

THE UNIFOR PUBLIC REVIEW BOARD

In the Matter of a Request for Review of a Decision
under Article 18 of the Unifor *Constitution*

Case No. 2018-01

BETWEEN:

Jesse Forbes
Member, Unifor Local 222

Applicant

v.

The Unifor National Executive Board

Respondent

DECISION

Date: August 14, 2018

Board Members: Cara Faith Zwibel (Chair) Marvin Schiff, Hélène David, and Pradeep Kumar

Executive Secretary: Ron Franklin

MAJORITY OPINION:

I. Overview

This Request for Review turns primarily on the interpretation of Article 19(2) of Unifor's Constitution, which states:

Suspension or disaffiliation from the Canadian Labour Congress may be authorized by the National Executive Board subject to approval of Convention, or the Canadian Council.

On January 16, 2018, Unifor's National Executive Board (NEB) decided to disaffiliate from the Canadian Labour Congress (CLC). The decision was communicated to the CLC the following day by Unifor's President. At the time of this Request for Review, Jesse Forbes was a member and Recording Secretary of Unifor Local 222. Mr. Forbes takes the position that the NEB required approval by Convention or the Canadian Council to disaffiliate from the CLC and that the NEB's actions in disaffiliating unilaterally were anti-democratic, contrary to the principles of due process, and inconsistent with the Constitution. Unifor strongly disputes this characterization and argues that the Constitution gives the NEB the authority to act as it did, and that subsequent approval of Convention or the Canadian Council can either reaffirm the decision to disaffiliate or reverse it. Unifor asks that the Public Review Board (PRB) either dismiss the Request for Review or hold it in abeyance until the delegates to the Unifor Canadian Council debate and come to a conclusion on disaffiliation at the next Canadian Council meeting, scheduled to take place in just a few weeks.

As there are no factual issues in dispute between the parties, the PRB has decided to proceed without the need for an oral hearing. For the reasons set out below, we have determined that Unifor acted unreasonably in its interpretation of Article 19(2) and that, based on the current wording of the Constitution, a decision by the NEB to disaffiliate from the CLC must be

approved by Convention or the Canadian Council *before* the decision is communicated to the CLC and *before* disaffiliation is implemented. Mr. Forbes' request for review is granted.

Since the substantive question of disaffiliation will be addressed by the Canadian Council very shortly, the PRB will not send this matter back to the NEB for further consideration. However, we hope that these reasons will contribute positively to further discussion of the issues raised in this case as well as any consideration of whether a constitutional change is required.

II. Jurisdiction

At the outset, we wish to address Unifor's submission that the PRB does not have jurisdiction to review Local 222's request "until such time as the Unifor delegates make the final determination in August of 2018." This submission was made by Rick Garant, Director of Constitutional Matters, in correspondence to the PRB dated March 1, 2018 (prior to Mr. Forbes' statement of reasons). A similar statement was set out in Unifor's Answer to the Statement of Reasons dated April 16, 2018, wherein Mr. Garant asks that the PRB "either dismiss Local 222's request for Review of Decision or agree to hold such request in abeyance until such time as the delegates to Unifor Canadian Council debate and come to a conclusion on the above noted action."

Unifor's jurisdictional argument suggests that disaffiliation from the CLC has not occurred or is, in some sense, not final. The record does not support this characterization. The record includes a document dated January 18, 2018, entitled "Facts on Unifor's Disaffiliation from the CLC" which begins "Why did Unifor leave the CLC?" Another document sets out "Top Five Questions & Answers on Unifor's Disaffiliation". Further, on February 8, 2018 a letter was sent to Unifor representatives of federations and labour councils referring to the NEB's decision to cease affiliation to the CLC and explaining the reasons therefor. Finally, and most significantly, in its Answer to this Request for Review, Unifor confirmed that the NEB decided

to disaffiliate from the CLC on January 16, 2018 and communicated that decision to the President of the CLC by way of letter dated January 17, 2018, signed by Unifor's National President, Jerry Dias. There is nothing tentative or preliminary in these documents, and nothing that suggests that the NEB's decision is contingent on further approval by Canadian Council. While we appreciate that there will be debate and a *further* decision made at the upcoming Canadian Council, the decision will not change the fact that Unifor has not been affiliated with the CLC since January of this year. In light of the foregoing, the PRB does not accept the claim that it lacks jurisdiction to consider this Request for Review at this time, or that it should hold its decision in abeyance. In our view, the PRB's jurisdiction in this matter is confined to an interpretation of the relevant constitutional provisions. We have therefore confined our consideration to the process by which the NEB arrived at and acted upon its decision to disaffiliate, but have not reviewed or commented on the merits of the decision itself.

III. Mr. Forbes' Request for Review

Mr. Forbes' Statement of Reasons alleges that the NEB's decision to disaffiliate Unifor from the CLC was made without due process and was contrary to Articles 3, 4, and 7 of the Constitution. With respect to Article 3 of the Constitution, Mr. Forbes argued that:

1. When the NEB decided to disaffiliate Unifor from the CLC, it did so unilaterally and acted contrary to the objective of ensuring that Unifor was committed to the principles and practices of democratic unionism;
2. When the NEB decided to disaffiliate Unifor from the CLC, it did so without proper discussion and without producing meeting minutes (i.e., despite public and private inquiries from Unifor members), and acted contrary to the objective of guaranteeing accountability and transparency in Unifor's decision-making and actions;
3. When the NEB decided to disaffiliate Unifor from the CLC, it did so without

offering its members any opportunity for democratic participation, and acted contrary to the objectives of ensuring that Unifor belonged to its members and was at all times driven by members' common objectives; and

4. When the NEB decided to disaffiliate Unifor from the CLC, it did so without a mandate from its membership, broke down and created disunity in the labour movement, and acted contrary to the objectives of building and unifying the labour movement and acting in solidarity with other labour organizations in Canada and throughout the world with objectives similar to Unifor's.

With respect to Article 4 of the Constitution, Mr. Forbes argued that:

1. When the NEB unilaterally disaffiliated Unifor from the CLC, it did so in an undemocratic fashion despite having ample opportunity to discuss the matter with appropriate elected convention bodies, and acted in a manner inconsistent with the requirement that Unifor, its Officers, Directors, Staff and members be bound by the highest possible standards of ethics, democratic practice, and personal conduct;

2. Given the gravity of the decision at issue, the NEB should have raised the issue of disaffiliation when Unifor's Canadian Council met in or around August of 2017, as that would have allowed for the fullest participation of its members;

3. If the decision to disaffiliate Unifor from the CLC was time sensitive, the NEB could and should have convened a Special Convention of the Canadian Council pursuant to Article 6(f)(1) of the Constitution, as that would have allowed for the fullest democratic input and would be consistent with Article 4.2 of Constitution;

4. By failing to convene a Special Convention of the Canadian Council, the NEB effectively stripped the Canadian Council of the opportunity for debate and acted contrary to the requirement that all decisions affecting the welfare of members be made

through the bodies set out in the Constitution in a manner allowing for the fullest possible participation of members;

5. When the NEB side-stepped the appropriate elected decision-making body and deprived members of their right to participate in the governance and debates of the Union, the NEB failed to live up to the democratic standards of the Union and acted contrary to the principle that democratic standards of the Union proceeded from the rights of members, including the right to participate in the governance and debates of the Union; and

6. When the NEB disregarded the democratic standards of the Union, it engaged in anti-democratic behaviour.

With respect to Article 7 of the Constitution, Mr. Forbes submitted that the NEB justified its decision and conduct on the basis of Article 7(C)(14) of the Constitution – an Article that confers upon the NEB the power to make and amend policies of the National Union between conventions. However, Mr. Forbes’ noted that the authority and mandate to disaffiliate Unifor from CLC is explicitly dealt with in Article 19(2) of the Constitution and that Article confirms that “suspension or disaffiliation from the Canadian Labour Congress may be authorized by the National Executive Board subject to the approval of Convention, or the Canadian Council.”

As remedy, Mr. Forbes requested that the PRB reverse the NEB’s decision to disaffiliate Unifor from the CLC until such time as the appropriate bodies can decide if they will give the NEB the mandate it requires to do so.

IV. Unifor’s Answer

Unifor explained that its decision to disaffiliate from the CLC was based on a difference of opinion between Unifor and the CLC about Article 4 of the CLC’s Constitution and the extent to which Article 4 protected workers’ right “to have a union of their choice”, and Unifor not

being afforded an opportunity to be part of an advisory committee that the CLC struck with a view to establishing interpretation guidelines for Article 4 of CLC's Constitution.

Unifor acknowledged the principles in Article 3 of the Constitution to which Mr. Forbes made reference and noted that they were very important and were indeed objectives of the Union. However, Unifor took the position that "[those principles] cannot simply be blanket statements that provide no opportunity for Unifor to react and constrain the Union in making decisions which may affect the interest of its membership and the Union as a whole".

In taking the position that it was justified in disaffiliating Unifor from the CLC, Unifor made reference to Articles 7(C)(13), 7(C)(14), and 19(2) of Unifor's Constitution. These Articles provide that:

7(C)(13) The National Executive Board shall exercise its authority and mandate as expressed elsewhere in this Constitution.

7(C)(14) Between Conventions, the National Executive Board has the authority to make and amend policies of the National Union.

19(2) Suspension or disaffiliation from the Canadian Labour Congress may be authorized by the National Executive Board subject to the approval of Convention, or the Canadian Council.

Unifor argued that if the NEB did not have the authority to act as it did, and had to seek input from the delegates to Convention or Canadian Council before acting, there would be no need for Article 19(2) of the Constitution and a provision of that nature simply would not exist.

Unifor argued that it has been clear that delegates will be given an opportunity to debate the NEB's decision, and either reaffirm that decision or come to some other decision, at Unifor's Canadian Council in August of 2018. It took the position that until such time that such debate occurred, the NEB was entitled to make the decision that it did. This argument further implies

that the NEB was entitled to implement that decision. Unifor further argued that “The Unifor Constitution is not silent where decisions must first be approved by other means prior to being implemented”, and made reference to Articles 15(A)(3) and 15(A)(4) of its Constitution in support of that position. Articles 15(A)(3) and 15(A)(4) provide that:

15(A)(3) All Local Unions must establish and/or maintain By-Laws which are consistent with this Constitution. Local Unions must repeal, amend, or modify such By-Laws as may be inconsistent with this Constitution, on their own action, or at the direction of the National Executive Board.

15(A)(4) Amendments to existing By-Laws, or new By-Laws must be submitted to the National Executive Board for approval. The amendments, or the new By-Laws are not effective until approved by the National Executive Board.

Unifor submitted that absent from Article 19(2) was any language of the sort found in Article 15(A)(4) that explicitly required approval by the NEB before changes became effective or could be made effective.

Unifor argued that it did not side step any decision-making body, nor did it act unilaterally without regard for the approval of Unifor’s membership. It noted that it has already indicated that the matter of Unifor’s disaffiliation from the CLC will be part of the next Canadian Council Meeting. It also noted that Article 19(2) of the Constitution contemplated the possibility of approval by Canadian Council delegates or Convention delegates, and argued that the fact that two options existed, further reinforced its position that Article 19(2) of the Constitution did not impose upon Unifor any requirement to call a Special Convention.

V. Mr. Forbes’ Reply

In his Reply, Mr. Forbes argued that in its Answer, Unifor treated its Constitution as if it were a series of disconnected paragraphs when it should be viewing its Constitution as a unified whole, informed by the principles and values of the Union, including the principles and values that emanate from Articles 3 and 4 of the Constitution. In addition, Mr. Forbes argued that the issue of affiliation to the CLC needs to be viewed in light of the constitutionally mandated objective, in Article 3: To build and unify the labour movement and to act in solidarity with other labour organizations in Canada and throughout the world with objectives similar to ours. He argued that affiliation with the CLC was necessary to meet the objective of unifying the labour movement in Canada, and to act in solidarity with other labour organizations in Canada, and that any action to end such an affiliation needed to be based on compelling reasons and carried out in a way that was consistent with the Objectives, and Code of Ethics and Democratic Practices, in Unifor's Constitution. In the latter regard, he submitted there was no compelling reason to disaffiliate from the CLC, the reasons cited by Unifor for doing so were weak, and the NEB failed to satisfy its Constitutional obligation to act in a democratic and transparent manner (i.e., in a manner that provided all the members of Unifor with "ample opportunities for democratic participation" as set out in Article 3 of the Constitution.)

Mr. Forbes noted that the Constitution required that "all decisions affecting the welfare of members [...] should be made [...] in a manner allowing the fullest participation of members", and argued that members of Unifor had not only been denied any opportunity to participate in the disaffiliation decision, they had not even been informed that the decision was being contemplated.

VI. Issues & Analysis

Article 18(A)(9) of the *Constitution* provides that the PRB can only overturn a decision of a lower body when that body acted unreasonably. The concept of "reasonableness" as a

standard of review is not simple to describe, but at its essence, the reasonableness standard recognizes that in a given situation there may not be a single obvious or correct answer, but rather a range of possibilities. A decision is reasonable if it falls within the range. The standard requires a level of deference to the decision being reviewed, focusing on justification, transparency and the intelligibility of the decision-making process.¹

In this case, the decision under review boils down to the question of the reasonable interpretation of Article 19(2). Once again, that article states that:

Suspension or disaffiliation from the Canadian Labour Congress may be authorized by the National Executive Board subject to approval of Convention, or the Canadian Council.

Essentially, Mr. Forbes' argues that the article requires approval of Convention or the Canadian Council before the disaffiliation decision may be implemented. Unifor's position appears to be that the NEB's power to "authorize" disaffiliation includes the act of implementing that decision and that the reference to "approval" of the Convention or Canadian Council is a reference to a decision that will determine whether the decision that the NEB has already made and implemented will be allowed to remain in effect. In Unifor's Answer, Mr. Garant states:

As a former member of the Constitutional Working Group privileged with the opportunity of helping create the Unifor Constitution, I was fortunate enough to attend every meeting where every article was discussed and agreed upon. I believe that affords me the opportunity to have an understanding of the intent behind the article. It was decided amongst the Working Group, that the NEB maintained the right to decide but required the approval of Convention or Canadian Council delegates which gave the delegates the power to change such decision.

¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9.

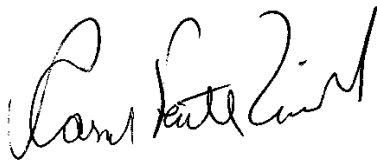
With respect, our view is that the language of Article 19(2) does not support this intent. This may mean that an amendment to the Constitution should be considered, but for our purposes, we must take the provision as we currently find it.

In our view, the language of Article 19(2) makes plain that the decision to disaffiliate from the CLC does not lie with the NEB alone. The words “subject to” indicate a qualification of the NEB’s authority and reading the provision in a way that authorizes the NEB to make and implement such a decision unilaterally effectively reads these words out of the article. We appreciate and have considered the argument, made by Unifor, that other articles of the Constitution make it explicit when decisions must be approved by other means prior to being implemented. Certainly, compared with the language contained in article 15(A)(4), article 19(2) is less explicit and arguably gives rise to some ambiguity. However, we cannot accept that the words “subject to” have no real meaning or that they simply confer a power to decide whether a decision made and implemented many months ago will remain in effect, or be reversed. In our view, such an interpretation is unreasonable.

To the extent there is some ambiguity in the language of article 19(2), we rely on the principle of contractual interpretation known as the *contra proferentum rule* which holds that ambiguities in a contract should be interpreted against the interests of the party that required the inclusion of the ambiguous provision. The significance of this principle in interpreting Union constitutions has been addressed by the Ontario Court of Appeal which has held that union constitutions are essentially contracts of adhesion where the membership has little choice but to accept the constitution and its terms. Thus, where there is ambiguity in a constitutional provision,

it should be resolved in favour of the membership on the basis of the *contra proferentem rule*.² In this case, the potential ambiguity in Article 19(2) is resolved in favour of Mr. Forbes.

As noted at the outset of these reasons, given that the Canadian Council will be convened in a few weeks and will consider the question of disaffiliation, we do not propose to reverse the NEB's decision. If the Council approves of the decision to disaffiliate, we see no rational basis upon which to carry the Local's case forward. However, if the Council does not approve and the NEB has to nullify its actions, any further action it may take on this issue should directly and effectively involve the membership, as we have found the Constitution requires.



Cara Faith Zwibel, Chair, Unifor Public Review Board



Marvin Schiff, Member, Unifor Public Review Board



Hélène David, Member, Unifor Public Review Board

² *Universal Workers Union (Labourers' International Union of North America, Local 183) v. Ferreira*, 2009 ONCA 155, para. 47.

DISSENTING OPINION:

I am in agreement with the majority of the PRB that the NEB decision should not be reversed. However, I disagree with my colleagues' interpretation of Article 19(2). In my view, the NEB, a democratically elected representative body, has the authority to take the decision to disaffiliate from the CLC, and implement it.

A handwritten signature in black ink, appearing to read "Pradeep Kumar", is written over a solid horizontal line.

Pradeep Kumar, Member, Unifor Public Review Board