



File No.

Decision No.

04-043

**IN THE MATTER OF AN UNFAIR LABOUR PRACTICE COMPLAINT**

**BETWEEN:**

**CONSTRUCTION & GENERAL LABOURERS AND  
GENERAL WORKERS IN CONSTRUCTION, INDUSTRIAL  
AND COMMERCIAL (LOCAL UNION NO. 1077) and  
ROBERT PORTER**

**COMPLAINANTS**

**AND:**

**MERIDIAN CONSTRUCTION INC. (MERIDIAN)**

**RESPONDENT**

**AND:**

**MILESTONE CONSTRUCTION & DEVELOPMENT INC.  
("MILESTONE")**

**RESPONDENT**

**COUNSEL FOR THE COMPLAINANTS  
COUNSEL FOR THE RESPONDENT**

**J. Gordon MacKay, Q.C.  
David Coles**

**DECISION**

**Background**

On September 2, 2004, the Prince Edward Island Labour Relations Board (hereinafter referred to as "the Board") received an Unfair Labour Practice Complaint from the Construction and General Labourers and General Workers in Construction, Industrial and Commercial, Local Union No. 1077 (hereinafter referred to as "Local 1077") and Robert Porter. Local 1077 alleged it was determining what employees of the Respondent wished to have Local 1077 be its certified bargaining agent when the Respondents, Meridian and/or Milestone terminated Robert Porter because it was alleged he had joined a union.

The remedies requested were set out as the following:

1. reinstatement of the employment of Robert Porter with pay at the rate he was being paid before the unlawful layoff, being the 6<sup>th</sup> day of August, 2004, to the date of his reinstatement, pursuant to Section 11(3)(c) of the *Labour Act*, R.S.P.E.I. 1988, Cap. L-1;
2. a direction that the Respondents, jointly and severally, pay the Complainant, Robert Porter, a sum equal to the wage or other remuneration lost by him by reason of the Respondents' violation of the *Labour Act*, *supra*;

3. a determination that the related activities or business of construction activity on the Project is carried on by or through both Meridian and Milestone under common control or direction and that Meridian and Milestone constitute one employer for the purposes of Part 1 of the *Labour Act, supra* pursuant to Section 7(3) of the *Labour Act, supra*;
4. automatic certification of the Complainant, Local 1077, effective August 6, 2004, as the bargaining agent of all employees of the Respondents engaged as labourers in construction but excluding those above the rank of working foremen, within the jurisdiction of the trade in Prince Edward Island, pursuant to Section 11(3) of the *Labour Act, supra*; and
5. costs to the Complainant of advancing this unfair labour practice complaint.

On September 13, 2004, the Respondent, Milestone Construction & Development Inc. (hereinafter referred to as "Milestone") responded that Mr. Porter left the work site prematurely and was terminated.

On September 13, 2004, Meridian Construction Inc. (hereinafter referred to as "Meridian") responded that Mr. Robert Porter was retained by its subcontractor, Milestone.

The matter was brought before the Board for hearing on February 10, 2005 and was heard at MacLaughlans Best Western Motel in Charlottetown.

### **Issues**

The issues before the Board were set out by Mr. MacKay, on behalf of Local 1077. He indicated that of the remedies requested, (a) and (b) noted above were no longer in issue. The only remedies that remained for the Board to deal with concerned:

1. a determination by the Board as to whether or not the activities of Meridian and Milestone were such that Meridian and Milestone constitute one employer for the purposes of Section 7(3) of the *Labour Act* and there should be a one Employer Declaration;
2. whether or not the Board should grant Automatic Certification of Local 1077 pursuant to Section 11(3) of the *Labour Act*; and
3. Costs.

### **Cases Considered**

1. ***MacIntyre Sheet Metal Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 721***
2. ***United Brotherhood of Carpenters and Joiners, Local 1338 and Labourers International Union of North America, Local 079A and Prebilt Structures Ltd. and Williams, Murphy and MacLeod (1971) Ltd.***
3. ***National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and Central Farmer's Co-operative Association Ltd. doing business under the firm name and style of Island Food Centers and the United Food & Commercial Workers International Union***

4. *International Union of Operating Engineers, Local 942 and Charlottetown Clinic Management Company*
5. *Public Service Alliance of Canada v. Canadian Corps of Commissionaires (NB and PEI Division Inc.)*

#### Statutes Considered

1. *Labour Act*, R.S.P.E.I. 1988, Cap. L-1;
2. *Labour Act, Regulations* (EC 521/71) Section 18.

#### Evidence

Given the reverse onus section in the *Labour Act*, the onus was on the Respondent to demonstrate there was no basis for the Unfair Labour Practice Complaint.

In order to be successful in the remedies requested, the Board would have to make a finding that Meridian and Milestone were in effect one employer. To that end, Mr. Coles, on behalf of Meridian Construction, led evidence.

Mike McGuire, the Superintendent of Meridian and Ken Clifford, who was a foreman for Meridian, testified as did Michael Mercier, who held the position of President with Meridian. Evidence was given by Mike McGuire, the Site Superintendent of Meridian, to the effect that Meridian was the general contractor for a project commonly known as the Home Depot job on North River Road, Charlottetown, PEI. Mr. McGuire indicated that Meridian was his employer and that Milestone was a subcontractor for him. Mr. McGuire was responsible for co-ordination of all subcontracts in order to complete the Home Depot job, and he testified he had the power to "hire and fire".

Mr. Porter was hired as a labourer to work for Milestone, one of the subcontractors, who had a subcontractual arrangement with Meridian. Shortly after being hired, Mr. McGuire testified that Mr. Porter was observed leaving the work-site early and was not performing "up to snuff."

Mr. McGuire said warnings were issued to Mr. Porter on more than one occasion and Mr. McGuire testified that Mr. Porter was advised if this behaviour continued, Mr. Porter would be let go. Then, on August 4, 2004, Mr. McGuire testified that Mr. Porter was again warned. On August 5, 2004, Mr. Porter left early and on August 6, 2004, Mr. Porter was dismissed for cause. Mr. McGuire indicated that he expressed some personal feeling about unions, but these were not the views of Meridian.

The next witness called on behalf of Meridian was Ken Clifford. Mr. Clifford also worked on the Home Depot project as a carpenter foreman for Meridian, and reported to Mr. McGuire. His evidence was that Mr. Porter seemed to have lots of doctor appointments, took extended lunch hours, and left the site on numerous occasions without permission. Mr. Clifford indicated that he gave Mr. Porter warnings and aware of the warnings given to Mr. Porter by Mr. McGuire, and it was felt that Mr. Porter was on thin ice. Mr. Clifford was not present when Mr. Porter was actually terminated and he was aware that Mr. Porter was working for Milestone.

Michael Mercier was an officer of Meridian in 2004 and continues to be an officer of Meridian. Mr. Mercier testified that the relationship between Meridian and Milestone was contractual and that it was not a policy of either Meridian or Milestone to indicate to employees that they cannot join unions. In fact, Mr. Mercier, through Meridian, uses unionized employees.

The union called one witnesses, namely Craig Savidant, a member of Local 1077. Craig Savidant, gave evidence to the effect that Mr. McGuire advised Mr. Porter had been laid off because he joined a union and Mr. Clifford confirmed this. Mr. Savidant did confirm that Mr. Porter was often absent from the worksite. The evidence of Craig Savidant was challenged on rebuttal by both Messrs. McGuire and Clifford, both of whom denied having such a conversation with Mr. Savidant.

### Decision

After giving consideration to the evidence as presented, the Board finds that Mr. Porter was let go for cause. There is no evidence of any union activity before the board, and the only reference to union relates to the views of Mr. McGuire which he said were his own.

There is no question that the law prescribes that every employee has the right to join a union. The only evidence that is before the Board in this case is that Mr. Porter may have had a phone number for an individual in relation to joining the union but there is no evidence before the Board as to whether or not Mr. Porter ever did join the union.

In *Horne v. Perrin's Clinton View Lodge Ltd.*, [February 13, 1996], the PEILRB in File No. 95-064 stated the following at page 15:

*It was noted in the De Vilbiss (Canada) Ltd. Hearing reported in (1975) OLLRB Rep. September 678 that:*

*"the following factors are relevant in our determination of whether there was any anti-union motive for the discharge. (1) The existence of a pattern of anti-union activity. (2) The extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity. (3) The manner in which the employee was discharged. (4) The credibility of the witnesses."*

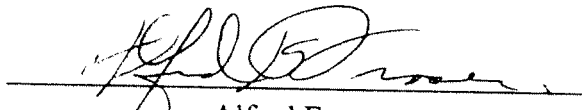
In view of the case law on the subject, the Board finds that there was no pattern of anti-union activity and accordingly, there is no evidence before the Board of any unfair labour practice. In fact, there is no evidence before the Board of any attempt to organize a union.


Local 1077 suggested that there was sworn evidence before the Board in the form of Lloyd MacDonald, which Unfair Labour Practice Complaint was dated September 2, 2004. It was with respect to these documents that are before the Board, while they are sworn evidence, while they must be sworn, without the deponent being put in the witness stand and be tested by cross-examination in relation to the Affidavit, the evidence is just that, an unsworn Affidavit, untested by cross-examination.

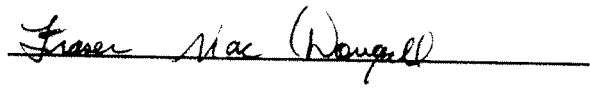
There is no indication that there was a pattern of anti-union animus such that would enable the Board to certify Local 1077. Without the evidence of Mr. Porter, it is difficult, if not impossible, for the Board to reach any decision. The only evidence adduced indicates there was no anti-union animus and where credibility is an issue, the Board would need to hear from both parties. As Mr. Porter was not called, the only evidence before the Board is that of Mr. McGuire and Mr. Clifford, which does not indicate the existence of a pattern of anti-union activity.

In the view of this finding, the Board is of the opinion that Mr. Porter was let go for cause. Further, on the evidence presented by Mr. Mercier, the Board concludes no evidence exists which would allow for the determination asked for, namely a one Employer Declaration or automatic certification.

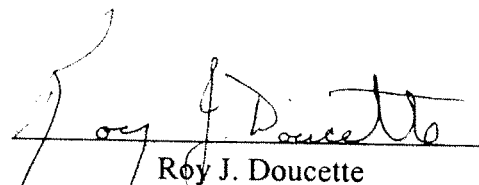
As to costs, the Board exercises its discretion and follows its usual practice in stating that no costs are to be awarded.

  
Alfred Fraser  
Vice-Chair

  
Elizabeth MacFadyen

  
Fraser MacDougall

This Decision made by the Prince Edward Island Labour Relations Board on the 30<sup>th</sup> day of March, A.D., 2005, and issued under the hand of its Chief Executive Officer on the 31<sup>st</sup> day of March, A.D., 2005.

  
Roy J. Doucette  
Chief Executive Officer