



**GOVERNMENT OF PRINCE EDWARD ISLAND  
LABOUR RELATIONS BOARD**

M. Lynn Murray, B.B.A., LL.B.  
Chairman

Roy J. Doucette  
Chief Executive Officer

DEPARTMENT OF LABOUR  
P.O. BOX 2000  
CHARLOTTETOWN  
PRINCE EDWARD ISLAND  
C1A 7N8

DECISION

**RE: ASSESSMENT OF DAMAGES - UNFAIR LABOUR PRACTICE COMPLAINTS  
BOARD APPLICATION NUMBERS 88-031/89-028**

**BETWEEN: THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1252  
(IN TRUSTEESHIP)**

**COMPLAINANT**

**AND:**

**CAVENDISH FARMS**

**RESPONDENT**

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**COUNSEL FOR THE COMPLAINANT - BENJAMIN B. TAYLOR, Q. C.**

**COUNSEL FOR THE RESPONDENT - DAVID H. JENKINS, Q. C.**

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**BACKGROUND:**

1. Board Application No. 88-031 was an Unfair Labour Practice Complaint filed by the Complainant (hereinafter referred to as UFCW) against the Respondent, Cavendish Farms on December 8, 1987. It was subsequently amended on October 31, 1988 and the Board rendered its decision on March 1, 1989.

2. In the Board decision of March 1, 1989, the Board found the Respondent, Cavendish Farms guilty of violating Section 9 (1) (e) of the Labour Act, R.S.P.E.I. 1974, Cap L-1, in that it failed or refused to bargain collectively with UFCW who was and continues to be the certified bargaining agent. At Paragraph 60 of that decision, the Board imposed the following remedy:

For the forgoing reasons, the Board orders and directs that Cavendish Farms is obligated to pay to all Bargaining Unit Employees all monetary losses that UFCW can establish by reasonable proof as arising from the loss of opportunity to negotiate a Collective Agreement due to the unlawful conduct of Cavendish Farms; the said monetary losses or damages, if any, running from November 24, 1987 the date the violation occurred up to the date of the first meeting ordered in Paragraph 58 hereof, together with interest as appropriate. The Chief Executive Officer is directed to reschedule this matter for hearing and determination on the issues of monetary losses or damages and interest, if any, and the Board remains seized of this case for such purposes.

3. The Board convened a hearing on June 15, 1989 to deal with the issue of damages. At that time the Board was advised by the parties that a new Collective Agreement had been entered into and ratified by the Employees of Cavendish Farms on May 29, 1989. By virtue of that Agreement, the parties had negotiated a formula for retroactive pay for those Employees who were still in the employ of the Respondent on the date of ratification, as well as for those employees who had retired. The Board was requested to confirm that

such negotiated sums be paid to the said Employees, said payments to start at 12:00 A.M. on June 16, 1989, and to continue over the next 24 hour period. While the Board would have liked to have had more notice on this issue, the Board felt that as the Union representing the interests of its membership had agreed and the Employees, had, in fact, ratified such an agreement, the amount to be paid to the Employees should be that as agreed to by the parties. That agreement was outlined in Exhibit R-2 and basically amounted to 27.4 cents per hour for the period of December 1, 1986 to November 30, 1987 and 58.9 cents per hour for the period of December 1, 1987 to October 14, 1988.

4. In light of the foregoing, the Board ordered that the Employees who were on the Employer's payroll on May 29, 1989 be paid the amounts agreed to and ratified by those very Employees. The issue then became, what should the Board do in regard to the Employees who were no longer in the employ of Cavendish Farms at the date of ratification? There was no provision for those Employees to receive any retroactive pay other than the individuals who had retired from the Respondent's employ.

5. The matter was adjourned to July 26, 1989 for evidence and argument. The Board asked the Respondent, Cavendish Farms, to file a document outlining the amounts of money that Cavendish Farms had paid out to its Employees as a result of the retroactive pay period being negotiated and ratified. Such a document was filed with the Board on July 10, 1989; however, it was not released to UFCW and UFCW did not object to this procedure. The document was not marked as an Exhibit as it was filed for Board use only. It outlined in some detail the amounts of money paid to each Employee who was in the Respondent's employ at the date of ratification and the amounts of benefits that were also paid in terms of Unemployment Insurance, Canada Pension Plan, and Workers Compensation Board Premiums. UFCW was not advised of the total sum that was paid out, and suffice it to say that the amount in question was considerable.

6. The Respondent's arguments in regard to this issue of retroactive pay for Employees who were not in the employ of Cavendish Farms at the date of ratification can be summarized as follows:

- (i) Cavendish Farms had a certain fund set aside for the Collective Agreement and the entire fund was spent by Cavendish Farms on the Employees who were working for it on May 29, 1989, the date the new contract was ratified;
- (ii) Cavendish Farms negotiated a retroactive pay increase for the employees for the period of December 1, 1986 to November 30, 1987, despite the fact it was not required to do so; and
- (iii) It was not the policy of Cavendish Farms to pay retroactive pay to Employees who were no longer in its employ.

7. In terms of the time frame from December 1, 1986 to November 30, 1987, while the Board hoped the parties would address this period, Cavendish Farms was not required to do so by virtue of the Board order of March 1, 1989. The Board decision of March 1, 1989, at Paragraph 64 stated the following:

It is hoped that the parties during the course of negotiations or conciliation can address the issue of salary increases for the period of November 30, 1986 to November 24, 1987. The Board believes the Employees should not have to suffer because of the actions of Cavendish Farms, Gordon Whitlock, Gordon Porter, or James Arsenault. However, the Board can do nothing to resolve the situation in so far as it relates to that particular period of time.

8. In a normal situation, the Board would not find fault with the position taken by Cavendish Farms in terms of not paying retroactive pay or other benefits to Employees who had left its employ. The

Labour Relations Board by its very nature, is tripartite in nature, meaning that a Board panel usually, but not always, is comprised of one representative from Labour, one from Management, and a neutral Chairman. This composition brings a wealth of knowledge to the Board and considerable expertise in labour matters.

9. By virtue of the expertise the members of the Board bring to a hearing, the Board is aware of situations where Labour and Management have negotiated that any retroactive pay will apply to Employees who have also left the employ of the Company. However, that normally is an issue to be negotiated between Management and the Union. If this were a normal situation, the Board would have no difficulty in accepting the position Cavendish Farms took in this particular instance. This, however, was not a normal situation and both UFCW and Cavendish Farms Company were faced with the Board decision of March 1, 1989 wherein the Board outlined the remedy to be imposed for the Employees of Cavendish Farms.

10. Thus, the Board decision of March 1, 1989 must be adhered to in the strictest sense of the words. That decision referred to "all bargaining unit Employees" and by necessary implication that would mean any Employee who was in the employ of the Respondent during the specified time period. However, the Board wishes to make clear that it is not faulting either UFCW or Cavendish Farms for not dealing with this issue. Both parties were undoubtedly unsure of the wide reaching implications such an order would have.

11. Having said foregoing, the Board believes that there are undoubtedly Employees who were in the employ of the Company on November 24, 1987 who left the employ of the Company prior to March 8, 1989, the date of the first meeting that was ordered by virtue of Paragraph 58 of the decision of March 1, 1989. Any Employees who were employed during that time frame are entitled to any losses that UFCW can establish by reasonable proof as arising from the loss of opportunity to negotiate a Collective Agreement.

12. The best indicator to the Board of what the monetary losses or damages would have been is that sum negotiated between the parties, namely, 58.9 cents per hour for the period of December 1, 1987 to October 14, 1988. On October 15, 1988, Cavendish Farms voluntarily, and with the consent of UFCW, increased the Employees wages by 7 percent; thus the period of time between October 15, 1988 and the date of the Board Order, March 1, 1989 or the date of the first meeting ordered, namely March 8, 1989, is of no concern to the Board, as the Board believes that the voluntary wage increase would compensate the employees for that time frame.

13. After the decision of the Board on March 1, 1989, a contract was ratified by the Employees on May 29, 1989, a period of some 3 months later. During this period of time, Cavendish Farms and UFCW attempted to negotiate a Collective Agreement and the matter went to conciliation with one vote being held wherein the contract was rejected. Another session of conciliation was held and the subsequent ratification vote on May 29, 1989 was successful.

14. The Board heard evidence that in a normal situation, it would take approximately 3 months to negotiate a Collective Agreement and the Board accepts that that is probably an accurate estimate. However, the Board recognizes that this was not a normal period of time. The Collective Agreement was to expire on November 30, 1986 and the parties were in conciliation during the Spring of 1987. Thereafter followed probably the longest and one of, if not, the most disruptive Union battles ever encountered in this Province. That Union battle did not end until the last Board decisions were rendered on March 1, 1989. Thus the Board finds as a fact that this was an abnormal situation and the average period of time for negotiating a Collective Agreement cannot be used as the norm in this situation. Given the background against which these negotiations would have taken place, had Cavendish Farms commenced negotiations, the majority of the Board believes that an extra 2 months would have been necessary to conclude a Collective Agreement. That would take the time frame up to April 27, 1989. The majority of the Board believes that if Cavendish

Farms had not failed to negotiate on November 24, 1987 and negotiations had commenced on that date, there would have been a Collective Agreement in place, agreed to by the parties and ratified by the employees on May 1, 1988.

15. For the foregoing reasons, the Board rules that any Employees, who were in the employ of the Company between May 1, 1988 and October 14, 1988, excluding probationary Employees, are to be paid any sums of money on a pro rata basis that they would have received had they still been in the employ of the Company on May 29, 1989, the date of ratification. The Board believes that there are no damages for the period October 15, 1988 to the present as the Board believes the seven per cent increase effective on October 15, 1988 adequately compensated those employees.

16. The Respondent had submitted several Exhibits, demonstrating the amount of money that the Employees would have received if they had been paid retroactive pay according to the Collective Agreement. Those Exhibits were; Exhibit R-3 being a list of Employees who worked between November 24, 1987 and October 15, 1988; Exhibit R-4 being a list of Employees who worked more than 270 hours between November 24, 1987 to October 15, 1988; Exhibit R-5 being those Employees who were hired subsequent to October 15, 1988; and an amended Exhibit R-4. However, in light of the decision being rendered by the Board, such information is not applicable.

17. In terms of notice to the Employees of this decision, the Board orders UFCW to place an advertisement in 2 newspapers on Prince Edward Island namely "The Journal Pioneer" and "The Guardian Patriot", said notices to run once a week from the date of this decision for a period of 2 weeks.

18. The Board is also placing the obligation on the Employee to claim as against Cavendish Farms and is imposing a time limit. The Board does not believe that Cavendish Farms should be faced with uncertainty for any period of time longer than 30 days from the date of

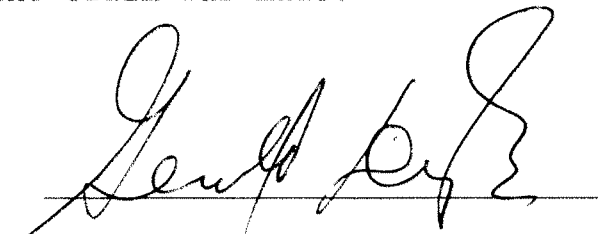
this decision. The Board further believes that as the Board decision was rendered on March 1, 1989, most Employees should be aware of such decision now.

19. For the foregoing reasons, the majority of the Board orders that any Employee who has a claim for retroactive pay for the period May 1, 1988 to October 14, 1988, and who was not employed on the date of ratification of the Collective Agreement, namely, May 29, 1989, SHALL make claim by notice in writing to the Employer, Cavendish Farms, [which was his/her former Employer], within 30 calendar days of the date of this decision. Upon a claim being made, the Employer, Cavendish Farms, shall calculate the amount of retroactive pay to which that Employee is entitled and shall forward to such Employee that sum within 30 days from the date the claim was made.



ELIZABETH MACFADYEN

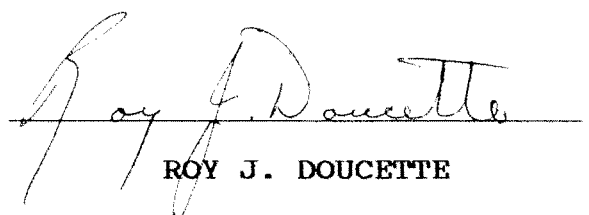
MEMBER



GERALD DOYLE

MEMBER

THIS DECISION of the Labour Relations Board made this 28th day of August, 1989 and issued under the hand of its Chief Executive Officer.



ROY J. DOUCETTE  
CHIEF EXECUTIVE OFFICER

**MINORITY DISSENT**

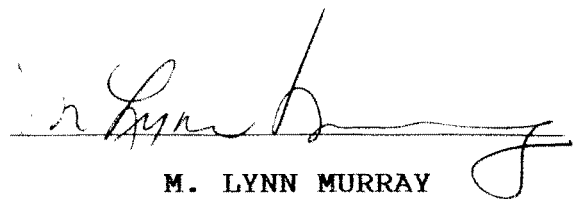
20. I have read the decision of the majority of the members of the Labour Relations Board and while I agree with most points, I must dissent in terms of the period of time in which it would have taken to negotiate a Collective Agreement. I am not satisfied that a contract



would have been agreed to by May 1, 1988. It is my belief that a contract could not have been negotiated in 5 months given the circumstances that existed at the time of this dispute.

21. Having sat through this Hearing in the initial stages dealing with the Unfair Labour Practice Complaint, it is my belief that while Cavendish Farms were in fact guilty of committing an Unfair Labour Practice Complaint, had Cavendish Farms not violated the Labour Act, supra, and in fact negotiated with UFCW on November 24, 1987, the actions of other individuals would still have interfered with negotiations. Given these circumstances, I do not believe there would ever have been a new Collective Agreement in place until a date subsequent to May 1, 1989. The actions of certain individuals would have precluded the ratification of a contract until at least August 1, 1988..

22. Thus it would have been my view that the earliest a Collective Agreement could have been ratified would have been August 1, 1988. That would necessarily mean that any Employees employed during that period of time, namely; August 1, 1988 to October 14, 1988, would be entitled to retroactive pay of 58.9 cents an hour. Thus I would have ordered that any Employees, excluding probationary Employees, who were in the employ of Cavendish Farms between August 1, 1988 and October 14, 1988, would deserve retroactive pay of 58.9 cents an hour for any hours they worked during that time frame.



M. LYNN MURRAY

CHAIRMAN