PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No.
01-005 and 01-006

BETWEEN

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 864

APPLICANT

POLAR FOODS INTERNATIONAL INC., CARRYING ON
BUSINESS UNDER THE FIRM NAME AND STYLE OF
POLAR FOODS INTERNATIONAL INC. (BEACH POINT DIVISION) and
POLAR FOODS INTERNATIONAL INC. (SOURIS DIVISION)

RESPONDENT

Eugene P. Rossiter, Q.C. — Counsel for the Applicant/Responding Party

Mark Ledwell and Murray Murphy — Counsel for the Respondent/Moving Party

DECISION ON PRELIMINARY MOTION

Background

The Applicant Union filed with the Labour Relations Board of Prince Edward Island an Application for Certification pursuant to section 12 of the *Labour Act R.S.P.E.I. 1988 Cap L-1*, which application was designated as Board file 01-005, on the 7th day of May, 2001. The Reply to this Application for Certification was filed by the Respondent on the 30th day of May, 2001.

Similarly, in relation to the Board's file 01-006, the Application for Certification was filed by the Applicant on the 7th day of May, 2001 and the Reply to that Application was also filed on the 30th day of May, 2001.

In regards to the Board's file 01-005, the description of the unit of employees of the Respondent and the geographic area that the Applicant claims to be appropriate for collective bargaining purposes was described at paragraph 6 of the Application as "all employees of employer employed at its operations situate at Beach Point, Prince Edward Island, but excluding any employees who exercise secretarial or office functions, managerial functions, or who are employed in a confidential capacity related to labour relations".

In respect of the Board's file 01-006, the detailed description of the unit of employees of the Respondent and the geographic area that the Applicant claims to be appropriate for collective bargaining purposes are set out at paragraph 6 of the Application as "all employees of employer employed at its operations situate at Souris, Prince Edward Island, but excluding any employees who exercise secretarial or office functions, managerial functions, or who are employed in a confidential capacity related to labour relations".

There was no pre-hearing conference in regards to either of these matters.

The Board convened a hearing on Monday, the 17th day of September, 2001 and two matters were called by the Chair of the Board. Paul J. D. Mullin, Q.C., Solicitor for potential Intervenors in Board File 01-005 and Board file 01-006, had advised the Board in writing that he was withdrawing the interventions that he had filed on May 30, 2001 on behalf of certain employees of the Respondent employed at the Beach Point and Souris plants. These letters were read into the record.

The Chairman next read into the record the pertinent excerpts of the letter to Roy J. Doucette, CEO of the Prince Edward Island Labour Relations Board, from Mark Ledwell, Counsel for the Respondent dated the 31st day of August, 2001 and transmitted via facsimile. This letter indicates that the Respondent, Polar Foods International Inc., intended to rely upon its written submissions in regards to the Applications for Certification and proposed that the other matters that had been filed with the Board, namely a number of Unfair Labour Practice Complaints, be deferred pending the Board's decision on the Applications presently before it.

Counsel for the Applicant, Eugene P. Rossiter, Q.C., commenced representations to the Board in regards to the Reply filed by the Respondent, in particular the allegations of facts set out in Schedule B to the Replies. In the midst of that dissertation, Mr. Ledwell requested an adjournment to consider a very important matter. On the reconvening of the hearing, a Motion was made by Mr. Ledwell, on behalf of the Respondent, that the Board cease proceedings. The Motion was stated to be based on two grounds of perceived bias, first, on the part of the Chairman of the Board and presiding member on this Panel, and secondly, on the part of this entire Panel. In submissions made on Day 2 of the hearing, the Respondent added the ground that the Board was improperly constituted given the vacancy of Vice-Chair of the Labour Relations Board of Prince Edward Island.

Cases Considered

(a) *Newfoundland Telephone Co.* v. *Newfoundland (Public Utilities Board),* [1992] 1 S.C.R. 623;

(b) *Huerto* v. *College of Physicians and Surgeons (Saskatchewan)* (1994), 117 D.L.R (4th) 129 (Sask. Q.B.); Aff'd (1996) 133 D.L.R. (4th 100 (Sask.CA);

(c) *Committee for Justice and Liberty* v. *National Energy Board,* [1978] 1S.C.R. 369 (S.C.C.);

(d) *MacKinnon* v. *PEI Law Society* [11 June 2001] Docket No. S-1-GS-18394 (PEISCTD);

(e) *Miller* v. *Council for Licensed Practical Nurses* [1999], N.J. No. 175 (Nfld. S.C.T.D.);

(f) *Re Reid et al. And Wigle* [1980], 29 OR. (2d) 633 (Ont. H.C.J. Div. Ct.);

(g) *C.D. Lee Trucking Ltd* v. *Industrial Wood and Allied Workers of Canada* [1998], B.C.J. No. 2776 (B.C.S.C.);

(h) *Gillingham* v. *Corner Brook/Deer Lake/St. Barbe School District No. 3,* [1998] N.J. No. 212 (Nfld. S.C.T.D.);

(I) *Weyer* v. *Canada (F.C.A.),* [1988] F.C.J. No. 137,(Fed. C.A.);

(j) *Cyr* v. *Roy,* [1996] N.B.J. No. 25 (N.B.C.A.);

(k) *R.* v. *Novak,* [1995] B.C.J. No. 1127, (B.C.C.A.);

(l) *Brosseau* v. *Alberta Securities Commission,* (1998), 57 D.L.R. (4th) 458 (S.C.C.);

(m) *Ontario Hydro,* [1997] OLRB Rep. November/December 1005 [1997] O.L.R.D. No. 3578 (O.L.R.B.). ,

(n) *Hyde Park Masonry Ltd.*, [2000] O.L.R.D. No. 4368 QL (O.L.R.B.),

Statutes Considered

(a) *Labour Act*, R.S.P.E.I. 1988, Cap. L-1, Subsection 3(2), 3(4), 3(8) and 3(9);

(b) *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-4, Subsection 17(2)(d);

Texts Considered

(a) James T. Casey, *The Regulation of Professions in Canada*, Carswell 1994;

(b) Robert D. Kligman, B.A., LL.B., LL.M., *Bias*, "Chapter 7, Practice and Procedural Issues", Butterworths;

Evidence

There was no evidence called on behalf of either the Respondent or the Applicant in regards to this motion. There was anecdotal evidence with respect to the events of September 2000 placed on the record by counsel for both parties, the Chairman, and also set out in the written submission of the Respondent.

Issues

The Board considers that there are three issues before the Board in regards to this motion, all of which go to the question of jurisdiction. There is a question as to whether this Board is seized of all matters including the two (2) Applications for Certification and eleven (11) Unfair Labour Practice Complaints. The second issue relates to whether this Panel should recuse itself on the basis of an apprehension of perceived bias which is alleged on two (2) grounds by the Respondent. The third issue is whether the Board is improperly constituted given the vacancy of the position of Vice-Chair of the Prince Edward Island Labour Relations Board.

Findings of Fact

It is a matter of record that there were complaints of Unfair Labour Practices made by the United Food and Commercial Workers Union, Local 864, *et al*, against Polar Foods International Inc., *et al,* in relation to its Summerside division, which were filed with the Board in February of 2000. The Board Panel comprised of the Chairman, Robert MacArthur, and Panel Members Gerald Doyle and Elizabeth MacFadyen, held 22 days of hearings between April of 2000 and February of 2001. The decision in regards to that matter was issued by the Board on the 7th day of June, 2001, which found the Respondent, Polar Foods International Inc., guilty of Unfair Labour Practices.

The majority, if not all, of the hearings involving the Respondent's Summerside division were conducted at the MacLaughlan's Best Western Motel conference rooms and the parties and Panel members habitually frequented the dining room of that establishment. Sometime in September of 2000, a chance meeting of the Board Chair and Mr. Eugene P. Rossiter, Q.C., occurred in the dining room of the Best Western MacLaughlan's Motel, where the hearings were being held. While Mr. Rossiter did not recall the encounter, the Chairman did recall that on one occasion he attended at the dining room, and there being no other guests present, he asked Mr. Rossiter if he could join his lunch table. There was no discussion of the matters respecting the Summerside division. This meeting apparently occurred sometime in September of 2000. The meeting was observed by Mr. Jack Quinn, a Polar Foods International Inc. representative at the hearings concerning the Summerside division.

The written submission of the Respondent, filed in this motion, in relation to the chance meeting that occurred between the Board Chair and Counsel for the Applicant, states that "the observation was disconcerting to Mr. Quinn and it caused him an apprehension of bias". The first time this issue was raised with the Board was on September 17, 2001 approximately one year after the encounter and on the first day of the hearings of these Applications for Certification involving the Souris and Beach Point divisions.

On occasion, the Board will hold pre-hearing conferences to identify issues, predict numbers of witnesses and the number of hearing dates required to deal with matters. The Board has never consulted with parties in regards to panel selection. On these current applications there was no pre-hearing conference held between the parties and a Board representative.

The Chair of the Board, as he is mandated to do by virtue of subsection 3(4) of the *Labour Act*, supra, determined that the same Panel should hear these current matters. In deciding to strike the Panel to hear the Applications currently before the Board, the Chair weighed a variety of factors including the past practice of the Board in similar situations, the fact that in the course of the hearing of the previous matter this Panel had been educated on the finer points of the operations of a fish processing plant, the relative complexity of such an operation, and the fact that these current Applications for Certification, while involving ostensibly the same parties, dealt with different locations, different employees and different divisions. After all considerations, the Board concluded the circumstances dictated that the same panel should hear these matters.

Decision

Issue I

The Board has carefully considered all of the submissions and supporting authorities and anecdotal evidence submitted in regards to all of the issues before the Board. The first issue concerns which matters are currently before the Board. Given that the letter from Mr. Ledwell suggesting that the matters of the Unfair Labour Practices Complaint be put in abeyance while the Board considered the Applications for Certification on the basis of written submissions, only the two Applications for Certification were called when the Board convened on September 17, 2001. As such, this Board concludes that the only matters before it are the matters of the two Applications for Certification filed in May of 2001, one Application involving Beach Point division and the other Application involving the Souris division..

The eleven (11) Unfair Labour Practices Complaints were not called and are not before the Board at this time. Indeed, given that the eventual decision in regards to either Application for Certification may have an impact on the approach that the respective parties may take to the Unfair Labour Practice Complaints, the Board rules that it is only seized of the Applications for

Certification noted above. However the Board must also rule on the challenge to its initial jurisdiction on the basis of the allegations of apprehension of bias and the submission that the Board is not validly constituted in the absence of the appointment of a Vice-Chair.

Issue II

The Board has carefully considered the anecdotal evidence and the submissions of Counsel as well as the authorities submitted by Counsel for the parties in relation to the second issue, namely apprehension of bias on the part of the Board Chair and the Panel in its entirety.

The Board notes, as described in submissions by his Counsel, that Mr. Quinn personally felt disconcerted over his observation of the lunch meeting in September 2000 between the Chair of the Board and Legal Counsel, Eugene P. Rossiter, Q.C.

The law in regards to apprehension of bias is well settled in terms of the test that is applied. As both Counsel pointed out and were in agreement, the test is "... *whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator...*", as set out in the case, *Newfoundland Telephone Co.* v. *Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 623.

In *Newfoundland Telephone Co.* v. *Newfoundland (Public Utilities Board)*, Mr. Justice Cory recited this test and went on to comment that:

> *27. It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the Legislature.*

In the Prince Edward Island Supreme Court decision, *MacKinnon* v. *PEI Law Society* [11 June 2001] Docket No. S-1-GS-18394 (PEISCTD) Mr. Justice Jenkins states:

[42] The rules of natural justice apply to the Law Society. The absence of reasonable apprehension of bias is an essential element of natural justice procedural fairness. The very nature of law societies, as governing bodies of the legal profession, and as guiding forces in maintenance of the rule of law, suggests they should be acutely aware of the ramifications of relaxing the application of this principle of natural justice. The following assessment by Laskin C.J.C. in his dissenting judgment in ***Law Society of Upper Canada v. French****, supra, is perceptual:*

> *The likelihood the members of the Discipline Committee would stand above their findings and conclusions could be best ensured if they abstained from participating in the ensuing Convocation proceedings. That they should do so as a matter of law seems to me to be the more obvious when it is the organized legal profession whose conduct is under scrutiny. It is a reasonable expectation that lawyers, in their organized capacity as the governing body of their profession, should be most sensitive to the application of the rationale underlying the principle of impartiality. Indeed, whether or not the law was on their side - and I think it is not - it would have been a simple matter to have acceded to the request of the solicitor that members of the Discipline Committee abstain from participating in proceedings consequent upon their report and findings of guilt. One such member did abstain on his own. That way this protracted litigation might have been avoided without sacrifice by the Law Society of either principle or, authority.*

[43] That MacKinnon perceives a reasonable apprehension of bias raises an inquiry, but is not determinative or even especially influential. The test to be employed is an objective one. Cory J. stated in ***R. v. S.(R.D.),****[1997] 3 S.C.R. 484, at para. 111:*

> *The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in* ***Committee for Justice and Liberty v. National Energy Board****, [1978] 1 S.C.R. 369, at p. 394:*
>
> > *[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ...[The] test is "what would an informed persons, viewing the matter realistically and practically – and having thought the matter through – conclude. ..."*
>
> ***This test*** *has been adopted and applied for the past two decades.* ***It contains a two-fold objective element; the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.*** *...Further the reasonable person must be an informed person, with knowledge of all relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": ...****[emphasis added]***

[44] A presumption of regularity is to be accounted for as well. McEachern C.J.B.C. made this observation in ***G.W.L. Properties v. W.R. Grace & Co. of Canada Ltd.*** *(1993), 74 B.C.L.R. (2d) (B.C.C.A.), at p. 287:*

> *A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price.*

As the Board has observed above in relation to the encounter in September 2000 as set out in the written submission of the Respondent, while Mr. Quinn was disconcerted over the meeting and that it had caused him an apprehension of bias, in law his subjective apprehension serves to raise an inquiry, however, his subjective apprehension neither determines the issue nor is it to be particularly influential in applying the objective test of the reasonably informed person concluding that a reasonable apprehension of bias exists.

The hearings were conducted over the period of April 2000 to February 2001 and were held at the same facility where the encounter occurred. The encounter occurred in September 2000 and was definitely a chance encounter. Mr. Rossiter was not appearing as a witness before the Board. Additionally, as the parties and their Counsel are aware, the Board Chair and Mr. Rossiter are both lawyers practicing in a small jurisdiction who may on occasion represent clients with differing interests. Lawyers are trained in encountering and addressing such matters. It is the considered opinion of this Panel that a reasonably informed person, that is to say informed of all of the circumstances would conclude that there was no basis for a reasonable apprehension of bias in all of the circumstances.

In relation to the second part of this issue, namely that the self-same Panel heard, adjudicated, and ruled on the Unfair Labour Practice Complaints concerning the Summerside division of Polar Foods International Inc. on June 7, 2001, and the Panel should, therefore, recuse itself, the Board considered each of the authorities filed in respect to the motion. The Board also has considered that while no direct evidence was filed in support of the motion, a decision was issued in the previous proceedings involving Summerside.

The particular points that the Respondent relied on to support apprehension of bias were outlined in its written submissions and need not be reiterated here.

Counsel for the Respondent submitted that it was arguing reasonable apprehension of bias and it was not arguing actual bias on the part of this Panel. However, Counsel for the Respondent did state to the Board words to the effect *"How can you not be biased given what you did before and found before?"*. In light of those comments, it appears that actual bias may in fact have been raised, although no evidence was tendered that would suggest actual bias.

However, the Panel has reviewed its decision rendered June 7, 2001 with particular attention to detail in light of the submissions that had been made.

While Counsel for the Respondent suggested that this Panel made negative findings and unfavourable rulings in the previous matter involving Summerside, a review of the decision of June 7, 2001 demonstrates that the Board made findings which were both for and against Polar Foods International Inc. Some Unfair Labour Practice Complaints were held by the Board to be well founded while others were not. In that case, the Board rendered a decision and made a finding based on the evidence that was adduced before it. Additionally, and as argued by Counsel for the Applicant, the Board did not disregard the evidence tendered on behalf of Polar Foods International Inc. and, in fact, fully accepted much of the evidence.

There was a suggestion that this Panel should also recuse itself because it made findings in its decision of June 7, 2001 which dealt with the credibility of Polar Foods International Inc. and/or its witness, Jack Quinn. As noted in the decision of *Hyde Park Masonry Ltd.*, [2000] O.L.R.D. No. 4368 QL (O.L.R.B.), just because an adjudicator did not accept every submission a party makes does not lead reasonably to the conclusion that the adjudicator is biased against that party. As noted above, a review of the decision of this Panel of June 7, 2001 demonstrates that in many aspects, the evidence of the witnesses of Polar Foods International Inc. was accepted. In fact, in *R.v.Novak*, [1995] B.C.J. No. 1127 QL (B.C.C.A.), even though a trial judge had ruled adversely on the credibility of a witness did not necessarily result in a reasonable apprehension of bias. It was held that something more was required which would show *"a predisposition by the adjudicator with respect to the accused's credibility, such as to amount to pre-judgment of the result of the second hearing"*. Finally, credibility should not be an issue in the Applications that are currently before the Board given that there will be no evidence tendered by the Respondent in accordance with the letter of its Counsel which was read into the record.

The previous matter that this Panel sat on involved the Summerside division, whereas the two matters that are currently before the Board involve Beach Point and Souris divisions. The current matters involve distinct locations, presumably will involve different facts and factual situations and different employees. It has been a past practice of this Board and, in fact, is the practice in most jurisdictions in regard to labour relations in the country, that, given the complex matters of fact and issues of law, a Panel may consider itself seized of a matter and continue to preside over any subsequent matters arising out of circumstances involving those same parties.

There was no evidence led, nor is there evidence before this Board, that would lead an informed reasonable third party to perceive that there is a real possibility of bias in the circumstances. There is nothing to indicate that this Panel is not open to persuasion upon presentation of new evidence or new argument. The fact that the Board found against Polar Foods International Inc. in its June 2001 decision by and of itself is not sufficient for a reasonably informed bystander to reasonably perceive bias on the part of these adjudicators.

After being fully apprised of all the circumstances and the relevant law in regards to this issue, this Panel is convinced entirely that it can hear the evidence and fairly adjudicate the matters in relation to these Applications for Certification. Accordingly, the Board is not prepared to grant the motion that it recuse itself on the basis of an apprehension of bias and the motion is denied.

Issue III

The Respondent suggested that the Labour Relations Board was without jurisdiction given that there was an absence of a Vice-Chair. In its written brief, the Respondent submitted that:

> *Indeed, situations like the instant case are exactly why the legislation provides for Vice-Chairs who can preside over hearings. In fact, the absence of a Vice-Chair in the face of mandatory statutory language requiring a minimum one Vice-Chair at all times, renders the Board incapable at law of convening a Panel. This intervening problem is compromising the ability of the Board and the Panel to objectively consider the bias issue.*

In the Applicant's submissions, certain provisions of the *Labour Act* were brought to the attention of the Board. Specifically, Sub-sections 3(4), 3(8) and 3(9) of the *Labour Act* and, as well, the provisions of section 17(2)(d) of the *Interpretation Act, R.S.P.E.I. 1988, Cap. I-4* .

The provisions of the *Labour Act* cited by the Parties are as follows:

> *3.(2) The Board shall be composed of a chairman, one or more vice-chairmen and as many members, equal in number, representative of employers and employees as the Lieutenant Governor in Council may determine, all of whom shall be appointed by the Lieutenant Governor in Council.*
>
> ...

> *(4) The chairman may establish one or more panels of the board and in respect of matters referred to, a panel by the chairman, or coming before it under the rules of the board made under this Act, the panel has the power and authority of the board and two or more panels may proceed with separate matters at the same time.*
>
> ...
>
> *(8) A majority of the members of the board or panel constitute a quorum.*
>
> *(9) A decision of the majority of the members of the board or a panel present and constituting a quorum is the decision of the board and if the votes are equal, the chairman shall have the casting vote.*

The provisions of subsection 17(2)(d) of the *Interpretation Act* are as follows:

> *17.*
> *(2) Where an enactment establishes a board, commission or other body consisting of three ore more members (in this section called the "association"),*
>
> ...
>
> *(d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office not less than a quorum.*

In stating that the Board had jurisdiction, the Applicant relied on the Newfoundland Supreme Court, Trial Division, decision in *Gillingham* v. *Corner Brook/Deer Lake/St. Barbe School District No. 3,* which states:

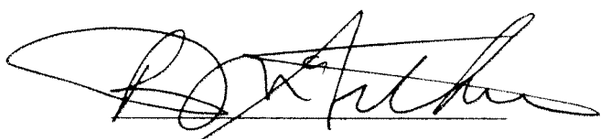
> *¶ 9 I do not accept the Applicants' argument that s. 23(2) of the Interpretation Act is overridden in the instant case by s. 3(1). Firstly, ss. 53(5) and 59(1) of the 1997 Act are not time specific. Furthermore, there is nothing in the 1997 Act to indicate that decisions, whatever their import, made by less than a full board are invalid. If the Legislature had wished to impose such a restriction it could and, I suggest, would have done so. While I accept that the thrust of the 1997 Act is to make the provision of education in the province more democratic, I repeat, there is absolutely nothing which dictates a universal requirement for a full board. All sorts of democratic institutions operate on the basis of a quorum and there was indeed the required quorum when the vote concerning the Cox's Cove School was taken. I also note that s. 60(3) of the 1997 Act states that:*

Unless otherwise provided by the constitution of the board, a majority of trustees constitutes a quorum.

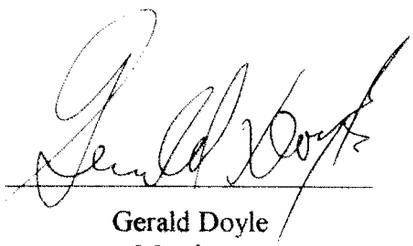
¶ 10 I therefore reject this argument.

This Board is in complete agreement with the rationale as set out in the learned Justice Robert's decision as set out above. The provisions of subsection 3(2) the *Labour Act* supra, cannot be read in isolation, but must be read in the whole context of that section and, indeed, in the context of the entire *Act*. The provisions of subsection 17(2)(d) of the *Interpretation Act* very specifically addresses the issue and the Board is convinced that arguments raised by the Respondent in regards to the constitution of the Board and the effect of a vacancy in the Vice-Chair position of the Board are not supported in law. That argument is rejected.

In summary, the Board rejects the challenge to its initial jurisdiction on the three grounds advanced by the Respondent. The Board will proceed with the hearing into the Applications for Certification on October 22, 2001 at the hour of 9:30 a.m., and such hearing to be held at Island Regulatory Appeals Commission Hearing Room in Charlottetown.



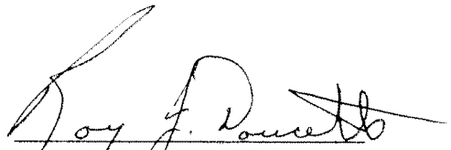
Robert MacArthur
Chair



Gerald Doyle
Member

Elizabeth MacFadyen
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 15th day of October, 2001 and issued under the hand of its Chief Executive Officer.



Roy J. Doucette
Chief Executive Officer