

Application 88-031



**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: UNFAIR LABOUR PRACTICE COMPLAINT - FAILURE
 TO NEGOTIATE - BOARD APPLICATION NO. 88-031**

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

COMPLAINANT

AND: CAVENDISH FARMS

RESPONDENT

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

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

BACKGROUND:

1. Board Application No. 88-031 is an Unfair Labour Practice Complaint filed by the Complainant (hereinafter referred to as UFCW) against the Respondent, Cavendish Farms on December 8, 1987. It alleged that Cavendish Farms had violated section 9(1)(e) of the Labour Act, R.S.P.E.I. 1974, Cap. L-1 in that:

The Respondent refuses to negotiate a Collective Agreement with the Certified bargaining agent for the employees described in Article II of the Collective Agreement between the Respondent, the Respondent and the Complainant in effect until November 30, 1989, and thereafter as provided therein.

2. The Chief Executive Officer, as required by statute inquired into the Complaint. He requested and received a reply from Cavendish Farms in regard to the allegations outlined in the Complaint. He filed his report with the Board on January 7, 1988 which included a copy of the response of the employer.

AMENDMENT:

3. On October 31, 1988, UFCW sought leave to amend the Complaint to claim additional remedies. The Complaint filed on December 7, 1987, only requested that the Board order Cavendish Farms to negotiate with UFCW. The Amended Complaint included a request for the following relief:

- (a) An Order directing the Respondent to negotiate in good faith with the Complainant immediately;
- (b) An Award against the Respondent in favour of the Complainant;
- (c) An Order providing that any pay increase received by the employees pursuant to any new contract negotiated and intended to replace the contract expiring on November 30, 1986, be retroactive, with interest thereon at the rate of 20% per annum, compounded monthly;
- (d) Costs in favour of the Complainant, on solicitor-client basis against the Respondent.

4. The jurisdiction to permit an amendment is outlined in Section 26 of the Regulations made pursuant to the Labour Act, which states:

An application, reply, intervention, complaint, statement of desire to make representation or notice may be amended before or at the hearing by leave of the Board on such terms and conditions as the Board thinks advisable.

5. After hearing submissions from the parties on whether or not an amendment should be granted, the Board granted leave to UFCW to file the Amended Unfair Labour Practice Complaint on October 31, 1988.

JURISDICTION:

6. Counsel for Cavendish Farms requested a copy of the report that the Chief Executive Officer had filed with the Board. The Board, in an attempt to facilitate the hearing of the Complaint, released a copy of the aforementioned report to both parties. After reviewing same, counsel for Cavendish Farms raised a preliminary matter dealing with the Board's jurisdiction to deal with the Complaint.

7. It was argued that the Board had no jurisdiction as the Chief Executive Officer had not made any attempts to settle the Complaint as required by statute. Sub-section 10(1) of the Labour Act states:

10(1) Where a complaint in writing is made to the board that an employer, employer's organization, trade union or other person is committing or has committed an act prohibited by section 9, the chief executive officer or an officer of the Department of Labour, appointed by him shall inquire into the complaint and endeavour to effect a settlement of the matter complained of.

8. Scott Smith, Operations Manager of Cavendish Farms, advised the Board that there had been no attempt to settle the Complaint. Therefore, it was submitted the necessary procedures had not been complied with and the Board was without jurisdiction.

9. After hearing the evidence and submissions of both parties, the Board dismissed this argument. The decision of the Board was based on the evidence of Mr. Smith. He confirmed the accuracy of the first paragraph of the Chief Executive Officer's report which stated:

On January 4, 1988, I talked to Scott Smith, Operations Manager at Cavendish Farms, concerning the above subject. Mr. Smith informed me that the Company was prepared to negotiate with the United Food & Commercial Workers if ordered to do so by the Board. Mr. Smith went on to say that the Company is not sure which union truly represents the employees; and, when the Board determines that matter, the Company will be prepared to negotiate at that time. [emphasis added]

10. The Board was satisfied that the only resolution of the matter, insofar as UFCW was concerned, was for negotiations to commence. The Board was also convinced that Cavendish Farms required an order of the Board directing it to negotiate.

11. Mr. MacKinnon, the Board's then Chief Executive Officer, had no authority to order the parties to the negotiating table. That is a matter reserved to the Board by virtue of Sub-section 10(3) of the Labour Act. The Board could not make such an order until the matter was brought on for hearing.

12. Having stated the foregoing, the Board found no settlement was possible. The Board determined that its Chief Executive Officer had acted properly and prudently when he filed his report with the Board indicating in part:

In view of the positions adopted by the parties, I have no alternative but to file my report indicating no settlement.

Thus, the Board found the preliminary argument was without foundation and that the Board had the necessary jurisdiction to proceed with the hearing into the Complaint.

DECISION:

13. The Complaint alleges a violation of sub-section 9(1)(e) of the Labour Act which states:

"9(1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall ...

(e) fail or refuse to bargain collectively in accordance with this Part;"

14. The Board has determined that Cavendish Farms is an employer within the meaning of Sub-section 9(1)(e) of the Labour Act. The Board also finds that Scott Smith was, at all times material hereto, acting on behalf of Cavendish Farms. Therefore, the issue really concerns whether or not Scott Smith, acting on behalf of Cavendish Farms, failed or refused to bargain collectively in accordance with Part I of the Labour Act.

15. The collective agreement between Cavendish Farms and UFCW

expired on November 30, 1986 (Exhibit A-5). The parties were in conciliation during the spring of 1987. Conciliation was withdrawn by correspondence dated December 2, 1987 (Exhibits R-1 and A-32).

16. The position of Cavendish Farms in regard to this Complaint can be summarized as follows:

- (a) there was no unfair labour practice complaint as there had been negotiations and then conciliation, until conciliation was withdrawn;
- (b) the company did not know who to deal with;
- (c) in the alternative, if there was an unfair labour practice, it was technical and the Board should consider several factors, namely:
 - delay of the Board in hearing the matter;
 - efforts made by Cavendish Farms to determine who it should deal with;
 - assumption of the company that the Complaint was not serious;
 - the Board made no order in terms of who Cavendish Farms should negotiate with;
- (d) if there was an unfair labour practice, the Board should consider the following when imposing a remedy:
 - no term or condition should be imposed and it should not be retrospective;
 - there should be a relationship between the complaint, consequences and remedy;
 - an award of damages is contrary to past practice and should not be punitive in any event; and
 - the Board should consider the losses that the employer has suffered.

17. There was an argument made that there was no Unfair Labour Practice committed between April of 1987 and December of 1987, in light of the fact that negotiations were at the conciliation stage. The Board is not concerned with the failure or refusal to negotiate prior to November 24, 1987. November 24, 1987 is the date the violation is alleged to have commenced. The Board will concern itself with the events that occurred on that date and subsequent thereto.

18. The Labour Act imposes duties on both management and labour. One of those obligations is the negotiating process, which, in fact, is part and parcel of the entire collective bargaining relationship between the parties. The Labour Relations Board, or its predecessor, certified UFCW as the bargaining agent for the employees at the Cavendish Farms plant in New Annan. That order was issued on November 21, 1967, and has not been revoked as of the date of this decision. When the aforementioned order was granted, by virtue of Section 16 of the Labour Act, UFCW obtained the "exclusive right to bargain collectively on behalf of employees in the unit". [emphasis added]

19. During the spring of 1987, a situation developed whereby another union was vying for the membership of UFCW. The Board can take notice of the fact that it received several applications between March and June of 1987, whereby Canadian Auto Workers

(hereinafter referred to as CAW) were seeking to be certified as the bargaining agent for those employees. During this same period of time, UFCW was placed in Trusteeship and Deputy Trustees were appointed to carry out the affairs of UFCW.

20. At the hearing, Cavendish Farms did admit that UFCW was the certified bargaining agent, however, it questioned who UFCW was. It was submitted that UFCW a "divided house", in terms of the Deputy Trustees on the one hand, and the in-plant bargaining committee on the other hand.

21. Although several authorities were submitted by Cavendish Farms, which questioned the imposition of a Trusteeship by UFCW on its Local 1252, the Board finds that the Constitution of the UFCW International Union (Exhibit A-6) demonstrates a Trusteeship may be imposed on a Local Union. The Bylaws of UFCW indicate that the Constitution and the laws of the International Union are applicable (Exhibit A-7). While a Trusteeship may be a drastic measure, in light of the events transpiring in regard to Local 1252, it is apparent an immediate solution was required. The Board does not find it necessary to inquire into the validity of such a procedure as Cavendish Farms does not question the Trusteeship. In fact, Mr. Smith indicated the appointment of the Trustees was never disputed and that the Trusteeship was an internal matter.

22. The inhouse bargaining committee were to represent the interests of UFCW and its membership in dealing with management regarding grievances, negotiations, and other like matters. This committee was comprised of Gordon Whitlock, Gordon Porter and James Arsenault.

23. Cavendish Farms submitted that it had always negotiated with the in-plant committee. Mr. Smith continually reiterated that the Company was doing business with the right people, namely, the in-house committee. He indicated that the past practice of the employer had been to deal with this committee. It further submitted that the in-plant committee was the Union, the certified bargaining agent and a party to the collective agreement. The Board does not accept this latter proposition. When the Labour Relations Board issues a certification order, such an order is issued to a trade union. Trade union is defined in sub-section 7(1) of the Labour Act to mean:

Any organization of employees formed for the purposes that include the regulation of relations and collective bargaining between employees and employers and includes a council of trade unions that has been vested with appropriate authority by any of its constituent unions to enable it to discharge the responsibilities of a bargaining agent.

24. The Board was satisfied, when it granted UFCW certification for the employees at Cavendish Farms, that UFCW was a trade union. Can it now be stated that the in-plant committee is a trade union within the meaning of the Labour Act? Did the previous Board issue to Whitlock, Porter and Arsenault, or any three individuals for that matter, the exclusive right to be the certified bargaining agent? The simple answer to both questions is an unqualified "no". The in-plant committee is not a trade union and thus cannot hold any rights prescribed by statute. The exclusive right to bargain must be held by a trade union, and in this case, that means UFCW. To state otherwise is to overlook the clear purpose, intent and wording of the Labour Act.

25. The Boards determination on this issue is confirmed by a review of the Collective Bargaining Agreement between the parties "Cavendish Farms for its New Annan Plant and The United Food and Commercial Workers, Local 1252" (Exhibit A-5). That document indicates UFCW is a party, not the in-plant committee and not

Whitlock, Porter and Arsenault. Article 1.01 of the Collective Agreement, in dealing with the purpose of the contract states:

"1.01 The Company or anyone authorized to act for it, recognizes the Union as the sole bargaining agent for its employees at New Annan described as in the bargaining unit in Article II of this agreement, and hereby consents and agrees to negotiate with the Union or any committee thereof in any or all of the matters affecting the relationship between the said company, and such employees of the company included in the bargaining unit, looking towards a peaceful and amicable settlement of any difference that may arise between the company and its employees." [emphasis added]

26. In light of the aforementioned section, how can it be stated that the in-plant committee is the Union? If that is a reasonable interpretation, how does one define the words "or any committee thereof"? A recent decision of the Prince Edward Island Court of Appeal, dated February 10, 1988 in Dumont v. Law Society of Prince Edward Island (GSC-7542) leads the Board to conclude "committee thereof" means committee of the Union. Therefore, by virtue of the Collective Agreement, Cavendish Farms had to negotiate with the Union or a committee of the Union. It is quite clear that the Union is separate and distinct from the committee.

27. The Board finds that Cavendish Farms was continuously advised by the Deputy Trustees that they were the individuals it should be dealing with. Numerous exhibits tendered to the Board support this finding; namely, Exhibit R-4; documents 5 (Nov. 2 1987); 7 (Nov. 5, 1987); 8 (Nov. 6, 1987); 9 (Nov. 9, 1987); 15 (Nov. 23, 1987) and 33 (March 29, 1988).

28. The employer did acknowledge that the Trustees of UFCW could change the address specified in article 6 of the Collective Agreement. The evidence of Scott Smith and Exhibit R-4, documents 7 and 8 confirm this finding. The company forwarded its dues to the address UFCW provided, however, it tells the Board it did not know whom to deal with. One of the most fundamental principles of labour law is that the union representing the employees is the party to whom its membership pays dues.

29. When the Trustees of UFCW sought to have the company deal only with the Trustees, the company instead listened to the comments of the in-plant committee (Exhibit R-4, documents 18, 28 and 36). Even when UFCW removed or purported to remove those individuals from their positions on February 25, 1988, Cavendish Farms did not recognize that the in-plant committee had been removed from office. Instead Cavendish Farms argued UFCW should have done more, by taking "concrete action to make it happen" or putting someone in to replace those individuals. The Board finds Cavendish Farms is a closed shop and that an employee has to belong to the union in order to remain an employee. Had UFCW expelled those individuals from the Union, these employees could no longer be employed by Cavendish Farms. UFCW is to be commended for not expelling them from the union when their interests were diametrically opposed to those of UFCW. However, UFCW must take some responsibility for leaving them in their positions as long as they did, although the Board is not satisfied it would have made any difference to the employer if UFCW had removed them earlier.

30. The Board finds that Whitlock, Arsenault and Porter were seeking to have the membership of UFCW switch allegiance to another union. Cavendish Farms was aware of this fact on April 27, 1987 according to the viva voce evidence of Mr. Smith. Mr. Smith was first aware that this committee was trying to pull out of "UFCW International or whatever" and form or join the United Fishermen. In fact, he stated to the Board he knew the "in-plant bargaining

committee was leading the breakaway to the Canadian Auto Workers". Mr. Smith admitted that he knew the in-plant group was attempting to destroy UFCW.

31. The evidence supports the finding that Whitlock, Arsenault and Porter wanted the representation issue resolved prior to negotiations continuing. There was no possibility of that Committee negotiating until such time as the Board dealt with the issue of which union should represent the interests of the employees of Cavendish Farms and Cavendish Farms was fully aware of this fact.

32. In regard to whether or not Cavendish Farms was bargaining, Mr. Smith stated the following in response to questions from Counsel:

MR. JENKINS: That unfair labour practice complaint was complaining that you wouldn't bargain. Is that correct?

MR. SMITH: Yes.

MR. JENKINS: And you had already given evidence that you were bargaining.

MR. SMITH: That is correct.

MR. JENKINS: Why didn't you bargain?

MR. SMITH: Because the Inhouse Bargaining Committee were not ready to bargain, did not wish to bargain. They were the representatives from my point of view. They were the people that we had to negotiate with. Who they brought in was up to them but they had to be there".

33. Murray Billett, a deputy trustee for UFCW, stated Mr. Smith refused to bargain on November 24, 1987. In regard to this point, Mr. Smith stated:

MR. JENKINS: And the facts set out in the complaint are that the issue was discussed between you and Murray Billett on November 24th, without going into detail, and they say in their complaint that you stated to the effect that you refused to negotiate with a Certified Bargaining Agent. Do you agree or disagree?

MR. SMITH: I disagree but I have to paint a picture if you will. There had over, on numerous occasions, been request to bargain, bargain with us, don't bargain with them. The other group, you can't deal with them, so on and or forth. In this particular conversation, the beginning of the conversations was certainly the traditional, 'look, here is our position,' which had been stated time and time and time again and was never changed. I agree with Mr. Billett, he said you know the thing got heated. We both raised voices and I said finally, 'Look, I am not going to bargain.' But in the context that earlier in the conversation it was and still is and always will be, if the inhouse bargaining committee is there, we will bargain and that was before that conversation and that was after that conversation and that was during that conversation."

34. It is apparent from the exchanges noted above that the Board was told that Cavendish Farms was bargaining and then it was not negotiating because the in-plant committee did not want to bargain. Either Cavendish Farms bargained collectively or it refused to do so. There is no middle ground.

35. When Scott Smith, on behalf of Cavendish Farms, stated that he never refused to negotiate or bargain collectively, this is to be interpreted as he never refused to negotiate with the in-plant committee. He did not have to refuse as he was fully aware that those individuals had requested or consented to the suspension of negotiations pending resolution of "the war". However, Mr. Smith did admit that he did refuse to negotiate with the Trustees and that "he refused to negotiate to this day with them alone".

36. Cavendish Farms then took the position sometime in August of 1988, that it would sit down and negotiate with both groups, the Deputy Trustees and the in-plant committee. However, the Board finds that Cavendish Farms knew the committee did not want to bargain. In light of this fact, the chances of the collective bargaining process proceeding would be slim, at best. It is likely that Cavendish Farms was fully aware of this fact, as the evidence indicated that Mr. Smith was a very experienced person in the field of collective bargaining.

37. The Board finds as a fact that Scott Smith, on behalf of the employer, refused to bargain with the Deputy Trustees on November 24, 1987. The Board notes the issue of conciliation was not raised by Cavendish Farms as being a reason for the refusal until some time subsequent to its response to the Unfair Labour Practice.

38. The Board does not accept the evidence of Mr. Smith that he did not know who to deal with on November 24, 1987. While that particular issue did arise subsequent to February 25, 1988, there is no evidence to support its presence prior to that date. In fact, the documentary evidence leads the Board to conclude Cavendish Farms knew exactly who the certified bargaining agent was on that date. A letter from Mr. Smith to the Board dated January 4, 1988, supports this finding. The relevant paragraphs stated:

"As indicated to you, I will negotiate with the United Food and Commercial Workers should the Board so order it. However, the reality of the situation is that while the United Food and Commercial Workers may have legal authority to represent Cavendish Farms employees, I would question whether in light of the current situation they have the moral authority to negotiate. It is my belief that any negotiations held prior to the CAW/UFCW dispute being resolved would be pointless. We at Cavendish Arms wish to maintain as neutral a posture as possible until this matter is resolved. At that time we would be more than willing to negotiate with whichever union truly represents our employees.

If this approach is not satisfactory and the Board orders us to negotiate with the UFCW, please be assured that we will attempt to comply."

39. There was no suggestion in the above noted correspondence that Cavendish Farms did not know who to deal with. The bottom line is that Cavendish Farms wanted the representation issue resolved and that it would bargain with the Union that "truly represents" its employees. While perhaps a noble stand, the Board finds Cavendish Farms does not have the right to advocate such a

position. The Legislature saw fit to grant to the Board the authority to determine which union the employees of a particular unit support. If the Board has previously certified a union, that order remains in effect until such time as the Board otherwise orders and the parties are bound by it. An employer does not have the right to determine when a Board Order should be followed.

40. The evidence is clear that Cavendish Farms was advised by the Trustees that they were the party Cavendish Farms had to deal with; that the Trustees had the power to do what they were doing and that the Trustees had adopted all functions of the union officers, bargaining committee, grievance committee and Chief Shop Steward Exhibit R-4, document 33). The company chose not to deal with the Trustees. The company does not have the option of choosing whom it will negotiate with, namely, the union or a committee thereof. That is a matter which falls exclusively to the union to determine.

41. The Board concluded in its decision involving UFCW and Garden Province Meats (1985) Inc. (Board Application No. 88-016, January 31, 1989) that the obligation to bargain still existed despite the fact that a displacement application was pending. The Board finds that there is an obligation on the employer to negotiate with the incumbent, despite the fact that another union is seeking to displace that incumbent. The obligation to bargain with the incumbent exists until such time as this Board orders the incumbent no longer holds the certification rights for the employees at the unit in question See: Ontario Labour Relations Board Law and Practice by Sack and Mitchell (1985; Butterworths, Toronto; p. 464); International Brotherhood of Electrical Workers Union Local 1687 v. Crowle Electrical Limited et al (1982), O.L.R.B. Rep. Oct. 1458.

42. Having stated the foregoing, the Board finds that Cavendish Farms had an obligation to negotiate with the incumbent UFCW, and for greater certainty, the Trustees thereof. UFCW was on November 24, 1987 and continues to be, the certified bargaining agent for the employees of Cavendish Farms. When the employer refused to bargain on November 24, 1987, it committed an Unfair Labour Practice. The Board finds that Cavendish Farms violated sub-section 9(1)(e) of the Labour Act and must now address its mind to the appropriate remedy.

43. Subsection 10(3) of the Labour Act grants the power to the Board to impose remedies and it states:

"(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 section 9, the board, shall, by order make such award, give such direction, or take such other act in 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 section 9;

(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 section 9;

(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 section 9;

(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 section 9.

It is obvious that the Board has broad remedial powers when it finds, as it has in this case, that there has been a violation of the Labour Act.

44. Counsel for Cavendish Farms submitted that, in the event the Board found a breach of the legislation it should consider mitigating factors.

45. The employer alleged there was a delay in the hearing of the Complaint. When the Complaint was filed, there were a number of matters in the Supreme Court of Prince Edward Island which involved the Board. In light of this, all matters involving UFCW, CAW and all affected employers were held in abeyance pending the outcome of the Court decision involving an allegation of "apprehension of bias" on the part of the Board. The Court decisions were rendered in February of 1988 and the Board finds Cavendish was aware of this in February of 1988 according to Mr. Smith's evidence and on March 17, 1988 when Mr. Smith made reference to the "uncertain status" of the Board following those decision (Exhibit R-4, document 31).

46. The Prince Edward Island Court of Appeal delivered its judgment on May 24, 1988 and the current panel was then convened to deal with all matters that involved UFCW and CAW, including the current Complaint. This matter was brought on for hearing on October 31, 1988. In light of the foregoing, including the knowledge of Cavendish Farms, the Board will not give credence to any complaint about the "great delay".

47. As mentioned previously, subsequent to the Unfair Labour Practice Complaint being filed, UFCW, on February 25, 1988 purported to remove Gordon Whitlock, Gordon Porter, and James Arsenault from any positions they held at Cavendish Farms, insofar as the union was concerned. Cavendish Farms made application to the Supreme Court of Prince Edward Island to resolve the issue of which group it should deal with, namely, the Trustees of UFCW or the in-plant bargaining committee comprised of Whitlock, Porter and Arsenault (Exhibit R-4, document 31). The court determined it had no jurisdiction to deal with the matter and suggested that one of the parties apply (Exhibit R-4, document 32). UFCW applied to the Court on May 6, 1988 (Exhibit A-20), which application was subsequently discontinued (Exhibit R-4, document 48).

48. Cavendish Farms submitted that the foregoing should be considered by the Board. While the Board does accept that this was an issue after February 25, 1988, the Board finds it was not an issue on November 24, 1987.

49. While Mr. Smith testified that he believed the Complaint

"would die" until one week before the hearing, the Board does not accept this evidence. Mr. Smith testified that the Board's current Chief Executive Officer contacted him in the early fall of 1988 in regard to the Complaint. Mr. Smith indicated he had advised the Chief Executive Officer the company had responded to the Board previously and had nothing more to say.

50. The Board reiterates that it is the only body which can dispose of a Complaint that has not been settled. This Complaint was not settled and the Board at no time indicated the matter was disposed of. If the parties are content to operate under an assumption, they must be prepared to live with the consequences. The Board also states that it had no jurisdiction to issue the order Cavendish Farms required until this Complaint was heard.

51. The Board has had difficulty in accepting the position of Cavendish Farms in terms of whether the complaint was serious. The employees at Cavendish Farms had been without a salary increase for slightly in excess of one year when the Complaint was filed. Yet, Cavendish Farms sit before this Board and submit that their impression was that the Complaint was "not serious". How could such not be serious when approximately 550 employees were affected? The lack of salary increase was undoubtedly serious in the minds of the employees. The board believes it is a serious matter and will deal with it accordingly.

52. After reviewing the evidence, it appears that Cavendish Farms may also have committed other violations of the Labour Act when it continued to deal with another union on matters that fall into the exclusive realm of the certified bargaining agent. The Board finds as a fact that Cavendish Farms recognized the in-plant committee or union executive as part of CAW. To continue to deal with those individuals was undoubtedly a violation of sub-section 9(1) of the Labour Act; namely, Cavendish Farms likely interfered in the representation of employees by a trade union.

53. The aforementioned conclusion is supported by the documentation submitted (Exhibit R-4, document 34) and by an Exhibit tendered as R-4, document 42. The latter is a memo addressed to all employees of Cavendish Farms, dated August 1, 1988 and signed by Robert K. Irving. The relevant portion thereof states:

"You have been told that the Union Executive approached the Company in June for a 5% wage increase. That is correct. Because of the dispute over who represented the employees, we obtained legal advice about what could be done. We were told that we could properly resume negotiations with your Union Executive and U.F.C.W. acting jointly, as then both of the unions claiming legal right to represent the employees would participate in negotiations. Mr. Scott Smith was advised by the Union Executive that they were unwilling to discuss the negotiations with the U.F.C.W." [emphasis added]

54. CAW had no legal right to represent the employees at Cavendish Farms until such time as this Board ordered same. While the Board accepts that Cavendish Farms stated on numerous occasions that it would negotiate with both parties, ie: UFCW and the in-plant committee, by doing so, Cavendish Farms interfered with UFCW's lawfully obtained certified bargaining rights. Since this violation has not been alleged in the Complaint, the Board will not consider this matter further.

55. The Board recognizes that Cavendish Farms offered a 7% raise to its employees on or about October 17, 1988 (Exhibit A-25), almost 2 years after the Collective Agreement expired. While

honourable, the Board was somewhat curious as to why the raise was offered some two weeks before the hearing into this matter and two days after the Board heard argument on what matters should be dealt with first, representation or the unfair labour practice complaints against the various employers. However, it is not for the Board to speculate on what may have been the reasons therefore.

56. The evidence demonstrated that Cavendish Farms were threatened with "problems" if they chose to deal with UFCW. The notes of Scott Smith made on February 25, 1988 indicate Gordon Whitlock advised him "if company doesn't recognize us [in-plant committee] there will be problems" (Exhibit R-4 document 28). Apparently, the Company was, understandably, concerned about a wildcat strike which could or would result in a plant closure.

57. The Board could have accepted the threat as a mitigating factor for the failure to negotiate from February 25, 1988 forward, however, it was not one of the reasons put forward for the action of Cavendish Farms. The employer although stating a strike was a reality, did not state that was the reason for refusing to negotiate. On the other hand, while a mitigating factor might have been the uncertainty of which group the employer should deal with during the same period, the Board disbelieves the viva voce evidence of Scott Smith insofar as it related to this point. The Board has come to this conclusion after observing the demeanour of Mr. Smith and the documentation in the possession of Cavendish Farms and submitted as evidence at the hearing. The Board is of the view that Mr. Smith's explanation is not credible and cannot be accepted as true.

58. After reviewing the authorities submitted by the parties, the Board has determined it will follow its previous decision in Board Application No. 88-016, dated January 31, 1989 between United Food & Commercial Workers' Union, Local 1252 (In Trusteeship) and Garden Province Meats (1985) Inc. Therefore, the Board orders and directs Cavendish Farms to negotiate in good faith with UFCW, said negotiations to commence within 7 days of the date of this Order.

59. The Board agrees that the remedy imposed should bear some relationship to the violation and consequences of such breach. See: National Bank of Canada v. Retail Clerks International Union et al (1984), 84 CLC 12,151 (S.C.C.). Any order made by the Board should enable the wronged party, namely UFCW and its membership, to be placed in the position it would have been in had the unlawful conduct of Cavendish Farms not occurred. The violation in this case resulted in the employees losing the opportunity of having a new collective agreement in place. It is for this reason that the Board is imposing the remedy it is. The Board is cognizant of the fact that the employees at Cavendish Farms were without a raise for a period of almost two years. The Board feels that it is "just and necessary" to grant a remedy, while at the same time, giving the parties an opportunity to be heard on the amount of the remedy, if there be any amount.

60. For the foregoing 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.

61. While Counsel for Cavendish Farms adduced documents regarding what the food industry average wage increase was during recent months, the Board believes this is a matter to be addressed

at another time. In accordance with the Board's ruling, the parties will have an opportunity to address this issue at the appropriate time.

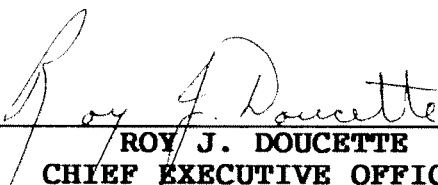
62. The Board does not intend to order a monetary award but wishes to make its reasons for not doing so very clear. The Board believes the violation by Cavendish Farms was flagrant in the truest sense of the word. Cavendish Farms contributed to the fact that UFCW did not have an active and current bargaining relationship on behalf of its membership at Cavendish Farms. While Porter, Whitlock and Arsenault are also, in part, responsible, had Cavendish Farms not heeded them as much, the tactics of those individuals would not have been quite so successful. The actions of the employer in this case showed a complete and utter disregard for a previous order of this Board, not to mention the overall labour-management relationship and overriding principle of harmonious industrial relations. Not only did Cavendish Farms show contempt for an order of the Board, but it also showed no respect for the individuals it employs.

63. The Board wishes to make it very clear that if UFCW had requested an award in its original complaint, the Board would have given serious consideration to making such an award. The violation continued in excess of one year and the Board did not find the witness of the employer credible. The Board in the future will not tolerate such interference with the rights of employees or of their representative union.

64. 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 insofar as it relates to that particular period of time.

65. The Board orders, in accordance with sub-section 10(4) of the Labour Act, that service of this order on both Cavendish Farms and UFCW shall be by serving a copy thereof on the solicitors who represented the parties at the hearing.

THIS DECISION made by the Labour Relations Board and issued under the hand of its Chief Executive Officer on March 1st, 1989.



ROY J. DOUCETTE
CHIEF EXECUTIVE OFFICER

PANEL:

M. Lynn Murray - Chairman
Gerald Doyle - Member
Elizabeth MacFadyen - Member