



File No. 04-034

Decision No.

IN THE MATTER OF AN APPLICATION UNDER SECTION 39 OF THE PRINCE EDWARD ISLAND LABOUR ACT R.S.P.E.I. 1988 CAP. L-1 (SUCCESSOR RIGHTS)

BETWEEN:

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1338

APPLICANT

AND:

MacBETH BROS. ROOFING

RESPONDENT

**COUNSEL FOR THE APPLICANT
COUNSEL FOR THE RESPONDENT**

Mr. Raymond Mitchell
Mr. Paul D. Michael, Q.C.

DECISION

Background

The Applicant Union, on July 20, 2004, filed with the Labour Relations Board of Prince Edward Island an Application under Section 39 of the *Labour Act, R.S.P.E.I. 1988, Cap L-1* (Successor Rights). The Respondent's Reply to this application was filed with the Board on August 10, 2004.

The Applicant sought, at paragraph 10 of its application, “. . . a declaration that the respondent MacBeth Bros. Roofing is a successor employer to Duane MacBeth Contracting and Darin MacBeth Contracting, and is thereby bound by the collective agreement between the applicant union and the accredited employers' organization, the Association of Commercial and Industrial Contractors of Prince Edward Island.”

The Reply to Application filed by the respondent denied that Duane MacBeth Contracting and Darin MacBeth Contracting were “employers” as defined in the Act as neither had any employees other than their principals, that there are shortcomings in the Agreement in any regard, and requesting a hearing.

The hearings respecting these matters between the parties convened on the 14th day of December, 2004.

Cases Considered

1. ***Long Lake Forest Products Inc.***, [1994] OLRB Rep. October 1343, File No. 3094-93-R79;
2. **United Brotherhood of Carpenters and Joiners of America, Local 83 v. K. C. Drywall and Basinn Drywall Limited**, [5 November 1996] N.S.L.R.B. Decision No. 1732c (Decision on Section 31 Successor Rights);
3. ***I. B. E. W., Local 1432 v. Trigen PEI/Trigen Energy Canada Inc.***, [11 January 1999] P.E.I.L.R.B. No. 97-055 (Decision on Section 39 Successor Rights);
4. **Trigen Energy Canada Inc. and Trigen PEI v. I. B. E. W., Local 1432**, [21 April 1999] P.E.I.L.R.B. No. 99-005 (Decision on Section 4 Reconsideration);
5. ***Queens Region Health & Community Services v. Canadian Blood Services and Union of public Sector Employees, Intervenor***, [22 October 2001] P.E.I.L.R.B. No. 00-008 (Decision on Section 39 Successor Rights);
6. ***I. A. T. S. E. v. Eatons Auditorium***, [2004] OLRB Rep. 706, Docket: 0381-03-R;

Statutes Considered

- (a) ***Labour Act***, R.S.P.E.I. 1988, Cap. L-1, sections 39, 52 and 53.

Evidence

The written evidence before the Board on these matters is in the form of sworn affidavit evidence in the application and in the reply filed with the Board. There was one (1) exhibit filed as Exhibit R-1 being Declaration of Partnership of MacBeth Bros. Roofing dated the 15th day of September 1988. There was oral testimony received from one (1) witness called on behalf of the Applicant Union Local, their current Business Agent, Mr. Paul Chaisson, and there was one (1) witness called on behalf of the Respondent, Mr. Duane MacBeth.

Issues

The issues that are to be considered and decided by this Board are listed as follows:

1. Whether, in 1988, Duane MacBeth Contracting and Darin MacBeth Contracting were “employers” as defined in the *Act*;
2. Whether the Agreements that were signed in 1988 by Duane MacBeth Contracting and Darin MacBeth Contracting were in fact Voluntary Recognition Agreements;

3. If there are affirmative findings on these two issues, do successor rights apply such that MacBeth Bros. Roofing is a successor employer to Duane MacBeth Contracting and Darin MacBeth Contracting; and
4. Whether there are grounds for granting the relief sought.

Preliminary Matter

The Board, at the commencement of the hearing, outlined the background of the case, noted that there had been only informal pre-hearing conferences held and cited the issues in the matter as cited above.

The Applicant's counsel expressed concern that the Applicant had not anticipated that the Board would be considering the relevant issues to be those as outlined above and requested and was granted a brief adjournment to consider the Applicant's options. Upon resumption of the hearing Counsel for the Applicant indicated that the Applicant had decided to proceed with the matters and address all of these issues.

Decision

All of the evidence presented has been thoroughly reviewed by the Panel. There has been a careful consideration of the evidence in light of the submissions advanced by the respective Parties in relation to this Application for Successor Rights.

The Law

This Application is brought pursuant to the provisions of Section 39 of the *Act* which states:

39. (1) Where an employer sells, leases or transfers or has agreed to sell, lease or transfer his business or the operations thereof or any part of either of them, and

(a) either the employer or the purchaser, lessee or transferee or both of them is a party to or is bound by a collective agreement with a bargaining agent on behalf of any employees affected by such sale, lease or transfer;

(b) one or more bargaining agents have been certified as bargaining agent for any such employees;

(c) one or more trade unions have applied to be certified as bargaining agent for any such employees; or

(d) one or more bargaining agents have given or are entitled to give notice under either section 21 or section 23 with respect to any such employees, unless and until the board otherwise directs, such collective agreement, certification, application, notice or entitlement to give notice continues in force and is binding upon such purchaser, lessee or transferee.

(2) Any such employer, purchaser, lessee or transferee, or any such bargaining agent or trade union may apply to the board for the resolution of any question or problem that, as a result of such sale, lease or transfer, has arisen or may arise with respect to any such collective agreement, certification, application, notice or entitlement to give notice.

(3) Upon such application being made, the board shall, by order, make such award, give such direction, or take such other action, as in its discretion the board considers appropriate, to resolve any such question or problem and, without restricting the generality of the foregoing, may by such order or subsequent order

(a) amend or rescind to such extent as the board considers necessary or appropriate any such collective agreement;

(b) revoke or amend any such certification or amend any such application for certification;

(c) modify or restrict the operation of any such notice or entitlement to give notice;

(d) determine whether employees affected constitute one or more appropriate bargaining units;

(e) if more than one collective agreement is to continue in force, designate which employees are to be covered by such agreements;

(f) modify or restrict the operation or effect of any provision of any such collective agreement and define the rights with respect thereto of any employees affected by such sale, lease or transfer;

(g) declare which trade union shall be the bargaining agent for such employees; and

(h) interpret any provision of any collective agreement.

(4) Until the board has disposed of any application under subsection (3), such purchaser, lessee or transferee, notwithstanding any other provisions of this Part, shall not be required to bargain with any such bargaining agent with respect to employees to whom the application relates.

(5) Where any application is made under this section, the board may make or cause to be made such examination of records or other inquiries and may hold such hearings and take such representation votes as it considers necessary and prescribe the nature of evidence to be furnished to the board.

(6) Where an employer who is a party to or is bound by more than one collective agreement reorganizes or intends to reorganize his operations so that employees covered by separate collective agreements are intermingled or will be intermingled, the board may, on application by such employer or any bargaining agent party to any such collective agreement, exercise the powers conferred on the board by this section and the provisions of this section shall apply.

(7) Where two or more municipalities are amalgamated, united, or otherwise joined together, or all or part of one such municipality is annexed, attached, or added to another such municipality, the provisions of this section apply. R.S.P.E.I. 1974, Cap. L-1, s.38.

Under the provisions of Part II of the *Act*, Construction Industry Labour Relations, Sections 52 and 53 read:

52. In this Part

(a) *“accredited employers’ organization” means an organization of employers that is accredited under the Act as the bargaining agent for a unit of employers in the construction industry;*

(b) *“appropriate unit” means a unit determined by the board to be appropriate for collective bargaining purposes;*

(c) *“construction industry” means the on-site construction, alteration, decoration, repair, or demolition of buildings, structures, roads, sewers, water mains, pipelines, tunnels, bridges, canals, or other works but excludes the manufacture, installation or sale of any prefabricated house or modular home or mobile home;*

(d) *“council of trade unions” means a council that is formed for the purpose of representing or that according to established bargaining practice represents trade unions as defined;*

(e) *“employee” means a person employed in the construction industry but does not include*

(i) a person who, in the opinion of the board, performs management functions or is employed in a confidential capacity in matters relating to labour relations, or

(ii) a member of the architectural, dental, engineering, legal or medical profession entitled to practise in Prince Edward Island and employed in a professional capacity, registered nurses, and teachers as defined in the School Act;

(f) *“employer” means any person who employs or in the preceding twelve months has employed more than one employee and who operates a business in the construction industry;*

(g) *“employers’ organization” means an organization of employers that is formed for purposes that include the regulation of relations between employers and employees as defined in this section;*

(h) *“sector” means one of the following divisions of the construction industry:*

(i) industrial and commercial,

(ii) housebuilding,

(iii) sewers, tunnels and water mains,

(iv) road building,

(v) any other sector determined by the board;

(i) *“trade union” or “union” means a trade union that according to established trade union practices pertains to the construction industry;*

(j) *“unionized employee” means an employee on behalf of whom a trade union or council of trade unions has been certified or recognized as bargaining agent in accordance with section 18 and where the certification or recognition has not been revoked;*

(k) "unionized employer" means an employer of unionized employees in the geographical area and sector concerned.

R.S.P.E.I. 1974, Cap. L-1, s.51; 1994, c.32, s.19; 1999,c.32,s.1

53. Except where inconsistent with Part II of this Act the provisions of Part I apply to the construction industry and all references therein to "employer" and "trade union" shall be taken to be references to "employers' organizations" and "council of trade unions" where appropriate.

R.S.P.E.I. 1974, Cap. L-1, s.52.

Findings of Fact

The Board finds that the period of time critical to all the matters before it is in September and October 1988, when the events surrounding the Voluntary Recognition Agreements between the therein named parties of Duane MacBeth Contracting and Darin MacBeth Contracting and the United Brotherhood of Carpenters and Joiners of America, Local 1338, transpired.

The witness for the Applicant, Mr. Paul Chaisson, was not privy to the events of those days and Counsel for the Applicant indicated that the then Business Agent would not be available to give evidence and in any event would not likely be called as a witness before the Board.

On the basis of the available evidence, that of Mr. Duane MacBeth, the Board finds that MacBeth Bros. Roofing was initially formed as a Partnership of Duane MacBeth and Darin MacBeth in the Declaration of Partnership dated the 15th day of September 1988. At all relevant times the company had two employees who were the principal owners Mr. Duane MacBeth and Mr. Darin MacBeth. This registration was allowed to lapse sometime in the mid- 1990's and was revived by a Declaration for Registration of a Business Name under Sec. 53 the Partnership Act dated the 10th day of March 1997. There never did ever exist any company named Duane MacBeth Contracting nor Darin MacBeth Contracting.

The Company, MacBeth Bros. Roofing, in September 1988 was installing the roof on the Our Lady of the Assumption Church in Southport, Prince Edward Island, which was a construction site under the management of a unionized general contractor. Under mounting pressure being exerted on the then Business Agent of the United Brotherhood of Carpenters and Joiners of America, Local 1338, as well as on the General Contractor, the then Business Agent approached the MacBeth brothers with the concerns of those mounting pressures being exerted on him. The MacBeth brothers are believed to have had a want to complete the job as well as a desire to assist the Business Agent and the General Contractor in addressing those concerns. Without much more consideration than that, they agreed to sign the Voluntary Recognition Agreements. The Agreements were solely prepared by the then Business Agent of the United Brotherhood of Carpenters and Joiners of America, Local 1338. The parties signed the Agreements on September 30, 1988, and the Agreements were filed with the Prince Edward Island Labour Relations Board on October 3, 1988.

There were never any continuing contacts or remittances of dues or any other involvements of any kind between any of these parties up to and until the events in May of 2003, which events gave rise to this Application.

Conclusion

The Board, in light of these findings of fact, must conclude that the named parties of Duane MacBeth Contracting and Darin MacBeth Contracting as set out in the Voluntary Recognition Agreements of 1988 were not “employers” as defined in the *Act*.

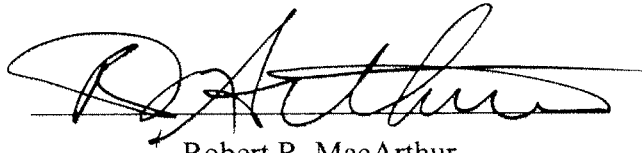
While it was argued by Counsel for the Applicant that the Applicant should be entitled to rely on the validity of the Voluntary Recognition Agreements by virtue of the Boards acceptance of and filing of the agreements and that the naming of the non-existing companies was at the own peril of the parties or an attempt by the then Business Agent to avoid some perceived concern over avoidance of the agreement by the parties, the Board simply cannot uphold the validity of the documents. Regardless of the reason, be it an error on the part of either or all of the parties preparing, signing and filing the Voluntary Recognition Agreements, or an attempt to address some perceived ulterior motive on another party’s part, the reality remains that these instruments purporting to voluntarily recognize and certify a bargaining agent of the employees of these employers are strictly erroneous. The entities of Duane MacBeth Contracting and Darin MacBeth Contracting simply did not exist.

The Board must also conclude that, even if they were in existence, those entities would not in fact be considered “employers” as contemplated in the provisions of Part II of the *Act*. Neither Duane MacBeth Contracting and Darin MacBeth Contracting, nor even MacBeth Bros. Roofing would have fit the definition of “employer” as dictated by the *Act* as they did not have more than one employee that would be considered to be an “employee” as defined under the *Act*.

In regards to the second issue before the Board, given its conclusion on the first issue, it must follow that the said Voluntary Recognition Agreements and their resulting implications under the *Act*, must be held to be invalid, be rescinded and be declared a nullity by definition, pursuant to Section 52(f) of the *Act*, and the Board so rules.

Further, as to the third issue, there now being no valid substantiating document upon which the implications of successor rights could follow, as against MacBeth Bros. Roofing, the Board has no basis to rule that this company is a successor employer.

There exists no basis upon which the Board could grant the relief sought in this Application for Successor Rights. Therefor the Application must be dismissed and the Board so rules.



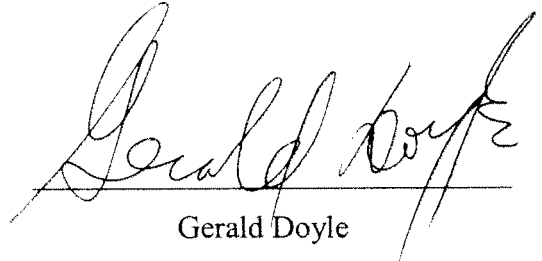
Robert R. MacArthur

Chair



Ted Crockett

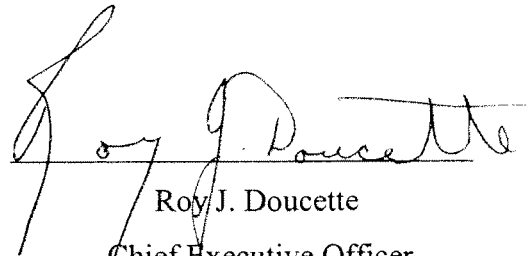
Member



Gerald Doyle

Member

This Decision made by the Prince Edward Island Labour Relations Board on the 14th day of February, A.D., 2005, and issued under the hand of its Chief Executive Officer on the 15th day of February, A.D., 2005.



Roy J. Doucette

Chief Executive Officer