearly waived its right to negotiate the implementation of the VSP in dispute. Consequently, the Board determined that Bell had interfered with the union's representation of employees, in violation of section 94(1)a) of the *Code*. As in this case, the collective agreement did not provide for a memorandum of agreement that clearly covered the VSP in question, but there were provisions relating to workforce reduction and adjustment. In the view of the Board, these are different measures, although voluntary measures can be considered in a context where there is a need to reduce staff levels in order to avoid a surplus of permanent employees. The Board believes that we are in the same situation here. The silence of the collective agreement on the subject of VSPs offered in the absence of a surplus declaration amounts to an absence in the collective agreement of provisions applicable to this case and appears to place the employer under the obligation to negotiate the VSP in dispute with the union.

[253] With regard to past practices, the evidence shows that, between 2004 and 2015, Bell implemented several VSPs that it had offered directly to the employees covered by the complainant's bargaining certificate without declaring a surplus and/or resorting to outsourcing. The evidence also shows that the union does not appear to have voiced any objections.

[254] However, the union claims that the vast majority of the examples adduced in evidence involved situations where there was a lower work volume, that these VSPs were aimed at avoiding surplus declarations or that the union agreed with the offers made. The union considers that the fact that it did not oppose VSPs implemented by Bell in the past does not mean that it cannot oppose them in the future.

[255] The evidence in this case related to past practices is insufficient for the Board to declare that the parties had agreed in a clear and convincing manner on the exercise of the union's representation rights outside of a situation involving a surplus declaration. The Board reiterates that the exercise of these rights is fundamental and must be analyzed restrictively. Even if it accepts Bell's evidence regarding past practices, the Board would consider that the union did not clearly waive its right to negotiate VSPs in the future in a context where there is no surplus declaration. The Board also reiterates that the decisions in *Bell Canada* and *Atomic Energy of Canada Ltd., supra,* suggest to us that the absence of opposition to VSPs in the past does not necessarily constitute a waiver of the union's exclusive bargaining rights.

[256] Although this question was not discussed in depth, the Board notes the conclusion it drew concerning residual management rights in *Bell Canada, supra*:

> [120] With respect to the question of residual management rights, the Board is of the view that, while management's rights may allow the unilateral imposition of some matters **not negotiated** in the collective agreement, matters that affect the terms and conditions of employment or the legal framework of the relationship between the employees and the employer must be negotiated or approved by the exclusive bargaining agent who represents the employees. The parties' failure to specifically negotiate a separation package in the collective agreement does not translate into an employer's right to implement such a package when it impacts on matters covered by the collective agreement. Further, the union's right to act as exclusive bargaining agent continues regardless of the existence of a collective agreement, and the silence of the collective agreement on an issue does not give the employer carte blanche to negotiate with employees on that issue.

[257] In the present dispute, the residual management rights do not extend to the non-negotiated elements affecting conditions of employment, such as the modalities of the VSP in question.

[258] Furthermore, it is not disputed that Bell announced its VSP directly to its employees on October 29, 2015, despite the fact that the union had filed five grievances concerning this VSP on October 23, 2015, and despite the present complaint for unfair labour practice filed on October 27, 2015, accompanied by an application for an interim order.

[259] Consequently, the Board finds that, by offering the disputed VSP to the employees concerned without the consent and despite the clear opposition of the complainant union, Bell interfered with the union's representation of its members, in violation of section 94(1)a) of the *Code*.

VII. Conclusion

[260] For all the above reasons, the Board allows the union's complaint pursuant to section 94(1)a) of the *Code*. The Board is of the view that, given the longstanding relationship of the parties, a simple declaration is sufficient in the circumstances to dispose of the matter.

[signed Louise Fecteau], Vice-Chairperson