



File No.

07-002

Decision No.

**IN THE MATTER OF AN APPLICATION UNDER SECTION 4 OF THE  
LABOUR ACT (APPLICATION FOR RECONSIDERATION)**

**BETWEEN:**

**UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS,  
LOCAL NO. 721**

**APPLICANT**

**AND:**

**DAVIES PLUMBING AND HEATING LIMITED**

**RESPONDENT**

**COUNSEL FOR THE APPLICANT**

Mr. Stephen Carpenter and  
Mr. Jonathan Coady

**COUNSEL FOR THE RESPONDENT**

Mr. Malcolm Boyle and  
Mr. John W. Hennessey Q. C.

**DECISION**

**Background**

The Applicant's Application for Reconsideration was first received by the Board on the 23<sup>rd</sup> day of January, 2007. On the 17<sup>th</sup> day of May, 2007, an Amended Application for Reconsideration was filed with the Board. There was a Further Amended Application for Reconsideration filed on the 26<sup>th</sup> day of June, 2007. The grounds of this Application for Reconsideration are set out in paragraph 3 which outlines that the Applicant intends to adduce new evidence not previously available to it by the exercise of due diligence which will impact substantially on the outcome of the Reconsideration hearing. In addition, it is alleged that the Board failed to properly consider material facts and evidence, made errors of law; failed to properly interpret evidence before it and/or apply such evidence to the law; and failed to consider

and/or properly apply legal issues and tests before it prior to making certain determinations with respect to:

- (a) *Whether Local 721 represented a majority of the employees of Davies that fell within the appropriate bargaining unit;*
- (b) *Determining the proper composition of the bargaining unit; in particular, including Carpenter and Gorman in the bargaining unit for the purposes of the Application for Certification when they did not meet the criteria for inclusion in the bargaining unit, when they did not share a community of interest with the other employees, and when they were otherwise not appropriate for inclusion in the bargaining unit.*
- (c) *Granting the request of Davies that the Order of July 14, 2005, certifying Local 721 as bargaining agent, be rescinded.*

The specific aspects of the decision for which reconsideration was requested were to the effect that:

- (a) *Failure to find and/or consider that two (2) of the eight (8) employees allegedly at work on the date of the Application for Certification, namely, Carpenter and Gorman, did not share a sufficient "community of interest" with the other employees for the purposes of determining the proper composition of the bargaining unit;*
- (b) *Failure to consider whether Carpenter and Gorman had a "continuing interest" in the bargaining unit while determining the proper composition of the bargaining unit; in particular, given that Carpenter and Gorman were residents of Nova Scotia who worked infrequently at the worksite at the University of Prince Edward Island and that they did not have a continuing interest in the described bargaining unit;*
- (c) *Failure to consider and identify the lack of frequency of contact between Carpenter and Gorman and the other employees as a factor in determining the proper composition of the bargaining unit; in particular, given that Carpenter and Gorman were residents of Nova Scotia who worked infrequently at the worksite at the University of Prince Edward Island and that they had little contact with other employees in the described bargaining unit;*
- (d) *Failure to consider and identify geographic proximity of Carpenter and Gorman to the other employees as a factor in determining the proper composition of the bargaining unit;*
- (e) *Failure to properly apply the facts and evidence to the legal test (with respect to the construction industry) for determining whether Carpenter and Gorman spent a "majority of their working day" performing tasks covered by the trade jurisdiction of Local 721 on the date of the Application for Certification;*
- (f) *Failure to consider the policy implications associated with management sending out-of-province employees to a worksite on the date of an Application for Certification, and thereby diminishing a trade union's level of support among employees*

- (g) *Failure to identify and draw the inference, based on the facts and evidence before the Board, that Davies intentionally “stacked” the bargaining unit; in particular, given that Carpenter and Gorman were sent to the worksite at the University of Prince Edward Island on July 12, 2005, by Davies to intentionally diminish the level of support for Local 721 and defeat its organizing efforts;*
- (h) *Failure to appropriately address Davies’ “stacking of” the bargaining unit by excluding both Carpenter and Gorman from the bargaining unit*
- (i) *Failure to properly place the legal onus on Davies to demonstrate that Carpenter and Gorman were transferred to the worksite at the University of Prince Edward Island on the date of the Application for Certification for bona fide reasons;*
- (j) *Failure to properly interpret the evidence before the Board and properly apply it to the legal issues before it;*
- (k) *Allowing “travel time” to be included in determining whether Carpenter and Gorman spent a majority of their working day performing relevant tasks at the worksite at the University of Prince Edward Island;*
- (l) *Failure to identify the transfer of Carpenter and Gorman to the worksite at the University of Prince Edward Island on the date of the Application for Certification as a “suspicious circumstance”, which would then place the legal onus on Davies to show bona fide reasons for effecting such transfer and to demonstrate that Davies was not gerrymandering with the bargaining unit;*
- (m) *Improperly applying the test for determining which employees are eligible for inclusion in the bargaining unit in order to determine whether Local 721 enjoyed majority support; and in particular, failing to require that both Carpenter and Gorman must have spent a majority of their entire working day on July 12, 2005 performing bargaining unit work at the worksite at the University of Prince Edward Island in order for both to be included in the unit for the purposes of the Application for Certification; and*
- (n) *Such further and other particulars as counsel may advise;*
- (o) *In addition, Local 721 intends to adduce new evidence which was not previously available to it by the exercise of due diligence and such evidence is likely to make a substantial impact on the outcome of the Reconsideration.*

The hearings respecting these matters between the parties convened on the 27<sup>th</sup> day of June, 2007. Written submissions were received from the Applicant at the hearing.

There were additional written submissions received from Legal Counsel for the Applicant by the Board on July 20, 2007. Legal Counsel for the Respondent provided written submissions which were received by the Board on July 23, 2007.

## Cases Considered

1. *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Perrin's Clinton View Lodge Ltd.*, [1 May 1996] PEILRB No. 96-008;
2. *Construction and General Labourers and General Workers in Construction, Industrial and Commercial, Local Union No. 1077 v. APM Construction*, [6 September 1996] PEILRB No. 96-011;
3. *Timeu Forest Products Inc. v. IWA - Canada*, [1997] Alta. L.R.B.R. 430;
4. *Graham Bros. Construction Ltd.*, [2005] OLRB N0. 2145;
5. *Don Pearson Construction Ltd. v. International Union of Operating Engineers, Local 115*, (July 28, 1986) B.C.L.R.B.D. N0. 175/86;
6. *North American Construction Ltd. (Re)*, [2000] B.C.L.R.B.D. N0. 267;
7. *United Food and Commercial Workers Union, Local 864, et al. v. Polar Foods International Inc., et. al.*, [29 March 2004] PEILRB No. 04-019;
8. *Allsco Building Products Ltd. V. U. F. C. A., Local 1288P*, (September 22, 1999) N. B. Labour & Emp. Board, 1998 CarswellNB 572;
9. *Town of Kensington v. Canadian Union of Public Employees, Local 1171*, [8 March 2000] PEILRB No. 99-015;
10. *Marjorie Hamilton Limited v. International Ladies' Garment Workers' Union, Local 287*, (May 28, 1986) B.C.L.R.B.D. N0. 124/86;
11. *Trigen Energy Canada Inc. and Trigen PEI v. The International Brotherhood of Electrical Workers, Local 1432*, [23 June 1999] PEILRB No. 99-005;
12. *Jackpine Forest Products Ltd. v. IAW - Canada, CLC, Local 1-425*, (May 19, 1995) B.C.L.R.B.D. N0. 183/95; and
13. *L.I.U.N.A., Local 183 v. Advance Tile & Carpet*, [2005] OLRB N0. 2555.;

## Statutes Considered

1. *Labour Act*, R.S.P.E.I. 1988, Cap. L-1, sections 4, 10, 52, 53 and 54.
2. *Labour Act, Regulations* (EC 521/71) sections 3 and 18.

## **Texts Considered**

- (a) *Ontario Labour Relations Board Law and Practice*, 3<sup>rd</sup> Ed., Sack and Mitchell, (Markham, Lexis Nexis Butterworths 1997), para. 10.41 and 10.50;
- (b) Adams, *Canadian Labour Law*, Aurora, Canada Law Book, 2002, p. 7-4;

## **Evidence**

The written evidence before the Board on these matters is in the form of sworn affidavit evidence. There were two (2) exhibits filed at the hearing of the matters by the Applicant. Exhibit A-1 was the affidavit of Mr. Ray McBride sworn the 26<sup>th</sup> day of June 2007 and Exhibit A-2 was the transcript of proceedings held in this matter on the 20<sup>th</sup> day of November 2005. The Respondent filed no exhibits.

There was oral testimony received from two (2) witnesses called on behalf of the Applicant being Mr. Ray McBride, Business Agent for Union Local 721 and from the Inter-provincial Journeyman Plumber Mr. John Scott, Carpenter. The Respondent called no witnesses.

## **Issues**

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

1. Whether the Board should exercise its discretionary powers under the “Reconsideration” provisions of section 3(11), 3(12) and 4(1) of the *Labour Act* and section 18 of the *Regulations*;
2. In the event of an affirmative finding on the first issue, then whether the Applicant Union Local represents a majority of the employees of Davies Plumbing and Heating Limited that fall within the appropriate bargaining unit described as “ ...all employees of Davies Plumbing and Heating Limited employed as journeymen and apprentices involved in plumbing, steamfitting and pipefitting and welding on Prince Edward Island.”
3. Whether there are grounds for granting the relief sought.

## **Preliminary Matters**

The hearing began with the Board outlining the background of the case and citing the issues in the matter as they are set out above.

Counsel for the Respondent asked the Board not to receive the Applicant's Further Amended Application for Reconsideration, the affidavit of Mr. Ray McBride and the Applicant's written submission. Counsel for the parties presented their respective positions on this preliminary matter.

The Respondent argued that it was contrary to the interest of fairness and natural justice to allow the receipt of this evidence in that it is not new evidence that was not previously available and the receipt of it would amount to allowing the Applicant to argue its case all over again.

Counsel for the Applicant submitted that the evidence was not previously available to it through the exercise of due diligence and should be received by the Board as it meets the legislative criteria. The Applicant offered and the Respondent accepted the opportunity to cross-examine Mr. McBride on his affidavit. Following the cross-examination, the parties re-iterated their respective positions. The Board adjourned briefly to consider the matter.

Upon re-convening the Board expressed its appreciation for counsels' able submissions on the matter of receipt of the Further Amended Application for Reconsideration and the supporting materials. The Board ruled that it was prepared to receive the Further Amended Application for Reconsideration as well as the evidence of Mr. John Carpenter and it would rule in its decision on whether the test for receipt of the evidence had been met.

The hearing proceeded with receipt of the evidence and argument in relation to the main matters.

### **Decision**

The Board has given very careful consideration to the evidence presented and the arguments advanced by the Parties respecting this Application for Reconsideration of the Board's decision dated the 12<sup>th</sup> day of July 2005.

### **The Law**

The legislation grants this Board the power to reconsider its decision by virtue of the provisions of section 4(1) of the *Labour Act* which states as follows:

*(1) ... but nevertheless the board may at any time, if it considers it advisable to do so, reconsider any decision, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.*

The Board reiterates its comment from its decision, *Trigen Energy Canada Inc. and Trigen PEI v. The International Brotherhood of Electrical Workers, Local 1432*, that the exercise of these powers are not to be taken lightly and are to be considered in light of the “three (3) part threshold test” which is set out in section 18 of the *Labour Act Regulations*, to the effect that:

*Where it appears that the Board has made a decision in ignorance of some material fact, or by reason of some technical irregularity, or if there is good reason for the Board doing so, the Board may entertain an application to reconsider a decision or order made by it under the Act.*

In the event that the Board makes an affirmative finding on the question of whether this is an appropriate instance upon which to exercise its discretionary powers, the Board will go on to consider the matter pursuant to the provisions of 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.*

As stated in its initial decision dated the 14<sup>th</sup> day of July, 2005, in this matter, 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.

It follows that in the course of its review of a Certification Order issued under section 54(6) of the *Labour Act*, obviously, the Board must once again consider each of these points.

### **Findings of Fact**

The Board finds that the evidence given at this hearing by John Scott Carpenter is credible and does serve to recant his previous testimony what was that, on the critical day of Monday, the 11<sup>th</sup> day of July, 2005, he performed work on the job site at the University of Prince Edward Island in Charlottetown. He stated that, while he was present on the site on that day, he did not perform any work in his plumbing trade.

### **Conclusion**

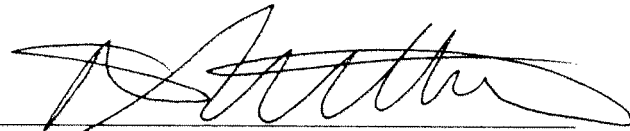
In its deliberation of this case the Board finds that there has been new evidence presented, which was not previously available, that establishes that the Board has acted in ignorance of some material fact. Given this conclusion, the Board is empowered to exercise its discretionary power to reconsider its previous decision pursuant to section 4 of the *Labour Act* and section 18 of the *Labour Act Regulations*.



While it can be held that Mr. Carpenter, by virtue of his being a journeyman plumber and an employee of Davies Plumbing and Heating Limited, would be an appropriate member of the bargaining unit, he is not eligible to be considered as part of the bargaining unit because he did not perform work on the job site on the day the Application for Certification was filed with the Board.

The Board finds that, given this new evidence of the actual composition of the bargaining unit and in consideration of the membership evidence already on file with the Board, the Applicant, the United Association of Plumbers and Pipefitters, Local No. 721, did enjoy the majority of support of the employees of Davies Plumbing and Heating Limited who were employed on Prince Edward Island on the 12<sup>th</sup> day of July, 2005, such that the Applicant was entitled to represent the employees for collective bargaining purposes.

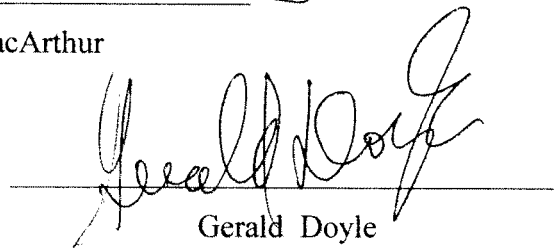
On the basis of this new evidence which was not previously available, the Board rules to certify the United Association of Plumbers and Pipefitters, Local No. 721 as bargaining agent for collective bargaining purposes of the employees of Davies Plumbing and Heating Limited employed on Prince Edward Island.



Robert R. MacArthur  
Chair

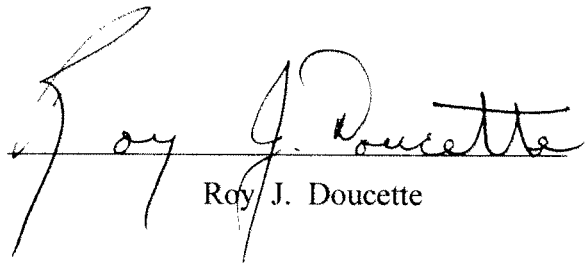


Ted Crockett  
Member



Gerald Doyle  
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 12<sup>th</sup> day of December, A.D., 2007, and issued under the hand of its Chief Executive Officer on the 21<sup>st</sup> day of December, A.D., 2007.



Roy J. Doucette