



File No. 04-038

Decision No.

IN THE MATTER OF AN APPLICATION FOR REVIEW OF A CERTIFICATION ORDER

BETWEEN:

EARL A. REDMOND INC.

APPLICANT

AND:

**CONSTRUCTION AND GENERAL LABOURERS'
AND GENERAL WORKERS' IN CONSTRUCTION,
INDUSTRIAL AND COMMERCIAL, LOCAL NO. 1077**

RESPONDENT

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

Mr. John K. Mithcell, Q.C.
Mr. J. Gordon MacKay, Q.C.,

DECISION

Background

In an Application filed with the Prince Edward Island Labour Relations Board (the "Board") on August 18, 2004, pursuant to Section 54 of the *Labour Act*, R.S.P.E.I. 1988, Cap L-1 as amended, being an Application for Certification in the Construction sector, by the Construction and General Labourers' and General Workers' in Construction, Industrial and Commercial, Local No. 1077 (the "Union Local"), it was requested that the Union Local be certified by the Board as bargaining agent of the employees Earl A. Redmond Inc. (the "Company") in the unit set forth as appropriate for collective bargaining purposes. The Union Local described, at paragraph 6 of that Application, the unit as "All employees engaged as Labourers in construction but excluding those above the rank of working foreman, within the jurisdiction of the trade on Prince Edward Island."

An Order, issued by this Board on the 31st day of August 2004, certified the Construction and General Labourers' and General Workers' in Construction, Industrial and Commercial, Local No. 1077 as bargaining agent of all employees of Earl A. Redmond Inc. engaged as labourers in construction but excluding those above the rank working foreman, within the jurisdiction of the trade on Prince Edward Island.

A Reply to Application for Certification was filed by Earl A. Redmond Inc. on September 17th, 2004, alleging, on a number of grounds, that Board lacked jurisdiction to issue the said Order, and also made this Application, pursuant to section 54(6) of the *Act*, requesting that the Order be rescinded as the Respondent, Construction and General Labourers' and General Workers' in Construction, Industrial and Commercial, Local No. 1077, did not represent the majority of the employees of the Earl A. Redmond Inc. that fall within the bargaining unit as defined above.

There was an informal Pre-hearing Conference between Counsel and the Board's Chief Executive Officer, Mr. Roy Doucette, to predict the main issues and hearing days required in this matter. A hearing was set for January 5 and 6, 2005. The hearing respecting these matters between the parties convened and concluded on the 5th day of January, 2005.

The Board commends the respective counsel and their clients for the efforts of all concerned in regards to the bringing their respective positions on the matter expeditiously before the Board.

Statutes Considered

- (a) *Labour Act*, R.S.P.E.I. 1988, Cap. L-1, sections 52, 53 and 54.
- (b) *Labour Act Regulations*, EC521/71, section 3.

Texts Considered

- (a) *Ontario Labour Relations Board Law and Practice*, 3rd Ed., Sack and Mitchell, (Markham, LexisNexis Butterworths 1997), Vol. 2 pp. 10.33, para. 10.45.

Evidence

The written evidence before the Board on these matters is in the form of sworn affidavit evidence in the Application for Certification and the Reply to the Application for Certification duly filed with the Board. There were twelve (12) exhibits filed at the hearing of the matters as Exhibits C-1 through C-12. There was oral testimony received from two witness called on behalf of the Applicant Company being two directors and officers of the company Mrs. Mary Redmond and Mr. Earl A. Redmond. The Respondent's counsel called no witnesses to present oral testimony.

Issues

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

1. Whether the Board lacked the jurisdiction to issue the Order in that:
 - a. The signatory of the Application was not “authorized to sign the Application”;
 - b. A copy of the constitution, rules, bylaws and a list of its officers was not filed by the Applicant Union Local; and/or
 - c. That the Board failed to comply with requirements of section 54(1) of the *Act* as it is alleged the Board neither made nor caused to be made an examination of records to determine essential issues raised by the Application prior to the issuance of the Order.
2. Whether the Applicant Union Local represents a majority of the employees of Earl A. Redmond Inc. that fall within the bargaining unit described as “ All employees engaged as Labourers in construction but excluding those above the rank of working foreman, within the jurisdiction of the trade on Prince Edward Island.”
3. Whether there are grounds for granting the relief sought.

Preliminary Matters

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 set out above.

Both counsel indicated that there were no specific preliminary matters that the parties wished to raise. The Applicant’s counsel expressed, at the beginning of his opening statement, that the Applicant was prepared to have all of the jurisdictional challenges specifically addressed and dispensed with on the basis of the assurances of the Chief Executive Officer that each of the points raised in the three parts of the first issue cited above had in fact been complied with in respect to the Application for Certification. The Chief Executive Officer affirmed to the parties, their counsel and the panel of the Board that there had been complete compliance with the requirements of the Act in all of those regards. The parties then agreed that the entire first issue was therefore resolved.

The Board proceed to hear the evidence and argument in relation to the remaining matters.

Decision

This Panel of the Board has thoroughly reviewed all of the evidence presented and carefully considered the evidence in light of the submissions advanced by the respective Parties in relation to this review of the Application for Certification with respect to Board file number 04-038 and the resulting Certification Order of the Board dated the 31st day of August 2004.

The Law

The Board has considered the application for review of the Certification Order, the supporting evidence and the parties' submissions in light of and pursuant to sections 52, 53 and 54 of the *Labour Act*, and section 3 of the *Regulations of the Act*. The provisions of sections 52 and 53 give the definitions pertinent to this *Part* and the application of *Part I* in regards to *Part II* of the *Act* which deals with Construction Industry Labour Relations. The *Act* then reads at section 54:

54. (1) Where a trade union makes application for certification as bargaining agent for a unit of employees of an employer, the board shall forthwith make or cause to be made such examinations of records and other inquiries as it considers necessary and shall determine

(a) whether the unit applied for is appropriate for collective bargaining; and

(b) whether a majority of the employees in the unit wish the applicant trade union to be certified as bargaining agent for such employees.

(2) If the board is satisfied that the unit applied for is appropriate for collective bargaining and that a majority of the employees in the unit wish the applicant trade union to be certified as bargaining agent for such employees, the board shall forthwith and without holding a hearing, issue a certification order, that, except as provided in this section, shall have the same effect as an order under section 13.

(3) An order issued under subsection (2) constitutes, as of the date of issue, a notice to commence collective bargaining and the trade union and the employer, or an employers' organization representing the employer, shall within ten days after the notice is issued, or such further time as the parties may agree, commence collective bargaining with a view to concluding a collective agreement.

(4) Where a trade union applies for certification under this section, the board may determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area and it need not confine the unit to a particular site or project.

(5) Section 22 applies where the board issues an order under subsection (2).

(6) The employer named in an order issued under subsection (2) may within ten days of the date of issue apply to the board for a review of the order, but the application shall not alter the rights or obligations of the parties arising from the order.

(7) Upon receipt of an application under subsection (6) the board shall conduct a review and shall either confirm, vary or rescind such order and where the order is rescinded, subsection 20(2) applies.

(8) Sections 12, 13, 14, 15 and 16 apply to applications under this section but where there is any conflict this section prevails. R.S.P.E.I.

1974, Cap. L-1, s.53.

The Labour Act Regulations at section 3 read:

3. (1) An application by a trade union for certification as bargaining agent pursuant to the Act shall be made in Form 1.

(2) Concurrently with the filing of an application for certification, the applicant trade union shall file with the Board the material upon which it relies to establish its right to certification and such material shall include

(a) a list of persons in the proposed bargaining unit who wish that the applicant trade union be certified as bargaining agent on their behalf;

(b) evidence that the persons in the list referred to in clause (a) wish that the applicant trade union be certified as bargaining agent on their behalf;

(c) a copy of its constitution, rules and bylaws, or other instruments or documents containing a full and complete statement of its objects and purposes;

(d) a list of its officers.

(3) The material filed by the applicant trade union under clauses 2(a) and (b) shall be for the information of the Board only and shall not be available to or open for inspection by any other party to the proceedings.

(4) A person shall be deemed by the Board to wish that the applicant trade union be certified as bargaining agent on his behalf if at the date of application

(a) he was a member in good standing of the applicant trade union, and, had paid at least two dollars as union dues within three months preceding the date on which the application was filed; or

(b) he has signed a document stating that he wishes the applicant trade union to be certified as bargaining agent on his behalf and has within three months preceding the date on which the application was filed paid at least two dollars as union dues or fees. (EC521/71)

In relation to an Application for Certification, the Board must address the following points, namely:

1. The appropriateness of the bargaining unit;
2. The composition of the unit;
3. Whether there is a majority of the employees in the unit who desire representation by the Applicant trade union; and
4. Whether there are grounds for granting the relief sought.

Similarly, the Board must, in the conduct of the review of the Certification Order under Section 54(6), again consider each of these points.

While they disagreed on the interpretation that the Board ought to place on the evidence, legal counsel were of a mind as to the state of the law regarding the date of the filing of the Application for Certification and as to how that date relates to the determination of which employees should be included in the unit. An excerpt from the treatise by Sack and Mitchell gives an edifying summary of the Ontario law which is highly instructive on the issue before this Board as follows:

It was previously the Board's practice, where employees were engaged in different crafts to characterize them by the craft in which they were employed for the majority of time during a representative period preceding the application date. However, the Board now focuses, for the purposes of certification, on what work an employee was performing for the majority of time on the date of application itself. If this cannot be determined or if an employee spent an equal amount of time on the date of application performing the work of more than one craft, then the Board will look to a representative period prior to the application and thereafter to a number of different factors including, rate of pay; and the work the employee was hired to perform or the work which the employee is primarily responsible for if this has changed since the actual hiring. Again, however, for the purposes of the count, the employees must have been performing the work of the craft sought in the bargaining unit on the application date.

Findings of Fact

The Board finds that Mr. Earl A. Redmond is a carpenter by trade who started off in the carpentry trade and was a building contractor in the 1970's. Earl A. Redmond Inc. was incorporated in 1983 and the Company has been engaged in the construction industry, to varying degrees, over the past twenty odd years in both the provinces of Prince Edward Island and New Brunswick.

While the evidence discloses that in more recent years the usual compliment of employees of the Company stood at three or four (3 or 4) employees, however, it also establishes that in regard to August 18, 2004, the date specifically pertinent to the matters of this review of the Certification Order, the Company employed a total of twelve (12) persons other than the principals of the corporation. Of these twelve (12) employees the evidence very clearly establishes, and there is apparent agreement between the parties, that there were two (2) employees, Mr. Jamie Condon and Mr. Fred Court, who were hired as and were employed as carpenters by the Company on the date of the application. Therefore, the Board is left to assess the Respondent's assertion, set out in the Application for Certification, that size of the appropriate unit is believed to be seven (7) employees, and the Company's assertion that there were ten (10) employees who should be considered to be members of the appropriate unit.

The list of these ten (10) employees was submitted as Schedule "A" an attachment to the Reply to the Application for Certification and was amended by the oral testimony of the witnesses and submissions of counsel at the hearing to in fact not include Mr. Len Farrell and to include Mr. Terry MacLean.

It was the evidence of Mrs. Mary Redmond that Mr. Terry MacLean was hired by the Company as a Carpenter's Helper. It was the evidence of both Mrs. Mary Redmond and Mr. Earl A. Redmond that on August 18, 2004, Mr. Terry MacLean was engaged in the installation of siding on an apartment building being built by the Company, for the Company, in Stratford, in Queens County, in the province of Prince Edward Island. In the testimony of Mr. Earl Redmond, it was stated that it was usual practice for him to attend at the site to give direction to Mr. MacLean and then Mr. MacLean would proceed to install the siding with or without assistance from other employees as the situation dictated.

While Mr. Redmond could not testify with certainty as to which trade had jurisdiction over the installation of siding, the evidence of industry practice contained in numerous documents of record filed with the Board confirm that it is universally accepted in the construction industry that the installation of siding is work in the Carpentry trade, not in the Labourers trade. The installation of siding involves the same type of tools and skills (ie use of saws, hammers, nails) that are commonly used by Carpenters in traditional framing work. As a result, this Board finds that Mr. MacLean was not employed as a Labourer on the date of application.

There was considerable evidence led which related to each of the other individual employees of the Company and the activities of each of those other employees on August 18, 2004. However, given the Board's findings of fact as set out above in regards to Mr. MacLean and how that impacts upon the critical issue of the majority of support and the Board's conclusion as set out below, further discussion of the evidence and further specific findings of fact relating to trade jurisdiction respecting other employees are unnecessary and would be redundant in all the circumstances of this particular case. The evidence presented does not lead the Board to conclude other than, and the Board finds that it is suffice for the Board to state, that there are no grounds on which to find that any other employees would be excluded from the unit.

Conclusion

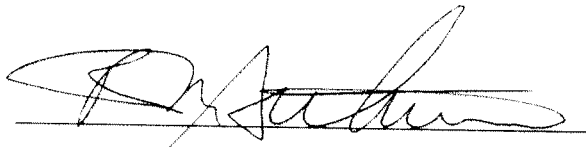
The evidence discloses that the description of the unit is set out in the Application for Certification, to be "All employees engaged as Labourers in construction but excluding those above the rank of working foreman, within the jurisdiction of the trade on Prince Edward Island.". The Board is satisfied that the unit, as described, is appropriate for collective bargaining purposes.

The available evidence, and the Board's findings on the basis of that evidence, leads to the conclusion that the composition of that appropriate unit, on the date of the filing of the application, on August 18, 2004, included nine (9) of the then twelve (12) employees of Earl A. Redmond Inc.

The Board has reviewed the membership evidence filed with the Application for Certification and concludes that there was on that day a clear majority of those nine (9) employees of the Respondent company who comprise the appropriate unit desired that the Applicant local union represent them for collective bargaining purposes.

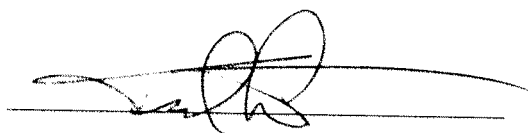
Accordingly, on the basis of its findings and conclusions, the Board is satisfied that the described unit is appropriate for collective bargaining, and that a majority of employees of the Respondent employer in that appropriate unit wish the Applicant to be certified to represent them for collective bargaining purposes. The Board finds that all requisite grounds existed on August 18, 2004 so as to empower the Board to grant the Certification Order that was requested by the Construction and General Labourers' and General Workers' in Construction, Industrial and Commercial, Local No. 1077 and issued by the Board on August 31, 2004.

Having conducted its Review as requested in this Application under section 54(6) of the Act, and having made the above findings, and reached the conclusions it has reached, the Board must further conclude that there are no grounds upon which it can grant the Applicant's request that the Board rescind its Order of August 31, 2004. The Applicant's request for rescission of that Order is therefor denied and the Board so rules.

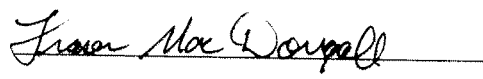


Robert R. MacArthur

Chair

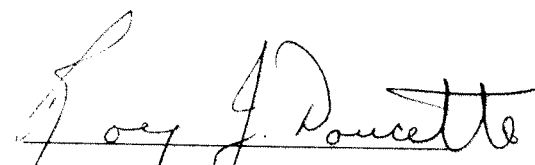


Ted Crockett
Member



Fraser MacDougall
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 1st day of March, A.D., 2005, and issued under the hand of its Chief Executive Officer on the 3rd day of March, A.D., 2005.



Roy J. Doucette