PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No.
13-008 and 13-012

IN THE MATTER OF AN APPLICATION FOR REVIEW OF A CERTIFICATION ORDER (13-008)

IN THE MATTER OF AN UNFAIR LABOUR PRACTICE COMPLAINT (13-012)

BETWEEN:

MacLEAN CONSTRUCTION LTD.

APPLICANT

AND:

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1338

RESPONDENT

Counsel for the Applicant — **Murray L. Murphy, QC**

Counsel for the Respondent — **J. Gordon MacKay, QC**

DECISION

Background

On March 13, 2013, the Respondent, United Brotherhood of Carpenters and Joiners of America, Local 1338, filed an Application for Certification with the Prince Edward Island Labour Relations Board (the "Board") pursuant to s. 54 of the *Labour Act*, R.S.P.E.I. 1988, Cap. L-1 (the "*Act*") and the *Regulations* made pursuant to the *Act*. The Respondent named in the Application is MacLean Construction Ltd. and the detailed description of the unit for which certification was sought is described in paragraph 9 of Form 1, as:

> *All Employees of the Respondent employed as Carpenters, Carpenters Apprentices, Carpenters Helpers, Carpenters Working Foreman on Prince Edward Island.*

On March 15, 2013, the Board granted the Respondent's Application for Certification and certified the Respondent Union as the bargaining agent for all employees of the Applicant employed as Carpenters, Carpenters Apprentices, Carpenters Helpers, Carpenters Working Foreman on Prince Edward Island.

The Applicant herein filed a Reply to the Application for Certification on March 27, 2013, pursuant to s. 54(6) of the *Act*, being a request for review of the Board's March 14, 2013, Certification Order. The Applicant subsequently provided supplementary information on April 3, 2013.

On April 16, 2013, the Respondent filed a document entitled *"Labour Relations Board (Prince Edward Island) Unfair Labour Practice Complaint"* which, despite its title, was later confirmed by the Respondent to be a response to the Applicant's request for review of the Certification Order. The Board has included this submission of the Respondent in File No. 13-008.

On the same date, being April 16, 2013, the Respondent filed an Unfair Labour Practice Complaint (ULPC) alleging a violation of s. 10 of the Prince Edward Island *Labour Act* and this matter was assigned Board file number 13-012. On May 2, 2013, the Applicant employer filed a Reply to the ULPC and on June 5, 2013, the Respondent filed a Response to the Applicant's Reply to the ULPC.

On June 20, 2013, a case management meeting was held with the Board Chair, Chief Executive Officer, Legal Counsel, and counsels for the Applicant and Respondent, where matters of a practical and logistical nature were discussed and dates for the hearing of the matter were confirmed. Although the matter was scheduled to be heard on July 15, 17 and 18, 2013, the Board was advised in writing by counsel for the parties that they had reached agreement to not proceed on July 15, 2013. The hearing of the matter therefore commenced on July 17, 2013, and counsel for the parties concluded their oral submissions on that date. The parties then each filed written submissions and responses to the written submissions of the other.

Statutes Considered

1. *Labour Act*, R.S.P.E.I. 1988, Cap. L-1
2. *Labour Act Regulations*, P.E.I. Reg. EC1971-521

Texts Considered

1. *Canadian Labour Law*, 2nd Edition, George W. Adams
2. *Ontario Labour Relations Board Law and Practice*, 3rd Edition, Sack Mitchell Price

Cases Considered

1. *Ontario Utility Foremen's Assn.*v. *Etobicoke Hydro Electric Commission* [1981] 2 Can. L.R.B.R. 157 (Ont. L.R.B.)

2. *Davies Plumbing and Heating Limited* v. *United Association of Plumbers and Pipefitters, Local No. 721*, [2006] CanLII 60696 (P.E.I.L.R.B.)

3. *E & E Seegmiller Ltd.*, [1987] O.L.R.B. Rep. Jan. 41 (Ont. L.R.B.)

4. *Gilvesy Enterprises Inc.*, [1987] O.L.R.B. Rep. Feb. 220 (Ont. L.R.B.)

5. *Wraymar Construction & Rental Sales Ltd.* v. *I.U.O.E., Local 793*, [1989] O.L.R.B. Rep. June 682 (Ont. L.R.B.)

6. *Labourers' International Union of North America, Ontario Provincial District Council* v. *Losani Homes (1998) Ltd.* 2007 CarswellOnt 10387 (Ont. L.R.B.)

Evidence

The Application for Certification was accompanied by the membership evidence and the requisite schedules and exhibits. At the hearing, neither party presented any witnesses to give evidence; however, both counsel agreed that their "submissions" on behalf of their clients formed part of the record as evidence and could be relied upon by the Board as evidence for the purposes of the Board's determination of the matter.

At the hearing, the Applicant filed the "Employer Book of Documents" which was admitted by the Board as Exhibit "E-1" with the consent of the Respondent. Following the conclusion of the hearing, the Applicant filed an Agreed Statement of Facts on July 24, 2013, which concerned the employment particulars of Kevin Ross. This document was submitted with the consent and agreement of the Respondent and accepted by the Board as Exhibit "E-2". Each of the parties filed with the Board decisions from the Prince Edward Island Labour Relations Board as well as decisions from other Labour Boards in Canada.

Preliminary Matters

Counsel for the parties advised the Board at the outset of the hearing that neither had any preliminary issues to be raised. The Applicant further advised that it did not have any concerns with the description of the bargaining unit as stated in the Respondent's Application for Certification. No questions have been raised as to whether the Application as submitted was in the proper form or whether the unit applied for is appropriate for collective bargaining. The Board is satisfied that the Respondent herein is a trade union and that the unit is appropriate for collective bargaining.

Issues

The issues to be determined by the Board in this matter are as follows:

1. Does the Respondent have the support of a majority of employees in the bargaining unit? This issue requires an examination into whether employee Kevin Ross is part of the identified bargaining unit.
2. Has the Applicant committed unfair labour practices pursuant to s. 10 of the *Act*?
3. If the Applicant has committed unfair labour practices pursuant to s. 10 of the *Act*, what is the effect of the prohibited acts and how can they be remedied?
4. Is this a matter where a representative vote should be held?
5. If the Board deems that a representative vote should be held, are employees Darcy McKenna and Kurri White eligible to vote?

Decision

The Board has carefully considered all of the evidence presented and the submissions advanced by the parties regarding the Respondent's Application for Certification being identified as Board File Number 13-008 and the Unfair Labour Practice Complaint brought by the Respondent, being identified as Board File Number 13-012.

The Board has reviewed the Application for Certification and the supporting evidence filed therewith and the evidence given in support of the Reply, the Respondent's response to the Reply, the Unfair Labour Practice Complaint and all documents submitted by the parties in relation to the Unfair Labour Practice Complaint. The Board has considered the submissions of counsel for the parties at the hearing, the exhibits tendered in the matter and the decisions from this Board and other Labour Boards as relied upon by the parties in support of their respective positions.

Pursuant to item 6 on Form 1 "Application for Certification" as filed by the Respondent Union, the Applicant Employer's business is identified as a General Contractor. The Application for Certification was therefore filed under s. 54 of the *Act*, meaning that the employees seeking certification are involved in the construction industry. Section 54 of the *Act* reads as follows:

> *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.

Issue 1 – Does the Respondent have the support of a majority of employees in the bargaining unit?

In the Respondent's Application for Certification, the Respondent indicated at paragraph 10 that the total number of employees of the Applicant in respect of which the Application for Certification had been made was thirty-four (34). The Respondent attached as Exhibit "B" to its Application a list of nineteen (19) employees in good standing as of the date of Application, being March 13, 2013. The Application was accompanied by the necessary materials pursuant to section 3 of the *Labour Act Regulations*.

In the Applicant's Reply to the Application for Certification dated March 27, 2013, the Applicant submitted that the proposed bargaining unit contained twenty-eight (28) employees and included as Schedule "A" a list of forty-six (46) employees deemed by the Respondent to be employees of the Applicant on payroll on the date of the Application for Certification. The Applicant disputed that the Respondent Trade Union represented a majority of the employees of the Applicant that fell within the bargaining unit.

In the Applicant's Supplemental Submissions of April 3, 2013, the Applicant provided as Schedule "B" a list of twenty-eight (28) employees that it believed were working within the jurisdiction of the trade on Prince Edward Island on the date of Application that fell within the bargaining unit defined by the Respondent.

Due to the efforts of the parties to narrow the issues to be argued at the Hearing of this matter, the parties agreed at the Hearing that the list of twenty-one (21) names appearing at Tab 25 of Exhibit "E-1" were members of the bargaining unit.

Initially, the parties were not in agreement with the four (4) names appearing at Tab 25 of Exhibit "E-1" below the heading "Disputed Bargaining Unit Members". However, during the course of the Hearing, the Respondent admitted that one (1) of the employees listed as a Disputed Bargaining Unit Member was not eligible to be a member of the bargaining unit on the date of the Application. The parties then further agreed that employees Kurri White and Darcy McKenna were, in fact, working within the jurisdiction of their trade as described in the bargaining unit on the date of Application and, as such, Mr. White and Mr. McKenna were accepted by both parties as being bargaining unit members. This left only Kevin Ross in the category of "Disputed Bargaining Unit Member" as of the date of Application.

Therefore, the parties ultimately agreed that there were at least twenty-three (23) bargaining unit members as at the date of Application for Certification. The parties did not agree on the status of Mr. Ross on the date of application and therefore this Board must determine whether Mr. Ross was a member of the bargaining unit on the date of Application for Certification.

The issue clouding Mr. Ross' eligibility to be included within the bargaining unit is whether his position of employment with the Applicant is one where he exercises management functions, such that he must be excluded from the bargaining unit pursuant to s. 52(e) of the *Act*.

At the Hearing of this matter, the parties made various submissions with respect to the role of Kevin Ross in his employ with the Applicant. Counsel for both parties agreed that the submissions with respect to Mr. Ross' duties and job description were accurate and could be relied upon by the Board as evidence of Mr. Ross' workplace powers and duties. Following the conclusion of the Hearing, the Applicant further presented an Agreed Statement of Facts (Exhibit "E-2") on behalf of both parties. As such, the parties agreed as follows with respect to Kevin Ross, pursuant to Exhibit "E-2":

1. *The Parties have agreed on the following facts in relation to Kevin Ross, an employee of MacLean Construction Ltd. ("MacLean") whose eligibility for membership in the bargaining unit is under dispute.*
2. *Ross can recommend hiring and firing, but does not have the power to hire and fire on his own.*
3. *Ross can send someone home from the job site, although he probably never has without running it by Grant MacPherson (Vice President and General Manager of MacLean).*
4. *Ross cannot authorize overtime.*
5. *Ross directs and coordinates all employees and trades on the job site, including carpenters, labourers and sub-trades.*
6. *Ross would have worked with the tools within the past two years.*
7. *Ross would work on the tools if he was with a crew of 4 or less.*
8. *If the crew had 5 or more Ross would not likely work with tools.*
9. *Most of the time in the past two years Ross would have been with larger crews (5 or more).*
10. *On MacLean's website, Ross is listed as a "superintendent". A copy of the website excerpt is attached.*
11. *On the application date, Ross was supervising carpenters, labourers and sub-trades, and was not working with the tools.*

In determining whether or not Mr. Ross' duties properly place him within the bargaining unit, the Board was disadvantaged by not having had the opportunity to hear Mr. Ross provide evidence at the hearing of this matter and to be questioned by the parties and by the Board. Instead, the Board must determine Mr. Ross' eligibility within the bargaining unit based on the ten points contained within the Agreed Statement of Facts and the submissions of counsel for the parties. At the conclusion of the Hearing, both parties agreed that their submissions could be relied upon by the Board as evidence in its determination of the matter.

The issue concerning Mr. Ross' eligibility for the bargaining unit is whether he performs management functions such that he is excluded from the unit. The *Act* is clear that employees who perform such functions are to be excluded from collective bargaining. Section 7.2 of the *Act* states:

s. 7(2) For the purposes of this Part, no person shall be deemed to be an employee

(a) ...

(b) who, in the opinion of the board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Section 52(e) of the *Act* further confirms the exclusion within the context of the construction industry, when it states:

s. 52(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

Section 52(e) of the *Act* also confirms, with the use of the language *"in the opinion of the Board"*, the broad discretion held by the Board to determine who in a group of employees may perform management functions and would therefore be excluded from the unit.

Counsel for both parties provided post-hearing written submissions as well as replies to each other's submissions. From the argument and case law provided, it is clear that the analysis of whether or not an employee performed "*management functions*" is highly fact specific. Again, in the present analysis, the Board only has the submissions of counsel for the parties concerning Kevin Ross and his functions, and does not have the benefit of having heard from Mr. Ross directly as to the nature of his position of employment with the Applicant.

With respect to the evolved law in the area of whether an individual performs management functions and is thus excluded from eligibility in a bargaining unit, counsel for the Applicant Employer presented the case of *Ontario Utility Foremen's Assn. v. Etobicoke Hydro Electric Commission* [1981] 2 Can. L.R.B.R. 157 where the Ontario Labour Relations Board stated at paragraph 23:

In the construction industry a distinction is regularly drawn between working and non-working foremen, with working foremen regularly falling within the bargaining unit and non-working foremen falling outside. These 'rules of thumb' merely reflect common practice and are not hard and fast rules. They do not themselves determine whether any particular foreman or group of foremen are employees for the purposes of the Act. Whenever a question arises over the appropriateness of the application of the "rule of thumb" in a particular case, the question must always be whether the foremen in question in fact exercise managerial functions within the meaning of [the Act]. (Etobicoke, paragraph 23)

At paragraph 25 of the same case, the Board further commented on the distinction between supervisory functions and managerial functions:

> *Exercising supervisory functions does not by itself exclude a person from engaging in collective bargaining. Even when a person is primarily engaged in the supervision of others he is not managerial unless he also has effective control over their employment relationship.*

From *Etobicoke*, we have the consideration of whether the individual in question has effective control and authority over the people he supervises. It is not sufficient for Mr. Ross in this case to merely be a working foreman to qualify as management; rather, Mr. Ross must exercise managerial functions which include the ability to affect the economic lives of the employees.

The Respondent correctly noted that *Etobicoke* was not a construction industry decision and therefore the discussion in that case often does not reflect the underpinnings of the construction industry that the legislators of this Province have deemed sufficiently important to justify the creation of a dedicated part of the *Labour Act*, being Part II of the *Act*, which pertains specifically to construction industry labour relations. The *Act's* provisions concerning Applications for Certification in the construction industry (commonly referred to as "Section 54 Applications") are reproduced earlier.

In this jurisdiction and others, it has become standard practice to determine Section 54 Applications by determining the employees in a bargaining unit as of the date of Application for Certification, and to consider the work performed by such employees on that date.

At sections 10.49 and 10.50 of *Ontario Labour Relations Board Law and Practice* (Sack, Mitchell and Price, 3rd Edition), the authors discussed the rationale behind the importance of application dates in the construction industry when they stated:

> *10.49 . . . Because of the short-term duration of the employment relationship in the construction industry, the rule is that, for the purposes of the count (as distinct from the description of the bargaining unit), the unit consists of those employed on the application date. Persons not at work in the unit on the day the application is made are not counted even though their absence may be due to uncontrollable circumstances.*
>
> *10.50 Since 1987, with its decisions in E & E Seegmiller Ltd. ([1987] OLRB Rep. Jan. 41.), and Gilvesy Enterprises Inc. ([1987] OLRB Rep. Feb. 220.), the [Ontario] Board has determined whether an employee who was at work on the date of application is an employee in the bargaining unit by focussing on the work actually performed by the employee on the date of application. An employee who spent all or the majority of his time on this day performing bargaining unit work will be included in the bargaining unit for the purpose of the count.*

This Board, in *Davies Plumbing and Heating Limited* v. *United Association of Plumbers and Pipefitters, Local no. 721*, [2006] CanLII 60696 (P.E.I.L.R.B.) consistently applied the tests suggested in *Seegmiller and Gilvesy Enterprises Inc.*, [1987] O.L.R.B. Rep. Feb 220, and for the purpose of Applications for Certification in the construction industry, has determined that employees must have spent a majority of their time on the date of Application performing work in a trade or craft to which the Application relates as an employee of the Responding employer. (*Davies*, paragraph 11).

From the discussion that follows, it is clear from the information available to the Board that Mr. Ross did not spend the majority of the day of Application working as a carpenter, carpenter's apprentice or carpenter's helper. The issue therefore is whether Mr. Ross worked the majority of the Application date as a carpenter's working foreman. In this jurisdiction at least, the law is clear in *Davies Plumbing and Heating* that a carpenter's working foreman must be "*on the tools*" the majority of the time on the date of Application in order to be considered a carpenters working foreman.

Davies also referenced the Ontario Labour Relations Board's decision in *Wraymar Construction & Rental Sales Ltd.* (1989) O.L.R.B. Rep. June 682, which lists at paragraph 10 several factors for consideration in determining whether an employee should be included in a bargaining unit:

> *10. "... In summary, the Board has looked at the following criteria in making its determinations:*
> *(a) whether the person concerned was employed by the respondent and at work on the date of application; and*
> *(b) if so, the work that that person spent the majority of his/her time doing on the date of application; or*
> *(c) where, previous to the date of application, the person has been engaged in the work of more than one trade or craft and the work s/he performed on the application date does not accurately reflect the work s/he normally spends the majority of his/her time doing, the work done by the employee during the appropriate representative period prior to the date of application; or*
> *(d) where there is inconclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire."*
> *(Wraymar, paragraph 10)*

The above criteria are relevant in the Board's analysis in the present case. With reference to the Agreed Statement of Facts filed by the parties, it is clear that Mr. Ross was not working with the tools on the date of Application but rather was supervising carpenters, labourers and sub-trades. This is consistent with previous assertions in the Agreed Statement of Facts, including that Mr. Ross would work on the tools if he was with a crew of four (4) or less but would not likely work on the tools if he was with a crew of five (5) or more. On the date of Application for Certification, pursuant to Exhibit "E-1", eight (8) employees of the Applicant were working on the Andrews expansion site, which is where Mr. Ross was working on the date of Application. The evidence before the Board therefore is that Mr. Ross had spent the majority of his time on the date of Application completing functions of a supervisory nature and that he

was not performing duties consistent with the subject bargaining unit on that date. In short, the evidence before the Board is that Mr. Ross was not "*on the tools*" on the date of Application for Certification.

If we apply subparagraphs (c) and (d) of *Wraymar*, *supra*, paragraphs 8 and 9 of the Agreed Statement of Facts establish that Mr. Ross would have worked with larger crews of five (5) or more persons most of the time in the past two years, which means he would not normally be working with the tools. Therefore, even if the Board adopts a larger perspective beyond the singular date of Application for Certification, the same conclusion is reached: Mr. Ross' primary functions and responsibilities diverge from those performed by employees within the bargaining unit. The Board therefore sees a distinction between the duties and responsibilities of Mr. Ross and those of the members within the bargaining unit.

The Applicant further provided *Labourers' International Union of North America, Ontario Provincial District Council* v. *Losani Homes (1998) Ltd.*, [2007] CarswellOnt 10387 (Ont. L.R.B.) for the Board's consideration. This case did involve the construction industry and provides further assistance to the Board in determining whether a person functions as a working foreman or acts in a position of management, when it stated:

> *52 The mere exercise of supervisory functions will not exclude a person from engaging in collective bargaining. Nor will acting as a conduit for management instructions be sufficient. Rather, the party seeking to exclude a person as managerial must demonstrate the person, at a minimum, makes effective recommendations in areas that materially affect the economic lives of employees: Ontario Utility Foremen's Assn. v. Etobicoke Hydro Electric Commission, [1981] O.L.R.B. Rep. 38 (Ont. L.R.B.).*
>
> *53 In the construction industry, non-working foremen are typically excluded from, while working foremen are typically included in, construction industry bargaining units. Working foremen may also be excluded where they have overall responsibility for a project, or can and do affect the employment status of employees: D & N Demolition and Construction Services Ltd, Re supra; Ontario Pipe Trades Council of U.A. v. Marsil Mechanical Inc., [1997] O.L.R.B. Rep. 636 (Ont. L.R.B.).*

The evidence before the Board pursuant to the Agreed Statement of Facts demonstrates that on the date of Application, Mr. Ross worked as a "*job super*" for nine hours with the Applicant at the "*Andrews expansion site*". This is indicated on the daily worksheet at Tab 2 in Exhibit "E-1". This evidence further discloses that eight (8) employees of the Applicant worked eight or more hours on that day at the Andrews expansion site and as noted, Mr. Ross would usually only work on the tools with crews of four (4) workers or less. Therefore, in keeping with *Losani*, *supra*, the Board deems Mr. Ross to have been a non-working foreman not only on the date of Application, but for a majority of the time in his employ with the Applicant prior to the date of Application.

The Board also takes notice of the fact that Mr. Ross, in his capacity as a supervisor or superintendant, was not merely supervising carpenters on the date of the Application but also labourers and sub-trades. The evidence before the Board therefore does not clearly establish that Mr. Ross worked as part of a carpentry bargaining unit on the date of Application and therefore cannot be considered a carpenters working foreman on that particular date.

As part of Exhibit "E-2", the Board has also been provided with the staff directory as printed from the Applicant's website. The directory presents a list of staff of the Applicant from the Vice President and General Manager down to Superintendent, along with individuals having the titles of Office Manager, Project Manager, and Small Jobs Manager. The Board notes five (5) individuals listed in the category of "Superintendent", including Kevin Ross. Mr. Ross' inclusion in the staff directory, which the Board finds to represent the management structure of the Applicant, and his identification as a Superintendent, distinguishes him and his role from others in the bargaining unit.

The Board further notes, with reference to the evidence provided within Exhibit "E-1", that there were no other "Superintendents" as per the Staff Directory working on the date of Application with the exception of Billy Coles. The parties have agreed by virtue of Tab 25 of Exhibit "E-1" that Mr. Coles is not in the bargaining unit. Such a conclusion suggests that the other Superintendent working on the date of Application, Kevin Ross, should also be excluded from the bargaining unit.

However, the parties agreed that both Kenny MacPhail and Leslie Robbins were to be included in the bargaining unit, and with reference to Tab 2 of Exhibit "E-1", they were also coded as 1-02 as performing job super functions on the date of Application. Neither Mr. MacPhail nor Mr. Robbins are indicated on the website as "*superintendents*". Although certainly not conclusive for the Board, the fact that Mr. Robbins and Mr. MacPhail were performing job super functions on the date of Application and were included in the bargaining unit by agreement, when Mr. Coles and Mr. Ross were not, is worthy of consideration in the Board's opinion. This suggests to the Board that the granting of the title Superintendent, and the inclusion on the company website staff directory, represents an intention to distinguish the role of Mr. Ross and other Superintendents like him from those that may perform job super functions on projects, from time to time. It is the latter of these employees that the Board finds would fit the description of "*Carpenters Working Foremen*" as per the description of the bargaining unit.

With reference to Tab 8 of Exhibit "E-1" – Employee Detail 03/08/2013 to 03/14/2013 – the Board further notes that only Mr. Coles, Mr. Ross and Mike MacQuaid received Auto Benefits during the identified period. These individuals are all listed as Superintendents on the Applicant's Staff Directory. None of the other employees in the Employee Detail for this period, including those agreed to be in the bargaining unit, received Auto Benefits.

The Board references the Employee Manual for the Respondent contained within Tab 12 of Exhibit "E-1", and specifically the Management Structure identified in Section 2.0 at page 9 of the Manual. This section states as follows:

> *All decisions and practices, whether arising from this manual, other company policies or procedures made by managers or supervisors are subject to final scrutiny by a Management Board appointed by the President. While the policies and procedures herein do give some discretion to individual supervisors and managers, all decisions and practices are reviewable by the Management Board...*
>
> *If disagreement arises between employees or between a supervisor and an employee or between supervisors that cannot be resolved through either the processes of this manual or through the intervention of the General Manager, then the Management Board will review the situation and make a determination.*

The Management Board is then identified as consisting of three (3) individuals, being Grant MacPherson, Sharon Kelly and Chris O'Rourke from the Applicant, and three (3) individuals from APM, being a company related to the Applicant.

The Board finds that it would be unrealistic to believe that only the Management Board would have the authority to make decisions that affect the "*economic lives*" of the employees of the Applicant. Indeed, the Management Structure appearing at Section 2.0 of the Employee Manual confirms that supervisors do have authority to make decisions and initiate practices.

Further, Section 9.7 of the Employee Manual, concerning Harassment Policy, grants supervisors and managers the responsibility to ensure that immediate action is taken to report or deal with all incidents of harassment that come to their attention, whether or not a complaint is made (page 40). The Board finds that it would be difficult to reconcile this authority as not being one that would have an impact on the economic lives of employees, given the broad and sweeping nature of the discretion and authority given to supervisors in this area. Certainly, the other members of the agreed upon bargaining unit do not have such authority.

The Board further notes the Disciplinary Action Policy (Policy #001) as contained within the Employee Manual which obligates the Supervisor to:

> *. . . make a thorough and careful documentation of all discussions held with an employee and this documentation will be kept on the employee's file. Standard disciplinary action will not apply if an employee commits a serious violation of Company rules. In such an event, the Supervisor may suspend the employee pending further investigation.*

Such powers to suspend fellow employees as granted to the supervisor are inconsistent with the job functions as contained within the description of the bargaining unit and have a direct impact on the economic lives of employees.

The Board further notes the Employee Appeal Policy (Policy # 005) as contained within the Employee Manual. Employees are directed when dissatisfied about an issue to make appeals to the "*management*" in order to address the problem. The steps in the appeal process commence with the immediate supervisor, who is to immediately address the situation prior to being directed to the general manager. With reference to the Staff Directory of the employer as contained within Exhibit "E-2", and the various job descriptions of the individuals identified therein, it appears clear to the Board based on staff hierarchy, job titles and the available evidence that Kevin Ross as superintendent would be identified as the "immediate supervisor" to employees as a first point of contact on issues of concern. From there, the General Manager is the next point of contact, who is clearly indicated on the Staff Directory as being Grant MacPherson. Beyond that, employees are to take their issues to the human resources department and ultimately the Management Board, if still not satisfied.

It is somewhat telling at this point to reference the main duties of Unit Group 7204, Contractors and Supervisors, Carpentry Trades, pursuant to the Human Resources and Skills Development Canada (HRSDC) National Occupation Classification. Mr. Ross is identified by his employer as a "*Superintendent*" and the Respondent's Employee Manual makes reference to "*supervisors*". If Mr. Ross is to be deemed a "*carpenters working foreman*" as per the claim of the Applicant, and therefore included in the bargaining unit, the underlying assumption is that he is a "*working*" foreman, i.e. working in the manner as with other members of the bargaining unit. In Unit Group 7204, which includes supervisors and foreman/woman, contractors and supervisors do not engage in the work of the trade but merely supervise, coordinate and schedule as well as monitor the crew. On the evidence presented, and giving consideration to his title and the work that he most often performs (including on the date of Application), the Board finds that Mr. Ross' functions and duties would place him within HRSDC Unit Group 7204 – a classification that does not include carpenters *working* foreman.

Given all of the foregoing, the Board is not satisfied that Mr. Ross performs functions and maintains a role consistent with a carpentry working foreman. Rather, given all of the available facts and evidence before the Board, the Board finds that Mr. Ross performs management functions within the meaning of s. 52(e) of the *Act* because the Board believes that Mr. Ross has a manner of effective control over the relationship between the employer and the employees who comprise the bargaining unit.

For all of the foregoing reasons, and given that Mr. Ross was engaged in his position as a Superintendent on the date of the Application, and that he was not working with the tools on that date, the Board concludes that Kevin Ross does not form part of the bargaining unit.

In light of this finding, and after considering the membership evidence filed by the Respondent, the Board has determined that the Respondent Union does have the support of the majority of employees in the bargaining unit.

Issue 2 – Has the Applicant committed an unfair labour practice, pursuant to s. 10 of the *Act*?

Notwithstanding the Board's granting of the Respondent's Application for Certification, the separate yet related matter of the unfair labour practice complaint must still be addressed.

On April 16, 2013, the Respondent filed an unfair labour practice complaint pursuant to s. 10 of the *Act*, alleging that the Applicant altered the terms or conditions of its employees' employment because the employees were members or officers of a trade union or had applied for membership in a trade union. The acts impugned by the Respondent involve the introduction of a pension plan after the Respondent filed an Application for Certification, and the adjustment of wages paid to its employees. In support of its complaint, the Respondent provided the following statement of each act or omission complained of:

> *(a)* *On or about March 28, 2013 the Respondent called a meeting of all of its employees to advise them of the implementation of a pension plan and the meeting was held on April 3, 2013.*
> *(b)* *On or about April 11, 2013 the Respondent increased the wages of certain of its employees affected by the Application for Certification.*
> (c) *On or about the 26th day of February 2013 the Respondent sent a request to Local 1338 requesting that Local 1338 waive, among other rights, the rights of its members and those wishing to be members of Local 1338 to become the certified bargaining agent of such individuals pursuant to the provisions of the Labour Act in consideration of the Respondent employing members of Local 1338 outside the provisions of the Labour Act and any collective agreements entered into thereunder.*

As a remedy for the unfair labour practice(s), the Respondent requested dismissal of the Applicant's request for review of the March 14, 2013, Certification Order and confirmation of the Certification Order.

In its Reply of May 2, 2013, the Applicant denied any violation of the *Labour Act* and the allegations contained in the Complaint. However, the Applicant admitted to holding a meeting on or about March 28, 2013, to discuss a proposed pension plan. The Applicant indicated that discussions and work on the introduction of a pension plan had been ongoing since the fall of 2012 and that the March meeting was part of this ongoing process in the ordinary course of business. The Applicant further admitted that certain wages were impacted (presumably after the date of the Certification Order) but again, that such alteration of wages was part of the "ordinary course of business". The Applicant referenced its policy manual which provides for pay adjustments to be effective April 1 of each year and that any salary adjustments were not motivated by any improper purpose.

The Applicant further admits to sending a request to the Respondent but again, such an event was not an unusual occurrence as the Respondent and the APM Group of companies, of which the Applicant is a member, had on previous occasions agreed to settle certain terms and issues by contract to establish certainty in labour relations. The Applicant submits that there was nothing unusual about any of its procedures as complained of by the Respondent and that the Applicant did not violate the statutory freeze or any other provision of the *Act*.

In its Reply of June 5, 2013, the Respondent indicates that the Applicant implemented a pension plan subsequent to the issuance of the Certification Order. The Respondent indicates that the Applicant had not approached the Respondent since the Certification Order with respect to its position as certified bargaining agent of the bargaining unit and alleges that the Applicant continued to change terms and conditions of the employment of its employees in the bargaining unit without negotiating with the Respondent or abiding by the collective agreement between the Respondent and the Association of Commercial and Industrial Contractors of Prince Edward Island, Labour Relations Committee, Carpenters Trade Sector, which collective agreement binds the Applicant. The Respondent further remarks that the Applicant had not taken any action to resolve the issues raised in the unfair labour practice complaint as had been filed on April 16, 2013, by the Respondent.

Section 10(1) of the *Act* reads as follows:

> *10(1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall*
>
> *(a) interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;*
>
> *(b) participate or interfere with the formation, selection or administration of a trade union or other labour organization or the representation of employees by a trade union or other labour organization; or contribute financial or other support to such trade union or labour organization;*
>
> *(c) suspend, transfer, refuse to transfer, lay-off, discharge, or change the status of an employee or alter any term or condition of employment, or use coercion, intimidation, threats or undue influence, or otherwise discriminate against any employee in regard to employment or any term or condition of employment, because the employee is a member or officer of a trade union or has applied for membership in a trade union;*
>
> *(d) refuse to employ any person because such person is a member or officer of a trade union or has applied for membership in a trade union or require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Part;*
>
> *(e) fail or refuse to bargain collectively in accordance with this Act;*
>
> *(f) call, authorize, counsel, procure, support, encourage or engage in a lockout except as permitted by section 41.*

At the hearing of this matter, counsel for the parties maintained their respective positions. The Applicant argued that, if anything, it violated the current union collective agreement for which there would be an inherent remedy within the agreement, but that the acts complained of did not constitute an unfair labour practice as they did not fall within the definition of an unfair labour practice under the *Act*; alternatively, if the impugned acts did fall within the stipulated definitions under the *Act*, they would be so low on the spectrum of unfair labour practices as to call for very little if any sanction. The Applicant therefore submitted that the only appropriate redress would be a declaration of the wrong doing. Counsel for the Respondent submitted that a declaration would not be appropriate in the circumstances and that one sanction that would be available to the Board, in addition and as an alternative to confirming the Respondent's Certification, would be to deny the Applicant's request for a representative vote.

As part of Exhibit "E-1", the parties have filed an agreed statement of facts which appears at Tab 24 of that exhibit. The agreed facts confirm the information as pertaining to dates and actions of the Applicant concerning the pension plan and pay increases; however, no facts were submitted concerning the alleged request by the Applicant to the Respondent, requesting that the Respondent waive the rights of its members, and those wishing to be members of the Respondent, to become the certified bargaining agent, pursuant to subparagraph (c) of the Respondent's aforesaid description of the unfair labour practice. Given that the Board has not received any evidence pertaining to this aspect of the original unfair labour practice complaint, the Board will restrict its discussion to the allegations concerning the Applicant's pension plan and the pay raises for certain employees in the bargaining unit.

The Board has broad discretion under the *Act* to rule on unfair labour practice complaints and to determine the appropriate remedy. Section 11(3) of the *Act* states:

> *11(3) If the chief executive officer or other officer appointed by him, as the case may be, is unable to effect a settlement of the matter complained of, the board shall conduct a hearing on the complaint, and, if the board is satisfied that an employer, employers' organization, trade union or other person is committing or has committed an act prohibited by this Act, the board, shall, by order, make such award, give such direction, or take such other action as the board considers just and necessary in the circumstances and, without restricting the generality of the foregoing, may, by such order or subsequent order,*
>
> > *(a)direct the employer, employers' organization, trade union or other person to cease doing the act and to rectify in such manner as the board considers just any violation of this Act;*
> > *(b) direct an employer to pay to an employee a sum equal to the wages, salary or other remuneration lost by the employee by reason of the employer's violation of this Act;*
> > *(c) direct an employer to reinstate an employee in his employ at such date as in the opinion of the board is just and proper in the circumstances in the position that the employee would have held but for a suspension, transfer, refusal to transfer, lay off, discharge or change of status of the employee done or made by the employer contrary to this Act;*
> > *(d) direct an employer to employ a person at such date as in the opinion of the board is just and proper in the circumstances in the position that the person would have held but for the refusal of such employer to employ such person contrary to this Act.*

This Board has serious concerns about any employer behaviour after an Application for Certification has been submitted that alters or affects the terms of employment of the employees in a bargaining unit. The concern is increased when, as in the present case, the employer has requested a review of the Certification Order which, by its very act, cloaks the Certification Order with uncertainty. We further note in the case before the Board that the Applicant has had, since the date of Certification, no contact or dealings with the Respondent concerning implementation of the collective agreement. The Applicant's actions with respect to the pension, and implementation of pay increases, were made without notifying or consulting the Respondent in any manner.

Section 16 of the *Act* confirms that an employer is not to alter any conditions of employment of any employees in a bargaining unit until such time that the Board renders its decision on an Application for Certification and until collective bargaining has been concluded. Section 16 of the *Act* states:

> *16. Where an application is made under this Part for the certification of a trade union as bargaining agent of employees in a unit, the employer shall not, without the consent of the board, increase or decrease rates of pay or wages or alter any other term or condition of employment of any employees in the unit until the board has given its decision on the application and, where the board certifies a trade union as bargaining agent, until section 22 has been complied with. R.S.P.E.I. 1974, Cap. L-1, s.15.*

Employers must also be mindful of s. 54(6) of the *Act* which explicitly states that applications for review of certification orders, such as in the present case, *"do not alter the rights or obligations of the parties arising from the order"*. These "rights and obligations" would, of course, include those terms and provisions contained within s. 16 of the *Act* as well as s. 10(1) of the *Act* concerning unfair labour practices.

The Applicant argues in its submissions, in part, that its act of announcing a previously planned employee pension plan and adjusting the wages of certain employees within the unit do not constitute unfair labour practices due to the application of the collective agreement between the Association of Commercial and Industrial Contractors of Prince Edward Island, Labour Relations Committee, Carpenters Trade Sector and the United Brotherhood of Carpenters and Joiners of America, Local 1338. Rather, the Applicant argues that the grievance procedure contained at article 22 of the collective agreement is the only and proper source of relief available to the Union given that the unfair labour practice provisions of the *Act* are inapplicable where the parties to a complaint are subject to a collective agreement.

The Board respectfully disagrees with the Applicant's position. To accept the Applicant's position would be to ignore the "statutory freeze" provision of s. 16 of the *Act* which is clear in its prohibition against an employer altering any term or condition of employment of any employee in the bargaining unit without the consent of the Board. Although a Certification Order has issued in this matter, the issuance of that Order is currently under review by virtue of the Applicant's own request for review of the granting of the Order. To accept the Applicant's argument would permit, under the protection of a collective bargaining agreement, virtually any act of the employer in a situation where a request for review of a Certification Order has been made by that employer. In other words, the statutory freeze and unfair labour practice provisions of the *Act* and the discretion afforded to the Board would be significantly undermined, as an employer could simply request a review of a Certification Order, engage in practices contrary to the *Act* – which could have the affect of influencing bargaining unit members – and claim the collective bargaining agreement as the appropriate forum to have the matter resolved.

With respect to the particular complaints of the Respondent in the present case, the Board notes from the Agreed Statement of Facts that the Applicant held meetings with members of the bargaining unit within a day of filing its request for review of the Certification Order. The Board further notes that the Applicant had circulated a memorandum about the pension plan with employees' paycheques on the first pay date following the issuance of the Certification Order (March 28, 2013). Such actions do have the ability to influence members of a bargaining unit which may have consequences, intended or otherwise, at a hearing pertaining to the Application for Certification or in the event that a representative vote is ultimately ordered by the Board. Until such time that an Application for Certification is fully and finally determined by the Board, which requires the determination of any employer's request for review of a Certification Order, the statutory freeze provision contained within s. 16 of the *Act* must be respected.

The Board therefore finds that the Applicant has committed unfair labour practices in breach of s. 10(1)(c) of the *Act* by altering a term or condition of employment, to wit, the pursuit of enhanced benefits for employees within the bargaining unit and adjusting the salary of employees within the bargaining unit.

Issue 3 – If the Applicant has committed unfair labour practices pursuant to s. 10 of the *Act*, what is the effect of the prohibited acts and how can they be remedied?

The Board must now determine the appropriate remedial action given the nature of the acts committed by the Applicant and the direction provided by s. 11(3) of the *Act*. This Board and the Supreme Court of this Province have interpreted s. 11(3) of the *Act* in a liberal manner, allowing the Board broad discretion to craft a remedy that is befitting of the circumstances before it in a given case. As noted by the parties in their submissions, and as requested by the Respondent, this discretion extends to the ordering of remedial certification of the bargaining unit.

On the issue of remedial certification, Justice Cheverie commented as follows in *United Food and Commercial Workers Union, Local 864 v. Polar Foods International Inc.* [2002] P.E.I.J. No. 69, at paragraph 25:

> *While remedial certification is an exceptional remedy, it is a remedy. It does serve to strike an appropriate balance in an appropriate case – and this is an appropriate case.*

The Board views the option of remedial certification as approaching a last resort – to be used when other relief is clearly not available or suitable in a given circumstance. Of course, in the present matter, remedial certification is a moot consideration given that the Board finds that the Respondent has the majority support of the members in its proposed bargaining unit. Also in the present case, the Board is without any evidence as to the extent of the impact that the Applicant's actions have had on the employees within the bargaining unit.

Given the lack of evidence before it, the Board can only speculate as to the impact such actions may have had on employees and how a representative vote may ultimately have been affected. Indeed, s. 11(3) of the *Act* suggests that when the Chief Executive Officer of the Board is unable to resolve an unfair labour practice complaint, a hearing shall be conducted following which the Board is empowered to order relief if it is satisfied that behaviour prohibited by the *Act* has been committed. In the present case, although a hearing was conducted, there is simply no evidence before the Board from which it could make an informed decision as to the full and proper relief necessary for the Respondent to be properly remediated. Accordingly, the Board is therefore only prepared to issue a declaration that the Respondent's actions in altering the terms and conditions of employment constituted unfair labour practices in breach of s. 10(1)(c) of the *Act*.

In the present case, the Board would have concerns about the ability of a representative vote to restore the Applicant to the position it would have been in, but for the intervention of the Respondent. Indeed, the Board would have such concerns in virtually any circumstance where an employer has altered or amended terms and conditions of employment of bargaining unit members after an Application for Certification has been filed.

Given that the Board has determined that the Respondent has the support of a majority of members in the bargaining unit, and has confirmed the Certification Order, it is unnecessary to further comment on the policy considerations of remedial certification and the appropriateness of such relief in the present circumstances.

Issues #4 and #5

Given the foregoing conclusions of the Board, it is unnecessary to address the remaining issues.

Conclusion

For the foregoing reasons and conclusions, the Board finds that the Respondent does have the support of a majority of employees in the bargaining unit and that the Respondent is a trade unit.

As to whether the unit applied for is appropriate for collective bargaining, it is noted that the parties are in agreement on this point. The unit description is "all employees of the Respondent employed as carpenters, carpenters apprentices, carpenters helpers, carpenters working foreman on Prince Edward Island". The Board has no concern with this description and accordingly finds the unit to be appropriate for collective bargaining.

The Board therefore confirms its Certification Order of March 14, 2013, certifying the United Brotherhood of Carpenters and Joiners of America, Local 1338, as the exclusive certified bargaining agent for all employees of MacLean Construction Ltd. employed in Prince Edward Island as carpenters, carpenters apprentices, carpenters helpers and carpenters working foreman.

Matthew MacFarlane
Chair

John Cormier
Member

Michael Lund
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 31st day of January, 2014, and issued under the hand of its Chief Executive Officer on the 31st day of January, 2014.

Shawn Shea
Chief Executive Officer